[***Paniccia v. Eckert, [2012] B.C.J. No. 1997***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S253-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Penticton, British Columbia

G. Barrow J.

Heard: June 13-17, 20-21 and September 7, 2011; written

submissions, October 17 and November 10, 2011.

Judgment: September 27, 2012.

Docket: 31923

Registry: Penticton

**[2012] B.C.J. No. 1997** | 2012 BCSC 1428

Between Domenico Paniccia and Helena Irene Atroszenko-Paniccia, Plaintiffs, and Felix John Eckert, Parkside Realty Inc. doing business as Royal LePage Parkside Realty, Larry Young, Donna Young, and Pears Home Inspections Ltd., doing business as D-Tect Home Inspections, Defendants

(138 paras.)

**Case Summary**

**Contracts — Breach of contract — Action by Paniccia for damages for breach of contract and negligent and fraudulent misrepresentation allowed in part — Paniccia purchased a rural property from the defendant Eckert — The defendant Young was the agent for both sides — There were leaks in the roof, electrical problems and buried diesel in the soil — Those problems resulted in contractual breaches and were negligent misrepresentations — They did not, however, amount to fraudulent misrepresentations — Furthermore, Young was not responsible for any negligent misrepresentations nor did he breach any fiduciary obligations — Paniccia was awarded $6,037 in damages.**

**Contracts — Remedies — Damages — Action by Paniccia for damages for breach of contract and negligent and fraudulent misrepresentation allowed in part — Paniccia purchased a rural property from the defendant Eckert — The defendant Young was the agent for both sides — There were leaks in the roof, electrical problems and buried diesel in the soil — Those problems resulted in contractual breaches and were negligent misrepresentations — They did not, however, amount to fraudulent misrepresentations — Furthermore, Young was not responsible for any negligent misrepresentations nor did he breach any fiduciary obligations — Paniccia was awarded $6,037 in damages.**

**Damages — In contract — Breach of contract — Type of contract — Sale of land — Action by Paniccia for damages for breach of contract and negligent and fraudulent misrepresentation allowed in part — Paniccia purchased a rural property from the defendant Eckert — The defendant Young was the agent for both sides — There were leaks in the roof, electrical problems and buried diesel in the soil — Those problems resulted in contractual breaches and were negligent misrepresentations — They did not, however, amount to fraudulent misrepresentations — Furthermore, Young was not responsible for any negligent misrepresentations nor did he breach any fiduciary obligations — Paniccia was awarded $6,037 in damages.**

**Real property law — Sale of land — Agreement of purchase and sale — Breach of — Damages — Misrepresentation — Quality defects — Latent — Remedies — Damages — Action by Paniccia for damages for breach of contract and negligent and fraudulent misrepresentation allowed in part — Paniccia purchased a rural property from the defendant Eckert — The defendant Young was the agent for both sides — There were leaks in the roof, electrical problems and buried diesel in the soil — Those problems resulted in contractual breaches and were negligent misrepresentations — They did not, however, amount to fraudulent misrepresentations — Furthermore, Young was not responsible for any negligent misrepresentations nor did he breach any fiduciary obligations — Paniccia was awarded $6,037 in damages.**

**Real property law — Real estate agents and brokers — Agent's duties to principal — Fiduciary duties — Duty to disclose information — Action by Paniccia for damages for breach of contract and negligent and fraudulent misrepresentation allowed in part — Paniccia purchased a rural property from the defendant Eckert — The defendant Young was the agent for both sides — There were leaks in the roof, electrical problems and buried diesel in the soil — Those problems resulted in contractual breaches and were negligent misrepresentations — They did not, however, amount to fraudulent misrepresentations — Furthermore, Young was not responsible for any negligent misrepresentations nor did he breach any fiduciary obligations — Paniccia was awarded $6,037 in damages.**

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| Action by Paniccia for damages for breach of a contract of purchase and sale and negligent and fraudulent misrepresentation. Paniccia purchased a rural property from the defendant Eckert. The defendant Young was the listing agent, the selling agent and the purchaser's agent. Eckert completed a property disclosure statement indicating that he was not aware of any problems with the well and water system, moisture problems in the walls, insect infestations or structural problems. After taking possession of the property, Paniccia began noticing several problems. Paniccia took the position that the property was not as represented in the disclosure statement and that Eckert and Young knew that was the case. Paniccia further took the position that Eckert and Young concealed the deficiencies in the property, thereby fraudulently misrepresenting the property.  HELD: Action allowed in part.  Some of the alleged misrepresentations, including those associated with the water system and insect infestation, were not actually misrepresentations. However, there were leaks in the roof, problems with the electrical supply to the barn and buried diesel in the soil. Those problems resulted in contractual breaches and were negligent misrepresentations. They did not, however, amount to fraudulent misrepresentations as Eckert never intentionally withheld the truth or misstated the state of the property. Furthermore, Young was not responsible for any negligent misrepresentations about the property nor did he breach any fiduciary obligations. Paniccia was awarded $6,037 in damages. |

**Statutes, Regulations and Rules Cited:**

Canadian Real Estate Association Realtor Code, s. 5.1

Real Estate Council of British Columbia Rules, Rule 5-13(1)

Water Act, [*RSBC 1996, CHAPTER 483, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5JPF-MSP1-DY89-M2XT-00000-00&context=)

**Counsel**

Counsel for the Plaintiffs: T.J. Johnston.

Counsel for the Defendant, F.J. Eckert: R.K. Oliver.

Counsel for the Defendants, Parkside Realty Inc., L. Young and D. Young: V. Reakes.

**Reasons for Judgment**

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| **G. BARROW J.** |

**1**   In the spring of 2008, the plaintiffs, Domenico Paniccia and Helena Atroszenko-Paniccia, purchased a rural property from the defendant, Felix Eckert. The defendant, Larry Young, was the listing agent, the selling agent and the purchasers' agent. The defendant, Donna Young, is his spouse and she worked as his assistant when this transaction took place. She did not play any role in the events other than typing some of the documents. The defendant, Parkside Realty Inc., is the licensed real estate agency under which Mr. Young worked.

**2**  The plaintiffs claim that Mr. Eckert breached the terms of the contract of purchase and sale. They also claim that both Mr. Eckert and Mr. Young made fraudulent and negligent misrepresentations about the property, and they seek damages as a result. Although the plaintiffs sought rescission of the contract in their statement of claim, they did not pursue that remedy at trial, and on the facts, it is not a remedy that is now open to them.

**3**  The plaintiffs also sued Pears Home Inspections Ltd., the company that carried out a home inspection on their behalf prior to the purchase. That claim was dismissed by consent prior to trial.

**Background Facts**

**4**  The property is located several kilometers west of Summerland on the Princeton-Summerland Road. It is a 6.4 acre parcel of land on which there is a bungalow, a barn and some smaller outbuildings. The property is shaped like a right-angle triangle with the northern boundary constituting the hypotenuse. The Kettle Valley Railway ("KVR") bisects the property from north to south at about the midpoint of the hypotenuse. The railway has long been decommissioned, but it is now used by hikers and cyclists. In fact, this section of the KVR is part of the Trans Canada Trail. Trout Creek flows by the property about 800 feet to the north of the property's northern boundary. It is the primary water source for the town of Summerland.

**5**  Mr. Eckert is now 82 years old. When he purchased the property about 30 years ago, it was unimproved. Over the course of several years, and with the assistance of various contractors, he built the house and the barn. He and his wife lived in the house 9 or 10 months of the year. They spent the winter months in a home they owned in the lower mainland.

**6**  The house is L-shaped and about 1,442 square feet in size. It is built on a concrete slab. The kitchen and one bedroom are at one end of the long axis of the house. They are about two feet above the slab, such that there is a crawl space underneath. The living room is at the other end of the house and built right on the slab. There is a single car garage adjacent to the kitchen, above which is another bedroom. There is a carport built off the garage, and it has a flat roof which serves as a large balcony for the upstairs bedroom.

**7**  The property is within the Regional District of Okanagan Similkameen and is not served by a municipal water or sewer system. While Mr. Eckert owned the property, he and his wife drew their water from Trout Creek. They had a water licence from the Province authorizing them to draw up to 500 gallons per day for domestic purposes. In March 1977, Mr. Eckert was granted an easement by his neighbour to the north, allowing him to install a water line across his neighbour's property to Trout Creek. Immediately beside the creek, he dug a 12-foot deep hole in which he put two apple barrels, one on top of the other. The barrels serve as casing for the hole. Inside the barrels, he installed a pump and two motors, one electric and one gas powered. The electric motor was the primary power source for the pump, and the gas motor was used as a backup. He also installed a light in the barrels which was used as a heat source. He built a lid for the top of the barrels to protect the pumps from the weather.

**8**  The bank of Trout Creek at the location of the well is steep. It rises almost vertically about 80 feet to the level of the surrounding land. To access the pump Mr. Eckert built a ladder and strung a clothes line for a hand hold. He ran a pipe up the bank to a shed he built at the top. The shed housed other components of the system, and it too had a light. Between the shed and his house, Mr. Eckert buried the water line and a power cable about three feet underground. He also installed a second, lighter power line to provide power to the pump house. It was not buried as deep as the water line and the other power cable but followed the same course. Sometime later, he added another water line. He used one water line for his domestic needs and the other for irrigation. On the surface of the land, the course of the water lines and power cables is marked by rocks arranged as if to mark a path.

**9**  There is an intake line that runs from at or near the bottom of the 12-foot hole into the creek. There is a screen at the end of that line. The water fills the bottom of the barrels and is pumped up to the house. At the house, Mr. Eckert installed a filter under the kitchen sink. During spring freshet, when Trout Creek floods, the water becomes turbid. For several weeks it is necessary to boil the water used for domestic consumption. The entire community of Summerland experiences annual boil water advisories for the same reason. Aside from the spring turbidity issue, Mr. Eckert and his wife used this system without apparent difficulty for over 25 years. He testified that with regular routine maintenance the system worked well.

**10**  Mr. Eckert had three septic tanks or septic fields installed. There was one for the main bathroom and kitchen sink, one for the washing machine, and a third for the upstairs toilet and sink.

**11**  By 2007, Mr. Eckert's wife's health was declining, and with his advancing age, they decided it was time to sell. They first listed the property in May 2007 with a Remax agent. The original asking price was $648,000. They received no offers and reduced the price to $618,000 in July 2007. They still received no offers, and in May 2008, they decided to list with Larry Young, an agent with Royal LePage Parkside Realty in Summerland. He listed the property for $530,000 on May 1, 2008.

**12**  When Mr. Young took the listing, he had Mr. Eckert complete a property disclosure statement in the form approved by the South Okanagan Real Estate Board. This form is central to several of the issues in this case. It consists of a series of questions which the seller answers by initialling in one of four adjacent boxes labelled "yes", "no", "do not know" and "does not apply". The questions are grouped into two categories: general and structural. In the general section, Mr. Eckert indicated that the property was not connected to a public sewer or water system, but rather that it was serviced by a "private well" and a private water system. He indicated that he was not aware of any problems with either. Under the structural section, Mr. Eckert answered that the walls and ceiling were insulated. He indicated that he did not know if the house had been given a final building inspection or whether there was an occupancy permit issued for it. He answered "no" to the question of whether any additions or alterations had been made without a required permit or final inspection. He said that he was not aware of any moisture problems in the walls, nor was he aware of any insect infestation or leaks in the roof. He indicated the roof was two years old.

**13**  Mr. and Mrs. Paniccia were living in Powell River in the spring of 2008. Mr. Paniccia was born in Italy and came to Canada when he was 9 years old. He speaks with a distinct accent. He has an elementary school education and worked most of his life as a labourer. In 2001, he retired and moved to Powell River. He has been married to Mrs. Paniccia for 45 years and they have four grown children. Mr. Paniccia testified that he was involved in a serious motor vehicle accident in 1985, which left him suffering from post traumatic stress disorder ("PTSD"). Although he has a number of physical ailments, he remains a reasonably robust and active person.

**14**  The evidence about Mr. Paniccia's stress disorder was objected to. His counsel, Mr. Johnston, said that it was relevant because it went some distance towards explaining why Mr. Paniccia interacts with people the way he does. Charles Perry, the realtor that listed the property on behalf of the Paniccias in 2009, described Mr. Paniccia as "difficult to deal with". He structured the showings of the home in a way that avoided or minimized the chances of Mr. Paniccia interacting with potential purchasers. He said that Mr. Paniccia could be argumentative and was sometimes difficult to understand. In argument, Mr. Johnston described Mr. Paniccia as a person who has difficulty controlling his anger; a person with a "hairline trigger on his temper". Mr. Paniccia's presentation in the witness stand bore out all of these observations.

**15**  In part due to Mr. Paniccia's personality and in part due to his medical condition, the Paniccias were looking for quiet property in the dry south Okanagan climate. They sold their house in Powell River in May 2008 with the sale to close on June 30, 2008. It was in May that Mr. Paniccia came to the Okanagan to look for accommodation. He stayed with a family friend, Barb Schlacter, while he was looking for a property. Ms. Schlacter accompanied him as he investigated prospective properties. He had just about exhausted his search when he noticed Mr. Young's listing of the Eckert property. Ms. Schlacter said that she knew Mr. Young because members of her family had dealt with him, and she recommended him to Mr. Paniccia. She sent Mr. Young an e-mail inquiring about the property. Mr. Young agreed to meet with them the next day at 10 a.m. to view it.

**16**  On May 20, 2008, Ms. Schlacter and Mr. Paniccia met Mr. Young at his office in Summerland. They discussed the kind of property the Paniccias were interested in and their price range, and Mr. Young said that, as far as he knew, the Eckert property was the only one that met their needs and fell within their budget. All three then went to the property and viewed it, after which they returned to Mr. Young's office where Mr. Paniccia, after telephoning Mrs. Paniccia who was in Powell River readying their house for completion of the sale, decided to make an offer. He offered $440,000 without a deposit and subject to a variety of conditions. Mr. Young had Mr. Paniccia sign various documents, including a "Limited Dual Agency Agreement". He then drove back to the property and presented the offer to Mr. Eckert. Subject to one minor change, Mr. Eckert accepted it. Agreement contemplated a June 30, 2008, closing and required that the conditions be waived or satisfied by May 29th. Mr. Paniccia waived the conditions on May 26th, and the conveyance completed as scheduled.

**17**  The Paniccias moved in on the completion date and initially all went well. In early December they ran out of water. Mr. Paniccia called various people to inspect the well and eventually called Mr. Young. There followed a series of telephone calls back and forth between Mr. Young and Mr. Paniccia and Mr. Young and Mr. Eckert. The water remained a problem. Mr. Paniccia decided that he needed to get a well drilled, and he hired Cyclone Drilling Ltd. to do that. By January 5, 2009, they had completed the well, drilling down some 218 feet to reach the underlying aquifer. Mr. Paniccia paid $15,225 for this and then paid a further $7,976 for the pumps and associated equipment to operate the well. He commenced this action in May 2009.

**The Issues**

**18**  The representations in the property disclosure statement that Mr. Eckert completed when he listed the property were incorporated into and form part of the contract of purchase and sale. The plaintiffs claim that Mr. Eckert was in breach of the contract in that the property was not as it was represented in the property disclosure statement. The plaintiffs also claim that Mr. Eckert and Mr. Young knew the property was not as it was represented and that they made the representations in spite of that knowledge. Further, the plaintiffs claim that Mr. Eckert and Mr. Young concealed the deficiencies in the property. It is on this basis that they claim Mr. Eckert and Mr. Young fraudulently misrepresented the property.

**19**  The first issue to be resolved is whether the property was or was not as it was represented in the contract. The answer to that question will determine whether Mr. Eckert was in breach of the contract; it will also go some distance towards resolving the tort claims.

**20**  To succeed as against either Mr. Eckert or Mr. Young on the basis of fraudulent misrepresentation the plaintiffs must prove the following things: first, that the defendant or defendants made a representation of fact; second, that the representation was false; third, that the defendant or defendants knew the representation was false or were reckless as to its truth; fourth, that the defendant or defendants made the representation with the intention that it would be relied on by the plaintiffs; fifth, that the plaintiffs did in fact rely on the representation; and finally, that the plaintiffs suffered damage as a result.

**21**  As noted both the contract claim and the negligent and fraudulent misrepresentation claims rest on the same alleged defects in the condition of the property. With one significant exception, Mr. Eckert does not dispute that he made the representations attributed to him by the plaintiffs. The exception relates to representations attributed to him about the well. As to the other representations, he says that they were true. Further, and in the alternative, he argues that to the extent they were not true, he did not make them knowing them to be untrue nor was he negligent in making them. Finally, he argues that any proven defects that were not the subject of specific terms in the contract were patent and/or were not such that they rendered the property dangerous or unfit for habitation and are therefore not actionable.

**22**  In relation to Mr. Young, there are two additional claims. The first is that he was negligent. In argument, the plaintiffs characterized his ***negligence*** as failing to advise them "about the special risks of the transaction, in particular, the state of the home and property".

**23**  The second additional claim is that he was in breach of a fiduciary duty he owed to the plaintiffs. In his written submissions, Mr. Johnston merged the two additional claims against Mr. Young, arguing that the basis for them lies in the following:

1. He did not afford Mr. Paniccia the opportunity to obtain independent legal advice of any kind;
2. He held himself out to be skilled in the duties, carried out by a realtor yet he failed to advise the Paniccias about the special risks of the transaction, in particular the state of the home and property;
3. as a realtor, Mr. Young is bound by the Canadian Real Estate Association Realtor Code;
4. As he was acting as a dual agent, he was positively required to have the Dual Agency Agreement explained to Mr. Paniccia by an independent person and due so prior to the time that the parties were executing the Contract of Purchase and Sale;
5. Mr. Young acted single-mindedly, representing only Mr. Eckert and failed to act without bias and even divulging to Eckert the price that Paniccia was prepared to pay;
6. Based on the evidence, it can be inferred that the Paniccias entered into the transaction contingent on the existence of the property as represented by Eckert through his agent Young ...

**24**  Mr. Young argues that he was not negligent nor was he in breach of his fiduciary duty. Specifically, he asserts that he complied with the *Realtor Code* in relation to acting as a dual agent in the transaction. Moreover, he argues that he did not prefer the interests of Mr. Eckert over those of the plaintiffs and did not fail to disclose any material facts.

**Discussion**

**25**  Mr. Eckert made the various representations about the property in the property disclosure statement. The plaintiffs say that Mr. Young confirmed those representations. At paragraph 25 of the statement of claim, they assert that they discovered the following defects in the property:

1. the Property was not connected to a private waste system and was not serviced by a private well. Therefore, the Plaintiffs had no drinking water or working sewer;
2. the ceiling/floor joist size over the garage is 2 x 6 and spaced at 16' on the centre, not 2 x 8 as required by law;
3. the beam size of the frame of the house was not 6 x 8, as was indicated in the Inspection, but is 2 x 6 beams, which is below the standard required by law;
4. water seeping in and around the fireplace in the living room;
5. walls separating in every room due to leaking from the roof;
6. diesel fuel, grease, oil and other noxious substances were dumped on the Property. The Property was used as a contaminated waste dump;
7. sliding doors were used as skylights;
8. a spigot had to be used to get drinking water on the Property;
9. refuse and junk including over 20 types of pipe were buried on the Property;
10. extension cords were used instead of electrical wiring in the home and buildings;
11. the home was infested with insects;
12. there were three (3) septic tanks, none of which worked properly;
13. the home is modular or mobile home construction, not a wood frame house as represented;
14. interior walls were not gyproc but rather, painted Styrofoam; and
15. there are three (3) driveways, roads, or accesses on the Property used by others. The Plaintiff knew of only one.

(the "Material Defects")

At paragraph 33, they plead that the property "deteriorated" inasmuch as the roof leaked, there was water seeping in around the chimney and fireplace in the living room, and the walls in every room were separating from the ceilings due to water seeping through the roof.

**26**  They argue that several of the representations contained in that statement were untrue or misleading. Aside from the specific representations in the property disclosure statement, the plaintiffs argue that there were other material latent defects for which Mr. Eckert is liable. As to those defects, they argue that when Mr. Eckert made representations about them he knew them to be false. In addition, the plaintiffs argue that some of the defects were such that they rendered the property either unsafe or unfit for habitation. To the extent either of these things are so, they argue that the doctrine of *caveat emptor* does not protect Mr. Eckert.

**27**  The doctrine of *caveat emptor* operates subject to any express representations in a contract. In other words, it does not operate to protect a vendor from the breach of express terms in a contract relating to the condition of the property, whether those terms go to the fitness for habitation or to some lesser quality of the property. The principle legal force of the doctrine is that, with some exceptions, it operates to exclude any implied warranties or representations about the state of the property. 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 p. 723, Dickson J. (as he then was) explained this aspect of the doctrine as follows:

Although the common law doctrine of *caveat emptor* has long since ceased to play any significant part in the sale of goods, it has lost little of its pristine force in the sale of land. In 1931, a breach was created in the doctrine that the buyer must beware, with recognition by an English court of an implied warranty of fitness for habitation in the sale of an *uncompleted* house. The breach has since been opened a little wider in some of the states of the United States by extending the warranty to *completed* houses when the seller is the builder and the defect is latent. Otherwise ... *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.

[Underline emphasis added]

The exceptions to the rule were discussed by Bennett J. (as she then was) 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.). At paragraph 53, she summarized them as follows:

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.

**28**  The doctrine of *caveat emptor* also serves to relieve the vendor from any obligation to examine the property for defects; that obligation rests on the purchaser. Ballance J. put it as follows 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=) (aff'd at [*2007 BCCA 313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21G0-00000-00&context=)) at para. 120:

[120] *Caveat emptor* has been described as operating passively because the vendor need not do anything to inform himself about the state of the property being sold or the existence of any defects: that burden falls to the purchaser. A vendor therefore has no obligation to review the condition of the home in order to be able to describe to prospective purchasers which areas are worn out, in need of repair, were constructed in a shoddy fashion or to the highest standard ...

**29**  The defects about which the Paniccias complain are whether the property was serviced by a well, and whether it had adequate water regardless of the source of that water. They argue that there were undisclosed, unregistered easements over the property. They say the home was infested with insects. Next, they assert that there were a number of structural defects in the house, including the spacing of the floor joists in the room above the garage; the size of the beams in the house; that the home was modular in method of construction as opposed to a wood frame structure; that the walls and ceilings were not insulated; that there was water penetration around the fireplace and at the junction of the walls and the roof; that the roof, including the skylights, leaked; that the walls were constructed with Styrofoam instead of gyproc; that the supply of electricity to the well was inadequate; that the power to the barn was delivered through a buried extension cord; that there was debris and noxious substances buried on the property; that the septic system did not function properly; and that Mr. Eckert did not have the necessary permits for the construction and occupation of the structures on the property. Finally, the plaintiffs allege that the property was not peaceful and quiet as represented but rather was in the midst of the Trans Canada Trail and surrounded by land used by others to operate all-terrain vehicles. The plaintiffs argue that express representations were made about all of these things, either directly and orally, by Mr. Eckert or indirectly and on his behalf by Mr. Young or by way of the statements in the Property Disclosure Statement.

**30**  The evidence about the oral representations conflicts to some degree, and because of that, I will deal first with the credibility and reliability of the witnesses. I will then deal with the representations and whether those representations were untrue, inaccurate or misleading.

**31**  Although I found Mr. Paniccia to be generally forthright in his evidence, there are two aspects of his evidence that cause me concern.

**32**  The first matter is particularly significant. It arises out of Mr. Paniccia's efforts to sell the property over the past couple of years. In the course of doing so, he completed two property disclosure statements: one in 2009 when he first listed the property and another in 2011 when he last listed it. In those property disclosure statements, Mr. Paniccia answered "no" to the question of whether he was aware of any "structural problems with the structure". In this action, he maintains that there are structural problems with the house, including specifically the size of the joists and beams which, Mr. Paniccia says, were inadequate when he purchased the property. He had not taken any steps to rectify that defect when he completed the 2009 and 2011 property disclosure statements. When this seeming inconsistency was put to him, he said that he planned to put a manufactured home on the property before he sold it, and he was answering the questions in the property disclosure statement with that structure in mind. It was then pointed out to him that in the same form he indicated that the roof of the dwelling was two or three years old (which was roughly the age of the roof that was on the house on the property). He said that the manufactured home he had in mind for the property had been on the sales lot for two or three years, and thus he thought it had a roof of about that age. Mr. Perry, who listed the property for Mr. Paniccia, helped him complete the 2011 property disclosure statement. He said he thought Mr. Paniccia was completing it for the house that was actually on the property. He said that he was not aware that Mr. Paniccia planned to replace the house with a manufactured home. All of the listing information and promotional material refers to the existing house. I find that Mr. Paniccia was not being truthful when he attempted to explain the statements he made in the property disclosure statements he completed.

**33**  The second area of concern is that Mr. Paniccia displayed a rather pronounced tendency to doggedly adhere to a view of matters notwithstanding reasonably convincing evidence to the contrary. He testified that when he purchased the house, he was interested in getting a standard wood framed house; a "stake house" as he put it. He did not want a mobile or a modular home because he wanted the option of adding a second storey in the future. He retained Bradley Pears, a home inspector, to examine the home before the purchase. Mr. Pears reported that the home appeared to be built using standard wood framing technique. After the purchase, Mr. Paniccia hired George Giannotti to examine the home. He reported that "the type of construction does not appear to be modular home type or mobile home type construction; rather it is [Mr. Giannotti's] opinion that the building is site build wood frame construction". Although Mr. Giannotti's report was not tendered for the truth of its contents, Mr. Paniccia testified about it. He said that he did not agree with Mr. Giannotti's conclusion about the method of construction. He dismissed his opinion in part because he had coffee with Mr. Giannotti, during which the inspector told him that he was in the same "union" as Mr. Pears. Based on that Mr. Paniccia appears to have concluded that he was biased and untruthful. The only basis for Mr. Paniccia's opinion that the house is a modular home is that he went into the crawl space and could not find any "anchor bolts".

**34**  Mr. Eckert, by his own admission, does not have a particularly sharp memory, but when his memory is triggered by a document or in some other manner, he said that he has reasonably good recall. I find this to be an accurate characterization. He gave his evidence in a straight forward manner and was not shaken on cross examination.

**35**  Mr. Young has been a real estate agent in Summerland for 32 years. He impressed me as an honest man, neither prone to overstatement nor to conveying matters more definitively than he actually recalled them. He said that he had a good memory and his evidence bore that out. He was not shaken on cross-examination either.

1. **The Representations**
2. ***The Well and The Water***

**36**  The most significant aspect of the plaintiffs' claim relates to the source of water on the property. Mr. Paniccia testified that representations were made about the well, both orally and in the property disclosure statement. In the property disclosure statement, Mr. Eckert indicated that the property was not connected to a public water system but rather was serviced by a "private well" and a private water system. He indicated that he was not aware of any problems with either. Mr. Paniccia testified that both Mr. Young and Mr. Eckert repeated this assertion when Mr. Paniccia viewed the property on May 20, 2008. Mr. Paniccia said that he understood "well" to mean a hole in the ground through which water is drawn from an underlying aquifer or similar water source. He said that any doubt about what was meant by the "well" was removed when Mr. Young told him that the well was 60 feet deep and drawing ground water. He said that Mr. Young made this claim when Mr. Paniccia was viewing the property prior to making an offer. He also said that during that same visit Mr. Eckert said that the well was 60 feet deep. Further, Mrs. Paniccia said that both her husband and Ms. Schlacter told her that there was a "proper 60 foot well on the property" in a telephone conversation before they made their offer. I pause to note that Ms. Schlacter did not testify. I take nothing from this because I accept that the plaintiffs attempted to locate her and were simply unsuccessful.

**37**  Mr. Eckert testified that the well was about 12 feet deep. He was not asked if he ever said otherwise. Mr. Young testified that when he listed the property, Mr. Eckert told him the well was 11 or 12 feet deep. He said he told Mr. Paniccia the well was 11 feet deep.

**38**  When Mr. Paniccia viewed the property, he climbed down to the creek to examine the well. He lifted the outer lid on the casing only to find another lid beneath it. That lid was locked and because Mr. Young, who had remained at the top of the embankment, did not have a key, Mr. Paniccia was not able and did not ask to examine the well further.

**39**  I am satisfied that Mr. Young told Mr. Paniccia the well was 11 or 12 feet deep. I reach that conclusion both because I accept the evidence of Mr. Young and Mr. Eckert on this point and because it is consistent with common sense. From Mr. Eckert's point of view, the creek had provided him and his wife with an adequate supply of potable water throughout the 30 years they had owned the property. He told Mr. Paniccia as much when he viewed the property. He had no reason to misrepresent either the source of the water or the nature of the well. From Mr. Young's point of view, I am satisfied that had he been told there was a 60-foot deep well right beside the creek, he would have questioned that claim. He knew that Mr. Eckert had a water licence to draw water from the creek. The well was right beside the creek. A casual observer would conclude that it was drawing water from the creek or from just under the creek bed given these two facts. Mr. Young was not a casual observer. He had listed four other properties along Trout Creek and all of those properties took their water from the creek under the authority of a water license.

**40**  In reaching this conclusion, I have not overlooked the fact that the water from the well was being used both for irrigation and domestic purposes. Mr. Paniccia testified that he thought the water that was used for irrigation was coming from the creek but that the domestic water was from an aquifer 60 feet below the surface. It may be that Mr. Paniccia reached that conclusion and thus did not question why the well was located where it was and did not associate the water license with the domestic water supply, but if that was his conclusion, it was a conclusion he reached on his own and without any misrepresentation on the part of either Mr. Eckert or Mr. Young.

**41**  Nor have I overlooked Mr. Johnston's argument that simply describing the water source as a "well" is a misrepresentation. He makes this argument based on the definition of "well" in the *Water Act*, [*R.S.B.C. 1996, c. 483, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5JPF-MSP1-DY89-M2XT-00000-00&context=), where "well" is defined in part as:

... an artificial opening in the ground made for the purpose of

1. exploring for, or extracting and using, ground water ...

He emphasizes the reference to "ground water" and notes that Mr. Eckert's well was not drawing ground water.

**42**  The term "well" is not defined in the property disclosure statement. Its primary meaning, according to the New Oxford Dictionary of English (Oxford University Press, 2001), is "a shaft sunk into the ground to obtain water ..." The structure that Mr. Paniccia examined on May 20, 2008, meets that description. There was no reference to the *Water Act* in any of the documentation examined by Mr. Paniccia prior to the purchase, nor was there any reference to it by anyone during Mr. Paniccia's inspection of the property or the subsequent negotiations leading up to the purchase. There is, however, a reference to "ground water" in the documentation that Mr. Young prepared for Mr. Eckert to sign and that Mr. Paniccia reviewed. The document is entitled "rural estate environmental questionnaire". It is a form which the Paniccias' bank required before they would agree to finance the purchase. Mr. Young filled it out on behalf of Mr. Eckert. Like the property disclosure statement, the form poses a series of questions which can be answered by ticking under columns labelled "yes" and "no". Among other things the form asks, "Does this property contain the following? ... Groundwater wells?". Mr. Young ticked "no". Mr. Eckert signed the document on May 22, 2008, under a declaration that reads in part, "I declare that the aforementioned information is true and complete, to the best of my knowledge ...". Mr Paniccia signed below Mr. Eckert's signature. I am satisfied that he did so prior to obtaining financing and removing the "subject to" clause relating to financing.

**43**  In the context of this case, I am not persuaded that "well" is limited to something that draws ground water. In fact, for the reasons noted above, a reasonable person would infer that the well beside the creek was drawing water from the creek or perhaps just below the creek. To describe the mechanism that Mr. Eckert installed by the creek as a well is not a misrepresentation.

**44**  As to the water produced by the well, the plaintiffs argue that it was misrepresented. Mr. Paniccia testified that he was told by Mr. Young that the Eckerts had been drinking the water for years without any problems. He said that he was told that the well produced "pure good water" and plenty of it both for domestic and irrigation purposes. Further, in the property disclosure statement Mr. Eckert indicated that he was not aware of any problems associated with his well.

**45**  The water in Trout Creek often has silt in it. In the spring, it also carries significant quantities of mud. These things cause problems both at the intake to the well itself and at the point of domestic consumption. At the well, the intake line can become plugged, and when that happens, the supply of water is reduced and the pump has to work harder, and that can cause the pump to overheat and fail. As to the second difficulty, Mrs. Paniccia testified that after she did laundry, she sometimes found sand in the clothes. Sometimes she also noticed grit in food that she prepared using water from the tap, for example in pasta she boiled.

**46**  Mr. Eckert testified that there were filters, one under the sink in the kitchen and one in the laundry room. The one in the kitchen was charcoal or stone; the one in the laundry room was paper or cloth. Mr. Young testified that he knew there was a filter under the sink, and he pointed it out to Mr. Paniccia. In fact, there is specific reference to "water pumps and filtration systems" in the contract of purchase and sale. They are included in the purchase price but specifically said to be in "as is condition".

**47**  I accept that Mr. Eckert told Mr. Paniccia and Mr. Young that he drank the water from the well and had done so for years without experiencing any problems. Mr. Eckert testified that he did not have any problems with water quality other than when there was a boil water advisory issued for the entire area. He said that he did not mention this to Mr. Young because he thought everyone in the Summerland area was aware of it, and he knew that Mr. Young lived in Summerland. Finally, Mr. Eckert said that he did not mention anything about the maintenance the water system required because he thought it was obvious that such a system needed to be maintained. He said that he maintained it and did not have any problems as a result. He said that he performed maintenance on it about every six months, although he did not say and was not asked what the maintenance involved. His evidence in this respect was not challenged on cross-examination.

**48**  According to Mr. Young, he did not discuss maintenance of the filters or the water system more generally either with Mr. Eckert when he listed the property or with Mr. Paniccia when he inspected the property. He said that he relied on the disclosure statement in which Mr. Eckert indicated there were no problems with the water supply.

**49**  Neither Mr. nor Mrs. Paniccia testified that they performed any maintenance, routine or otherwise, on the filtration systems in the house. As to the screen at the pump intake, Mrs. Paniccia testified that they did not clean it.

**50**  As to whether the representations about the quality and functioning of the system were untrue, inaccurate or misleading, it is first necessary to resolve how the system performed. If, from the outset, the water it provided was full of grit notwithstanding the filters, or if the system simply did not provide enough water for ordinary domestic purposes, then the question of whether it was properly maintained may not particularly matter because the contractual term that there were no problems that Mr. Eckert was aware of with the system may be untrue. That may be so because in the absence of some other explanation it is unlikely that a properly functioning system would simply stop functioning more or less coincidentally with the sale of the property. On the other hand, if the system operated satisfactorily for an appreciable period of time following the sale, that tends to support the conclusion that the problems which did develop were related to maintenance.

**51**  The evidence as to when the Paniccias first had problems with the water conflicts. Mr. Paniccia testified that he noticed problems within two weeks of moving in. He said that he called Mr. Young immediately and complained that they had no water. According to Mr. Paniccia, Mr. Young said that he would call Mr. Eckert. He did that but whatever information or advice Mr. Eckert provided did not resolve the problem. Mr. Paniccia called Mr. Young again, and again Mr. Young said he would call Mr. Eckert. This too failed to give rise to a solution, and when Mr. Paniccia called for a third time, Mr. Eckert responded in a manner that left no doubt in Mr. Paniccia's mind that the problem was not going to be resolved, at least not with the assistance of Mr. Eckert.

**52**  Mr. Young said that the issue of the water was first raised by Mr. Paniccia much later. He testified that the first time he learned there was a problem was in a telephone call from Mrs. Paniccia on December 20, 2008, almost six months after they took possession. Mrs. Paniccia was threatening to sue because they had no water. Mr. Young, on hearing the threat, took careful note of the conversation. His note is dated December 20, 2008, although the date "December 9, 2008" appears above that date. He said that given the time of year and the nature of the problem, he suspected the water at the intake might have frozen. He called Mr. Eckert who explained that he had lived there in the winter and had not had any problems as long as he kept a tap running when it was cold outside. Mr. Eckert testified that Mr. Young did call him about the water, and although he could not remember the date, he did recall it was in the winter.

**53**  Another aspect of Mr. Young's evidence that tends to confirm the timing of the water issue relates to a social visit he and his wife made to the Paniccias. Both Mr. and Mrs. Paniccia and Mr. Young testified about that visit. According to Mr. Paniccia, about "a week or two" after they bought the place, he met Mr. and Mrs. Young in downtown Summerland quite by chance. He invited them to his home for tea and the Youngs accepted. Mr. Young said that Mr. Paniccia showed him a new fence he had built and other improvements he had made to the barn. According to Mr. Young, the meeting was cordial; Mr. Paniccia was understandably proud of the improvements he had made to the property. Mr Young said there was no intimation during that visit that the Paniccias were at all unhappy with their new home, and there was no mention of any problems with the water supply or its quality. I am satisfied that this meeting took place in late October, on either October 20th or 27th. Mrs. Paniccia recalled that the meeting was on October 20th, and Mr. Young referenced it in his day timer on October 27th.

**54**  A final piece of evidence touching on the timing of the onset of the water problems relates to the steps taken to solve them. Mr. Paniccia obtained a quote on the cost of drilling a new well on December 9, 2008. That same day he paid to have the intake pipe on the well repaired.

**55**  I am satisfied that the problems with the well first arose in December 2008. That corresponds with Mr. Young's recollection, and the documents that would have been produced when the Paniccias began to explore the problem. Moreover, I am satisfied that by late October, when the Paniccias had the Youngs over for tea, the Paniccias had not experienced any problems with the water. Had it been otherwise, I have no doubt they would have raised the issue with the Youngs then and there.

**56**  I am not satisfied that the water system was incapable of providing sufficient water of potable quality initially. In fact, I am satisfied that it did just that for at least the first five months following the Paniccias taking possession. I accept that the Paniccias were unable to get water from the creek in December. I accept that they experienced problems with the quality of water sometime prior to December. The question that remains is whether either of those matters renders a term or a representation that the well produced potable water a misrepresentation. It seems to me that it is implicit that a 30-year-old water system that draws water from at or just under a creek will require at least some routine maintenance. Such routine maintenance would include regular cleaning of the screen at the pump intake, cleaning of the filters in the house itself, and making sure the water is kept flowing during cold snaps in the winter. If, in the face of such routine maintenance, the pump fails or the water at the tap contains grit or is otherwise unfit for consumption, then to represent the system as problem-free would be to misrepresent it.

**57**  I am unable to conclude that the system was misrepresented. The inability to draw water began when the weather turned cold. I think it more likely than not that the water in the vicinity of the intake pipe froze. It does not follow that the water system was other than it had been represented to be. Mr. Eckert said that he thought it was common sense that you needed to keep the water running by leaving a tap open when the weather was cold to prevent freeze up. There is no evidence that if that had been done it would not have been sufficient to prevent freezing. I am not persuaded that the water system was misrepresented in this respect. As to grit in the water, again there is no evidence that the filters were incapable of removing the grit if properly maintained. There is no evidence anyone cleaned the filters under the kitchen sink or in the laundry room. As to the potable quality of the water, the Paniccias consumed it for the first four or five months without apparent ill effect. There is no expert or other evidence that it was, even in December 2008, unsuitable for human consumption.

**58**  There is one other aspect of the water system that the plaintiffs argue was problematic. They found that if they also attempted to use a large appliance in the house, such as the washer or dryer, while the pump was working and drawing power, the power would short out leaving them without water. I will deal with this aspect of the claim when dealing with the other electrical issues.

***(ii) Unregistered Easements***

**59**  In the property disclosure statement, Mr. Eckert said that he was aware of "encroachments, unregistered easements or unregistered rights-of-way". Mr. Paniccia testified that there were three unregistered easements over the property, but he was only told about one of them. Although his evidence on this issue was somewhat confusing, the informal right of way that he was told about is one that runs parallel to and east of the Trans Canada Trail. This informal right of way was used by the Paniccias' neighbour to the north. Their house has a driveway that is quite steep, and hence Mr. Eckert allowed them to cross his land using a dirt driveway with a lesser grade. Mr. Paniccia was told about this arrangement. He asked Mr. Young to obtain a letter from the neighbour confirming that the driveway was being used only as a matter of courtesy and that Mr. Paniccia could stop the usage at any time. Mr. Young did not get that letter because he thought it was unnecessary. Ultimately, Mr. Paniccia blocked the driveway and the neighbour stopped using it. The fact of the existence of this driveway is not a breach of any term in the contract, nor was it misrepresented to the plaintiffs.

**60**  The two other possible encroachments are also driveways. One serves the same northern neighbour's house. The other provides access to a house southwest of the Paniccias' home. I am not persuaded that either of these two driveways actually encroaches on the Paniccias' property. The only evidence of their location is a Google Earth satellite map on which the boundaries of the Paniccias' two parcels have been drawn in by hand. Who drew the boundaries on the Google Earth satellite image was not revealed in the evidence. The two driveways in question either briefly straddle or slightly cross the Paniccias' property line as drawn. There are two problems with the evidence on this issue. The first is that the boundaries as drawn on the Google Earth satellite image may or may not be the actual boundaries of the property. There is no formal survey of the property. Further, even as drawn, it is difficult to tell whether there is an encroachment because the boundary lines are about the width of the various visible driveways. As a result, depending on where the actual boundary is, the driveways may or may not be encroaching.

**61**  It follows that I am not satisfied that the failure to disclose the other two driveways amounts to a misrepresentation.

***(iii) Insect Infestation***

**62**  In the statement of claim, the plaintiffs allege that the house was "infested with insects". In the property disclosure statement, Mr. Eckert claimed that he was not aware of any "infestation or unrepaired damage by insects or rodents". Mrs. Paniccia testified that there is a closet in the laundry room that houses a hot water tank. Prior to changing the tank, she said there were mice, spiders and crickets coming into the house from a gap between the wall and the floor. The partial crawl space is behind this wall. She said that they sealed the crack when they replaced the hot water tank and that, in addition to the acquisition of two cats and some strategic spraying, solved the problem, or mostly solved it. There is no evidence of any damage due to insects or rodents. The evidence of their presence does not establish an "infestation". It is difficult if not impossible to determine the extent of the problem as observed by Mrs. Paniccia. Bearing in mind that this is a rural property, and that the problem was remedied by spraying with over-the-counter insecticides, I am not satisfied that the representation relating to insects and rodents was a misrepresentation.

***(iv) Structural Issues***

**63**  The plaintiffs' concerns about the structure of the house relate to its general construction, that is, whether it was a wood frame house or a modular or mobile home, the beams and the joists, the insulation, the skylights, and water penetration.

**64**  As noted above, Mr. Paniccia testified that he wanted a home that was constructed in a manner that would allow him to add another storey in the future should he choose to. He did not convey those plans to Mr. Young or Mr. Eckert, but he testified that he did convey his desire to have a wood frame or, as he put it, a "stake house". I infer that he was told that Mr. Eckert's house met that description. The only evidence that the house is not a wood frame house is Mr. Paniccia's, and all he said was that he looked in the crawl space and could not find any "anchor bolts". It is not clear to me what the presence or absence of "anchor bolts" has to do with whether the house was constructed with a wood frame.

**65**  Assuming there is some connection, I am still not persuaded that the evidence supports the conclusion that Mr. Paniccia drew. Mr. Pears inspected the property on Mr. Paniccia's behalf. He testified that he noted the size of the joists (2" x 8") and beams (6" x 8"), and he recorded those findings in his report. Further, in the listing the Paniccias gave to their real estate agent in October 2009 (after this litigation was commenced), the house is described as being of wood frame construction. Mr. Paniccia explained that the description must have been one that the realtor came up with on the basis of an "old sheet", by which I took him to mean an earlier listing. The realtor, Mr. Perry, who gave evidence on behalf of the Paniccias did not say that nor was it suggested to him. On the basis of this evidence, I am not persuaded that the plaintiffs have proven the house is not constructed with a wooden frame.

**66**  In the property disclosure statement, Mr. Eckert indicated that he was not aware of any "structural problems" with the premises. The evidence reveals that the joists supporting the floor in the bedroom over the garage, and the beams throughout the house, were of the dimensions noted above. The plaintiffs argue that both are structural defects and latent defects at that. Thus, there are two issues in relation to this aspect of the claim: the first is whether the size of the beams and joists amounts to a "structural problem", and if so, whether Mr. Eckert was aware of it.

**67**  Mr. Paniccia testified that they do not use the bedroom above the garage because the floor is buckling and some of the linoleum tiling is lifting. Mrs. Paniccia said the floor bounces when you walk on it. Mr. Paniccia said that the floor "wobbles" when he walks on it.

**68**  There is no expert evidence as to whether 2" x 6" joists of the length that support the bedroom over the garage are adequate or not. Further, there is no evidence as to how far apart they are spaced. Mr. Giannotti apparently thought that they were spaced at 16 inches on center, but his report was not tendered in evidence. The Paniccias did not attempt to quantify the extent of the wobbling or bouncing in the floor, nor did they offer any other description from which one might infer that what they experienced amounted to a "structural problem". Moreover, as noted above, Mr. Paniccia, in completing a property disclosure statement in October 2009, represented that based on his then "actual knowledge", he was not aware of any "structural problems with the structure". There is no evidence that the Paniccias took any steps to fix whatever they thought was wrong with the bedroom floor between their purchase and October 2009. For the reasons already given, I reject Mr. Paniccia's evidence that in completing this disclosure statement, he had in mind a different structure; rather, I am satisfied that he had in mind the same house that Mr. Eckert had in mind when he completed his disclosure statement. Finally, Mr. Pears, who inspected the home on behalf of the Paniccias, indicated in his report that while some of the flooring sloped, it was all generally functional.

**69**  I am not satisfied that the plaintiffs have proven that the manner in which the bedroom floor was constructed was a "structural problem" on this evidence. Mr. Eckert was not asked and did not testify about the bedroom floor.

**70**  There is another clause in the property disclosure statement relevant to this aspect of the plaintiffs' claim. In paragraphs 1.N and O, Mr. Eckert said that he was not aware of any "material latent defect" as defined by the *Real Estate Council of British Columbia Rules* 5-13(1)(a)(i) or (ii). Rule 5-13(1) is reproduced in the property disclosure statement as follows:

**material latent defect** means a material defect that cannot be discerned through a reasonable inspection of the property, including any of the following:

1. a defect that renders the real estate
2. dangerous or potentially dangerous to the occupants,
3. unfit for habitation ...

This is, in essence, a codification of the common law doctrine of *caveat emptor*.

**71**  It is convenient at this juncture to deal with the distinction between latent and patent defects. Ballance J. succinctly explained the distinction in *Cardwell* at para. 122, where she wrote:

[122] ... 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=).

**72**  Assuming that the floor in the bedroom over the garage was such that it rendered that room "dangerous or potentially dangerous" to occupants, the issue that arises is whether that condition was patent or latent. According to the Paniccias, they discovered that the floor wobbled or bounced by simply walking on it. To the extent the condition of the floor was a defect, it was apparent on casual inspection and thus not latent.

**73**  The state of the insulation in the house was not alleged to have been misrepresented in the statement of claim, but Mr. Paniccia testified about it. Mr. Eckert answered "yes" to the question in the property disclosure statement about whether, to the best of his knowledge, the exterior walls were insulated. He answered "yes" to a similar question about the ceiling. He testified that the exterior walls of the house were insulated and that the insulation was under plastic sheeting installed over the framing for the walls. He also said that the ceiling was insulated and that the insulation in both the walls and ceiling was to R12 quality. He said that he was present when the insulation was installed. Mr. Paniccia said that there was no plastic sheeting and no insulation in the walls. He said that he noted this when he took down some of the exterior siding. Although initially Mr. Paniccia testified that there was no insulation in the attic, when it was pointed out to him that a photograph taken by Mr. Pears when he inspected the home showed insulation in the attic, he modified his evidence and said there was "hardly any insulation". Mrs. Paniccia said that the ceiling was properly insulated "if you call little bits of insulation proper". She also said that there was no insulation in the ceiling above the bedroom over the garage. Mr. Pears examined the insulation in the attic and reported to Mr. Paniccia that it was 8 to 10 inches deep. He said in his evidence that he thought it was a good depth given the age of the house. He also wrote in his report that he could not see whether the exterior walls were insulated. He was not challenged on this evidence in cross-examination. Based on this evidence, I am not persuaded that the plaintiffs have established that the insulation in the house was other than it was represented to be.

**74**  The next structural issue relates to the roof. In the property disclosure statement, Mr. Eckert indicated that the roof was two years old and that he was not aware of any leaks in it or damage to it. There is a skylight over the upstairs bedroom. It is part of the roof. It is constructed in three sections; each section consists of a sealed double-glazed pane of glass. It may be that those sections of glass were intended as windows or sliding doors and simply installed as skylights. The sections are side by side, and the seam where they join is covered with a wooden strip and sealed with a tar like substance. Around the outer edge of the skylight, there was more tar-like sealant. The skylights leaked at the seams and perhaps around the edges. Although the Paniccias did not indicate when they first noticed any leaks, I infer it was shortly after they took possession. They had the flashing around the skylights repaired in November 2009.

**75**  The house has a wood burning fireplace. According to Mr. Paniccia, the roof leaked around the chimney. He first noticed that when it snowed. He had the flashing around the chimney replaced at the same time he had the skylights fixed. That stopped the leak.

**76**  I accept that the skylights and the chimney leaked and that they were leaking when the Paniccias purchased of the property. Mr. Eckert did not give any evidence about whether the skylights leaked. He did say that the chimney leaked but that he had it repaired before he completed the disclosure statement. I understood his evidence to be that following the repair it did not leak "to any extent".

**77**  The remaining issue is whether Mr. Eckert was aware of the leaks. I am satisfied that he was aware of the leaks. In reaching this conclusion, I am not to be taken as finding that Mr. Eckert deliberately lied when he completed the property disclosure statement. I suspect that he simply did not turn his mind to the issue with any care and that had he done so, he would have recalled that the roof and walls continued to leak to some extent after he replaced the roof.

**78**  I am satisfied that Mr. Eckert misrepresented the state of the roof in relation to the leaking that was taking place around the chimney and the skylights.

**79**  The next issue relates to the walls, their construction and whether they were separating from the roof. As to the material used to construct the interior walls, there is no evidence that Mr. Eckert or Mr. Young either expressly or impliedly represented that the walls were made of any specific material. Thus, even if I was satisfied the walls were made of Styrofoam, that would not be contrary to any representation made about them.

**80**  The final structural issue is whether the walls were separating from the ceiling. If so, that would, assuming that Mr. Eckert knew about it, render the representation in the property disclosure statement that he was not aware of any structural problems untrue. If the separation was due to water penetration, then the representation that there were no moisture problems in the walls would be untrue assuming he knew otherwise. Mr. Paniccia testified that the ceiling was leaking inside and that there was cracking and some separation at the junction between the walls and the ceiling in the corners. He said that there was a leak in the roof, which penetrated into the wall of the bedroom over the garage. Mr. Young testified that he did not see anything to suggest that the walls were separating from the ceiling. As noted Mr. Eckert said that there was no leaking either from the roof or through the walls "to any extent". I am satisfied that there was leaking around the window in the upstairs bedroom and the roof in the vicinity of that window and that the leak penetrated into the wall. I am not satisfied that the walls were generally separating from the ceilings whether due to water penetration or otherwise.

1. ***Electrical Issues***

**81**  Although not specifically pleaded, the plaintiffs contend that the electrical supply to the well was not adequate or proper. They have pleaded that there were problems with the power supply to and around the barn. Mr. Eckert indicated in the property disclosure statement that he was not aware of any problems with the electrical system.

**82**  As to the well, Mr. Paniccia said that the power failed repeatedly, often when a large appliance was being used at the same time as the pump. He called Mr. Pearce, who sells and installs pumps, to look at the pump in the well. Mr. Pearce went to the property in December 2008. He said that when he looked inside the apple barrels that acted as housing for the pumps, he saw a broken pipe through which water was leaking. Because there were exposed wires, he recommended to Mr. Paniccia that he turn off the power and have an electrician examine the arrangement. Mr. Paniccia had an electrician carry out an examination, but he (the electrician) said he would not come to court to testify. In the result, I do not know whether the electrical situation at the pump was or was not safe, and if it was unsafe, whether that was because a pipe had broken or because it was unsafe in its design and construction. As to the power supply to the well, Mr. Pearce found what he described as "ordinary underground service wires". Mr. Paniccia said that he found a light gauge wire going to the well. Mr. Eckert testified that he used an appropriate gauge wire for the pump and ran a second wire, lighter in gauge and not buried as deeply, to supply power to a light in the pump house. Mr. Paniccia said that he found what he thought was a wire that was too light a gauge. Whether it was too light or not for the pump, I am not persuaded that the wire that he found was the wire for the pump; I think it more likely that it was the wire that carried power to the light. I am not satisfied that the electrical system for the pump was misrepresented.

**83**  The plaintiffs plead that "extension cords were used instead of electrical wiring in the home and the buildings". In the property disclosure statement, Mr. Eckert indicated that he was not aware of any problems with the electrical system. Mr. Paniccia said that the wiring carrying power to the barn was an orange cord that ran from the house to the barn, a distance of about 200 feet. He did not specifically describe it as an extension cord, but I infer that is what he saw. He said that the cord kept "melting", and thus the power to the barn kept failing. He dug it up and replaced it. Whether the cord was an extension cord or not, according to Mr. Paniccia, it was inadequate to carry the power. In addition, Mrs. Paniccia testified that there was a pole light near the barn that drew power from the barn. She said that if you touched the pole, you received a shock, and if you walked between the barn and the pole, you also received a shock. They had that wiring replaced. Mr. Eckert did not testify about the pole light in particular, but he did say that there were no problems with the electrical system. As to the barn and its power supply, he said that he used "certified underground wire". He said that he may have used an extension cord to provide power to take power to some heat tape, but he did not bury that extension cord. His evidence on this point was somewhat unclear. I am satisfied that whatever the wire was that carried power from the house to the barn, it was inadequate in gauge or construction to carry that power without melting or otherwise failing. Both of these things, that is, the power supply to the barn and the power supply to the pole adjacent to the barn, amounted to "problems with the electrical system". Moreover they were material latent defects. They rendered the property potentially dangerous to the occupants, and they are problems that would not be discernible on reasonable inspection. It is not reasonable to expect a purchaser to excavate underground wiring, and short of doing that, the problem would not have been apparent.

***(vi) The Land***

**84**  The next category of complaint made by the plaintiffs relates to the land and whether there was debris and/or noxious substances buried under it. In their statement of claim, they assert at para. 25(f) that they discovered:

1. diesel fuel, grease, oil, and other noxious substances were dumped on the Property. The Property was used as a contaminated waste dump;

At paragraph 25(i), they allege that there was refuse and junk buried on the property.

**85**  There are no specific representations about these items either in the property disclosure statement or otherwise. Both are said to be "material defects". The first issue is whether these things were present on the property. If so, the next issue is whether they are material latent defects and thus amount to a breach of paragraph 1.N or O in the property disclosure statement. By those paragraphs, Mr. Eckert indicated that he was not aware of any such defects. Whether Mr. Eckert was aware of them or not, if they were material latent defects, they amount to a breach of the implied term in the contract that the premises are not dangerous, a term not excluded by the operation of the doctrine of *caveat emptor*.

**86**  Mr. Paniccia said that behind some pine trees near the barn, he found oil and diesel in the ground. He said it took months of scraping to get the area cleaned and to get rid of the smell. He said that he found several barrels buried on the property, including one that was full of diesel. Although it was old and rusty, it was not leaking. Mr. Eckert said that there were no tanks on the property as far as he knew, except for a tank with diesel in it but it was not buried; rather, it was simply left on the property in case Mr. Paniccia wanted to use it as a burning barrel.

**87**  Mr. Paniccia testified that he picked up buckets of glass that was scattered about the property and a quantity of broken piping of various kinds. Mr. Eckert said nothing in his evidence about the presence of glass on the property. Ultimately, Mr. Paniccia said that he had to bring in a dump truck to cart off the debris he found.

**88**  I am satisfied that Mr. Paniccia found large quantities of glass on the property and that he found soil containing diesel and oil near the barn. He also found some barrels buried in the ground. Both Mr. and Mrs. Paniccia testified to these circumstances. I accept the Paniccias' evidence on this point. It is also consistent with the general state of the property. The property was somewhat unkempt in general appearance. Mr. Paniccia did not impress me as a particularly fastidious person, and yet even he found the property dishevelled. For example, he agreed that Mr. Eckert could leave his furniture in the house following completion of the sale. He said that the furniture was dirty and some of it smelled of urine. He and Mrs. Paniccia took it to the landfill. Mr. Eckert on the other hand thought that the furniture he left was in fairly good condition. This conflict is not due to any attempt to mislead but rather reflects the differing standards of cleanliness and order that the parties have.

**89**  As to the glass and pipes, they do not amount to material latent defects. As I understood Mr. Paniccia's evidence, both were entirely or at least mostly on the surface of the ground. As such they were not latent, even assuming they were material defects.

**90**  The diesel and oil was both material and latent. I am satisfied that Mr. Eckert knew about it. Again, in reaching this conclusion, I am not suggesting that he knew about it and deliberately lied when he completed the disclosure statement; rather that he knew in the sense that if he had turned his mind to the matters, he would have recalled them. He simply did not turn his mind to them. In his evidence at trial, he said that there were no underground oil storage tanks (he had indicated as much in the property disclosure statement). He was not specifically asked about whether there were discarded empty or partially empty diesel drums buried on the property or whether there was diesel in the soil. I am persuaded that there was at least one partially full diesel tank buried on the property and that there was diesel and oil in the soil and that Mr. Eckert knew about this in the sense noted above. The diesel rendered this hobby farm dangerous, and thus it amounted to a material latent defect that Mr. Eckert was aware of.

***(vii) The Septic Systems***

**91**  The next issue relates to the septic systems. The plaintiffs plead that none of the three septic systems on the property worked when they took possession. In the property disclosure statement, Mr. Eckert represented that the property was serviced by a septic system and that he was not aware of any problems with the system. Mr. Paniccia testified that he knew there were three systems. There is one that services the bathroom and shower on the main floor. It is located beneath the kitchen window. Another services the laundry appliances, and the third services the upstairs bathroom. As to the one under the front window, he said that initially it was prone to backing up, and when that happened he snaked the line, which solved the problem. He later had it pumped out, and since then, it has not given them any problems. They do not use the one that services the upstairs bathroom. The one that services the laundry room has not caused any problems. It is common knowledge that some septic systems have to be pumped from time to time. The fact that it was necessary to do that in the case of one of the systems at the property in question does not mean there was a "problem" with the system. It means that the system needed routine maintenance, and once that was done, the system has worked properly. The septic systems were not misrepresented.

***(viii) Permits***

**92**  The next issue relates to permits, both building permits and occupancy permits. This matter was raised in the evidence but was not pleaded. I will deal with it in any event.

**93**  In the property disclosure statement, Mr. Eckert indicated that he did not know if a final building inspection had been approved or if a final occupancy permit had been obtained. He also indicated that he was not aware of any additions or alterations that had been made without a final permit or a final inspection. Those are the only representations on the subject of permits of any kind.

**94**  Mr. Eckert said that he had a permit for the addition he built on the original house, but as for the building permit, he had long since thrown it away. He said that he completed the addition 15 years ago. He said that he did not have a permit for the electrical system that was used to supply the pump. However, Mr. Pearce testified that given when the system was likely installed, a permit would not then have been necessary, even assuming it was possible to obtain one. None of this evidence was challenged nor was it contradicted by other evidence.

**95**  I am not persuaded that there were any misrepresentations about the state of the permits for the house and the additions to it.

***(ix) Noise***

**96**  The final issue is noise in the surrounding area. Mr. Paniccia said he was interested in obtaining a quiet property partly because it was necessary due to his PTSD. Although there was some evidence called in relation to this issue, it was not pleaded and the defendants did not have an opportunity to consider it prior to Mr. Paniccia raising it during the trial. Further, the plaintiffs did not advance any argument on the point. I will not therefore address it.

1. ***Summary of Misrepresentations***

**97**  The fact that there were leaks in the roof (including around the skylight and the chimney and around the window in the bedroom), the state of the electrical supply to the barn and the pole beside the barn, and the buried diesel are all breaches of the terms of the contract and, in particular, the statements in the property disclosure statement. There are no other proven misrepresentations which stand independently of those in the property disclosure statement. It is thus not necessary to deal with the claim of negligent or fraudulent misrepresentation in relation to Mr. Eckert. I do, however, observe that while the contractual breaches I have found may also amount to negligent misrepresentation, they do not amount to fraudulent misrepresentation. I am satisfied that Mr. Eckert never intentionally withheld the truth or misstated the state of the property.

1. **Mr. Young's Liability**

**98**  There are two aspects of the plaintiffs' claim against Mr. Young. The first is based on negligent misrepresentation, and the second is grounded in a claim of breach of fiduciary duty. I will deal with these claims separately.

1. ***Negligent Misrepresentation***

**99**  The elements of the tort of negligent misrepresentation are set out in *Queen v. Cognos Inc.*, [*[1993] 1 S.C.R. 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609G-00000-00&context=) at 110. To establish such a claim, the plaintiff must prove:

1. a duty of care based on a "special relationship" between the person making the representation and the person to whom it was made;
2. that the representation in question is untrue, inaccurate, or misleading;
3. that the person making the representation acted negligently in making it;
4. that the person to whom the representation was made relied on it in a reasonable manner; and
5. that the reliance was detrimental in the sense that damages resulted.

**100**  In the context of representations relayed by a real estate agent on behalf of a vendor, the agent is required to use reasonable skill in determining the accuracy and completeness of the representations.

**101**  That Mr. Young owed the Paniccias a duty of care as a result of a "special relationship" is not disputed. I have addressed the issue of whether representations were made by Mr. Eckert were untrue, inaccurate or misleading. Those representations were conveyed by Mr. Young to Mr. Paniccia. The central issues on this aspect of the plaintiffs' claim relate to the last three factors noted in *Cognos*.

**102**  The duty owed by a real estate agent who provides information to a purchaser was discussed by Lysyk J. in *Sedgemore v. Block Bros. Realty Ltd.* *(1985), 39 R.P.R. 38* (B.C.S.C.). At paragraph 30, he adopted the following passages from *Forster, Real Estate Agency Law* (1984) (pp. 243 and 245-6):

It is now well established that real estate brokers who elect to provide information and advice to the third parties with whom they may have dealings must exercise reasonable care and skill in the performance of their undertaking in ensuring the completeness and accuracy of such information and advice.

...

That the misinformation conveyed by a broker to a third party originates with the broker's principal, or with the listing broker in a multiple listing situation, will not necessarily relieve the broker from personal liability to the third party. A broker must at least check the completeness and accuracy, both of all information which it is usual or customary for brokers to verify, and of all other information as to the completeness and accuracy of which he is in doubt. However, authority exists to support the contention that the obligation of, at least, a listing broker is somewhat broader in that he must ascertain and verify all pertinent facts concerning the property placed in his hands for disposal.

**103**  Mr. Young argues that there is no evidence that he failed to confirm the accuracy of any information that it is "usual or customary" for a listing or selling agent to confirm. That is so in part because there is no evidence as to what it is "usual or customary" for such an agent to verify. The plaintiffs argue that it is not necessary to call expert evidence in this case. They argue that support for this proposition can be found in *Zink v. Adrian*, [*2005 BCCA 93*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M3VG-00000-00&context=), and in *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=).

**104**  Expert evidence as to the standard of care is not always necessary. In *Walls v. Ross*, [*2001 BCPC 187*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-243P-00000-00&context=), Stansfield A.C.J. explained the kinds of circumstances in which it is likely required. At para. 74, he wrote:

[74] A review of the cases ... suggests that unless conduct is particularly egregious, the court *likely* requires expert evidence of the usual or customary standard in the real estate industry regarding:

1. the kind of information that must be checked or verified by realtors, where it has not been demonstrated that the realtor had cause to doubt the information;

**105**  *Zink* was a case of solicitor's ***negligence***. No expert evidence was adduced as to the standard expected of a reasonable solicitor in the circumstances there at issue. Mr. Johnston argues that the situation at hand is analogous. I am unable to agree. First, no issue was taken either at trial or on appeal with the fact that no expert evidence was adduced in *Zink*. Second, it was a case of solicitor's ***negligence*** and judges, being former lawyers, will sometimes have some idea of the standard of care expected. Because of that, it may be that expert evidence is less frequently necessary. Notwithstanding this, Southin J.A. underlined the danger of proceeding in the absence of expert evidence. In doing so, she set out the situations in which such evidence may not be required. She wrote at paras. 42 to 44:

[42] In the case at bar, the respondent did not call any expert evidence. The judge was his own expert. Before us, the appellant made nothing of this.

[43] But it does seem to me that in cases of alleged ***negligence*** by a solicitor, judges can only rarely make such a finding in the absence of expert evidence as to the standard of a competent solicitor conducting the business in question.

[44] The judge can only properly do so, in my opinion, if the matter is one of "non-technical matters or those of which an ordinary person may be expected to have knowledge." See *Anderson v. Chasney*, [*[1949] 2 W.W.R. 337*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DK1-JNY7-X2CK-00000-00&context=) at 341 (Man. C.A.). There is an underlying reason - the expert witness can be cross-examined with a view to showing he knows not whereof he speaks. But the parties have no means of discrediting a judge's implicit assertion that he knows the proper way to conduct a certain kind of legal business. One must not overlook that the reason some judges are judges is that whilst they were practising the profession they were of a standard far above that of the ordinary reasonably competent member of the profession.

**106**  In *Krawchuk*, Epstein J.A. cited and relied on both of the foregoing authorities. She found that expert evidence was not necessary because on the facts as she found them, the realtors conduct was "so egregious" that it was obvious it fell below the standard, even though the precise boundaries of that standard had not been established.

**107**  Absent expert evidence, I am not prepared to conclude that it is usual or customary for real estate agents to inquire into or check the electrical system in a house or outbuilding they list or sell. Nor am I prepared to reach such a conclusion about their obligation to examine the surrounding property. There was nothing about this property which would have put a reasonable real estate agent on his or her inquiry about the state of the surrounding property or the electrical systems in the house.

**108**  Aside from the matters about which it is usual or customary to inquire, if there are circumstances which would put a reasonable agent on his or her inquiry, or would otherwise cause an agent to doubt the accuracy of the information a vendor has provided, the agent may have a duty to make an inquiry or verify the information. The plaintiffs contend that Mr. Young saw moisture stains on the wall near the fireplace in the living room. Mr. Eckert said that those stains predated the installation of the new roof. It was apparent that the roof was relatively new. The plaintiffs also argue that it was incumbent on Mr. Young to recommend that someone qualified to inspect the water system be engaged. That obligation is, as I understand the plaintiffs' argument, based on the fact that the water source was unusual. I will deal with the latter point first.

**109**  I am not persuaded that it was incumbent on Mr. Young to recommend to Mr. Paniccia that someone examine the water system to determine if water was being drawn from an underground aquifer or the creek. There was no doubt in his mind, nor, for the reasons already given, would there be any doubt in the mind of a reasonable observer, that the water for the property was being drawn from the creek under the authority of the water licence.

**110**  As to the components of the system, the pumps and filters were expressly noted as being sold in an "as is condition". Mr. Eckert said they worked and there was no reason for Mr. Young to doubt that assertion.

**111**  As to the quality of the water, the contract was subject to Mr. Paniccia "testing and approving the domestic water". Mr. Paniccia chose to waive that condition without having the water tested.

**112**  Assuming that it was reasonable for Mr. Young to doubt the representations about the roof because of the presence of moisture stains on the living room wall, the issue that arises is whether the plaintiffs have proven that they relied on this information and that they did so reasonably.

**113**  To resolve the issue of reliance, it is necessary to consider the involvement of Mr. Pears, the home inspector. Mr. Paniccia's offer was made subject to a satisfactory home inspection. Mr. Young either made that suggestion or supported the inclusion of that condition when it was raised by Ms. Schlacter or Mrs. Paniccia. Mrs. Paniccia said that such an inspection was a "must" from her point of view. As noted, Mr. Paniccia hired Mr. Pears who carried out an inspection. In his report Mr. Pears wrote:

Recommend a qualified roofer inspect and advice [sic] on flashing for the skylights and chimney.

\*Also metal strips are nailed on at the peak from the inside with the nails showing through. Keep sealed.

Just below this notation he highlighted the flashing around the skylight noting that it was not visible.

**114**  Mr. Paniccia testified that he met with Mr. Pears at the property on May 23, 2008, the day he carried out the inspection. He said that Mr. Pears did not go through his report with him; he said that he just told him "little things". He said that he may not have received a copy of the report or, if he did, he may not have read it until well after the transaction closed.

**115**  Mr. Pears testified that he only had a general recollection of this particular inspection. He said, however, that he has a routine or practice that he follows in each home inspection he does where the customer is present at the house after he has completed the inspection. That practice involves showing the customer the report and going through the items he, that is, Mr. Pears, thinks worthy of emphasis. He does that by putting the report in front of the customer and literally highlighting the sections he wants to emphasize. He said he did that with Mr. Paniccia. The documentary evidence supports this contention. The inspection report is highlighted.

**116**  As to the value of such evidence, Ryan J. (as she then was) in *Shaak v. McIntyre*, [*[1991] B.C.J. No. 2607*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X2WN-00000-00&context=) (S.C.) adopted the following from *Wigmore on Evidence*, Vol. 1A, Tillers Revision, 1983, pp. 1607-1609:

Of the probative value of a person's habit or custom, as showing the doing on a specific occasion of the act that is the subject of the habit or custom, there can be no doubt. Every day's experience and reasoning make it clear enough ... (The real issue is whether the act defined as a habit) has sufficient regularity to make it probable that it would be carried out in every instance or in most instances ...

**117**  Mr. Pears testified that he has been doing home inspections for just under 10 years. He said that he typically schedules two inspections per day. I am satisfied that what he said was his usual practice was a habit and that he followed it when he met with Mr. Paniccia. On one page of the report, he wrote the word "recode" in reference to his suggestion that the codes for the locks on the doors be changed. The word is upside down in relation to the orientation of the print on the page. He said it is upside down likely because the report was properly oriented towards Mr. Paniccia and upside down in relation to Mr. Pears, who was sitting across the table from him. I am satisfied that Mr. Pears went through the report with Mr. Paniccia. Mr. Pears recommended that Mr. Paniccia have the roof inspected by a qualified roofer. Mr. Paniccia chose not to do that. Even if Mr. Young made a representation about the roof or was in breach of his duty to make further inquires and Mr. Paniccia relied on the representation or the absence of further inquiries, his reliance was not reasonable. A qualified home inspector who actually examined the roof told Mr. Paniccia that he should have a more detailed inspection commissioned. To ignore that advice and instead rely on what Mr. Young did or should have done was not reasonable (see generally *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=) per Schultes J. at para. 18, and *Lamontagne v. Anderson*, [*2005 BCSC 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M474-00000-00&context=) per Bouck J. at paras. 61-62).

**118**  Mr. Johnston argues that *Krawchuk* stands for the proposition that obtaining a home inspection does not "waive the right to rely on [a property disclosure statement]". I do not read *Krawchuk* that way. The plaintiff purchasers in that case relied on the Ontario equivalent of a property disclosure statement. They did not obtain a home inspection. The issue was whether they acted reasonably in relying on the property disclosure statement because the disclosure statement expressly provided that "buyers must still make their own enquires". The issue was not whether it was reasonable to rely on statements in a disclosure document in the face of the findings by a home inspector, but rather whether it was reasonable to forego a home inspection in the face of statements in the disclosure document.

**119**  In summary, with the possible exception of the condition of the roof, I am not persuaded that Mr. Young made or was responsible for any negligent misrepresentations about the property. As to the roof, I am not persuaded Mr. Paniccia relied on any representations about its condition or that Mr. Young's ***negligence*** in not making further inquires about the state of the roof caused the plaintiffs any damage.

***(ii) Breach of Fiduciary Duty***

**120**  There is a legal presumption that real estate agents are fiduciaries in relation to their principals (*DeJesus v. Sharif*, [*2010 BCCA 121*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X130-00000-00&context=) at para. 54). Mr. Young does not suggest otherwise. As a fiduciary, he owed the plaintiffs his loyalty and was obliged to put their interests ahead of his own. Further, he was obliged to act in good faith and honestly. Failing to disclose a material fact that might affect a principal's decision about whether to complete a transaction is a common instance of breach of a fiduciary duty. Sinclair Prowse J. described this kind of breach in *West Fork Ranch Ltd. v. Marcotte*, [*2005 BCSC 898*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0X1-00000-00&context=) at para. 127, where she wrote:

[127] To succeed ... the Plaintiff must establish that a fiduciary relationship exists between it and the Defendant; that in the context of that relationship the Defendant failed to disclose a material fact ... and that a loss arose as a result ... Once these elements are proven, the onus then shifts to the Defendant to prove that the loss would have occurred regardless of the breach of the fiduciary duty: *Commerce Capital Trust Co. v. Berk et al* [*(1989), 68 O.R. (2d) 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JYYX-60H2-00000-00&context=) (C.A.); *Canada Trustco Mortgage Co. v. Bartlet & Richardes et al* [*(1996), 28 O.R. (3d) 768*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JX3N-B1K5-00000-00&context=) (C.A.); *Jacks v. Davis,* [*[1982] B.C.J. No. 2053*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JC0G-629K-00000-00&context=) (C.A.); and *Hodgkinson v. Simms,* [*[1994] 3 S.C.R. 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3FN-00000-00&context=)).

**121**  As I understand this aspect of the plaintiffs' claim, it is based on three things. First, that Mr. Young was obliged to afford Mr. Paniccia the opportunity of getting independent legal advice before having him sign the dual agency agreement or the contract of purchase and sale; second, that he failed to meet the obligations imposed by the *Canadian Real Estate Association Realtor Code*; and third, that he preferred the interests of Mr. Eckert over those of Mr. Paniccia, including disclosing to Mr. Eckert the price that Mr. Paniccia was prepared to pay for the property.

**122**  The limited dual agency agreement, which Mr. Young had Mr. Paniccia sign, is a preprinted form prepared by the South Okanagan Real Estate Board. By signing it, both Mr. Paniccia and Mr. Eckert agreed that Mr. Young could act as agent for each of them without breaching his duty by doing so. He agreed to act impartially as between them. Finally, the agreement stipulated that Mr. Young's obligation to disclose to his principals remained in place, save that he was obliged not to disclose the motivations of the parties for entering into the transaction or what the seller was willing to accept and the buyer was willing to pay for the property, otherwise than in the offers or counteroffers that might be exchanged.

**123**  Mr. Johnston argues that the limited dual agency agreement was not signed until after the sale price had been agreed on and that this was improper. Further, he argues that Mr. Paniccia did not understand the limited dual agency agreement and that Mr. Young ought to have referred him for independent legal advice before having him sign it. These propositions are said to find support in *DeJesus v. Sharif* and *Idzan v. Broadfoot*, [*2011 ABPC 208*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93D1-JNS1-M1WY-00000-00&context=).

**124**  Limited dual agency agreements are not uncommon in this province, particularly in smaller centers (see generally *Grimshaw v. Progroup Realty Ltd.*, [*2004 BCSC 1836*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62JW-00000-00&context=) at para. 31, aff'd [*2004 BCCA 523*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S33D-00000-00&context=), and *DeJesus v. Sharif* at para. 64). In fact, Mrs. Paniccia said that she and her husband entered into a dual agency agreement in connection with the sale of their home in Powell River. Mr. Young said that such arrangements are common in Summerland.

**125**  The *Realtor Code* is published by the Canadian Real Estate Association. It represents the professional standards expected of real estate agents by that association. Mr. Young is a member of that association.

**126**  I will deal first with the timing of the signing of the dual agency agreement. The *Realtor Code* extant in 2007 provided in paragraph 5.1 that written service agreements between realtors and consumers should be signed "at the earliest possible opportunity and in any event prior to any offer to Purchase being presented or submitted". A limited dual agency agreement is, by definition, a service agreement.

**127**  The dual listing agreement was signed in Mr. Young's office after Mr. Paniccia had viewed the property and after he had resolved to offer $440,000 to purchase it but before the offer was presented to Mr. Eckert. According to Mr. Paniccia, after discussing the matter with his wife, Mr. Paniccia wanted to offer $460,000. Ms. Schlacter suggested he offer $420,000. Mr. Paniccia decided to offer $440,000. He told Mr. Young that $440,000 was what he would have available after the sale of his home in Powell River was completed. He told Mr. Young that he should convey that fact to Mr. Eckert. The offer was $90,000 below the list price.

**128**  While the dual listing agreement may not have been signed at the "earliest possible opportunity", it was signed before any of the plaintiffs' interests were at risk of being compromised. If the timing of the execution of the limited dual agency agreement was a breach of Mr. Young's fiduciary obligation, it was a breach without consequence.

**129**  As to the proposition that Mr. Young should have referred Mr. Paniccia for independent legal advice, it is useful to consider the *Realtor Code* and the circumstances in the cases said to support the need for Mr. Young to have done that. As I understand the argument, it is that such a referral was necessary in part because Mr. Paniccia may not have understood the limited dual agency agreement or the contract of purchase and sale.

**130**  The *Realtor Code* provides in article 10 that realtors should encourage parties "to seek the advice of outside professionals where such advice is beyond the expertise of the [realtor]". Mr. Young testified that he explained the dual agency agreement to Mr. Paniccia. While there may be circumstances in which it would be prudent for a realtor to refer a potential purchaser or seller for independent legal advice before entering into a dual listing agreement, this was not one of them. There was nothing in the circumstances that would suggest to a reasonable real estate agent that such a step was warranted. This was not the first house Mr. Paniccia had purchased and Mr. Young knew that. There is no evidence to suggest that Mr. Paniccia was incapable of understanding the document or that he did not, in fact, understand it. So, too, with respect to the contract of purchase and sale.

**131**  Mr. Johnston argues that Mr. Young's fiduciary obligations ought not to be circumscribed by the limited dual agency agreement. In support, he cites *DeJesus v. Sharif*. The limitations which a dual agency agreement place on the fiduciary obligations of a real estate agent are not relevant to any claim advanced by the plaintiffs. Be that as it may, *DeJesus v. Sharif* does not support the proposition for which it is cited. In that case, Finch C.J.B.C. concluded that the limited dual agency agreement the realtor had had his client sign was not effective to limit the realtor's obligation to disclose the property's fair market value. It was the failure to disclose the property's value which was one of the breaches asserted. Finch C.J.B.C. reached this conclusion for two reasons. First, the agent was also the vendor and the limitations contained in a limited dual agency agreement are simply incompatible in such circumstances. Second, even if the agreement applied, its terms did not limit the agent's obligation to disclose the value of the property. None of those circumstances arise in the matter at hand.

**132**  Nor does *Idzan v. Broadfoot* support the contention that a real estate agent should refer a customer for independent legal advice before having the customer enter into a dual listing agreement. While Skitsko P.C.J. suggested that the realtor defendant ought to have referred his customers for independent legal advice, that suggestion was made in relation to the execution of a guaranteed sales agreement not the dual agency agreement. It was the failure of the "guaranteed" sale that was at the core of the plaintiffs claims in that case.

**133**  I am not persuaded that Mr. Young was in breach of his fiduciary obligations to the plaintiffs.

**Damages**

**134**  The plaintiffs spent $250 on caulking and weather stripping and $1,837 to replace the flashing and the skylights. They spent $600 to fix the pole light by the barn and a further $600 to repair the electrical connection between the barn and the house. They paid $750 for a bin which was loaded in the effort to clean up the diesel (and perhaps other debris). They spent $13,009 to clean glass and other debris from the property which, I infer, included the cost of removing the diesel and oil soaked soil. Acknowledging the somewhat arbitrary nature of the assessment, I am satisfied that $2,000 of this cost is related to that aspect of the cleanup.

**135**  In summary, the plaintiffs are entitled to damages in the sum of $6,037 as against the defendant Mr. Eckert.

**Conclusion**

**136**  The claims against Mr. Young (and the related defendants) are dismissed.

**137**  The claim of breach of contract against Mr. Eckert is allowed and damages in the sum of $6,037 are awarded. The claim of fraudulent misrepresentation is dismissed.

**138**  The parties are at liberty to address the question of costs.

G. BARROW J.

**End of Document**

[***Rhodes v. Biggar, [2010] B.C.J. No. 1022***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-2228-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kelowna, British Columbia

L.D. Russell J.

Heard: February 8-12, 2010.

Judgment: May 28, 2010.

Docket: 07-4430

Registry: Victoria

**[2010] B.C.J. No. 1022** | 2010 BCSC 762 | 190 A.C.W.S. (3d) 451 | 2010 CarswellBC 1344

Between Andree Germaine Rhodes, Plaintiff, and Gayle Cecile Biggar, Defendant

(198 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Body injuries — Soft tissue — Considerations impacting on award — Age of claimant — Pre-existing injury — Credibility — Action by 57-year-old dental hygienist for damages for injuries sustained in 2005 car accident allowed — Accident aggravated and accelerated impact of pre-existing problems from 1999 crush injury for which plaintiff continued to seek treatment — Plaintiff understated impact of pre-existing injury on her current problems, which limited her to working nine hours per week and restricted her ability to garden — Plaintiff lacked credibility — Total award of $144,984 resulted from reduction of awards by 25 percent based on pre-existing condition — Plaintiff likely to work same hours for three more years, and would require personal training and gardening assistance.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Pre-existing medical conditions — Cost of future care — Loss of earning capacity — Loss of housekeeping ability — Retroactive loss of income — Special damages — Non-pecuniary loss — Pain and suffering — Action by 57-year-old dental hygienist for damages for injuries sustained in 2005 car accident allowed — Accident aggravated and accelerated impact of pre-existing problems from 1999 crush injury for which plaintiff continued to seek treatment — Plaintiff understated impact of pre-existing injury on her current problems, which limited her to working nine hours per week and restricted her ability to garden — Plaintiff lacked credibility — Total award of $144,984 resulted from reduction of awards by 25 percent based on pre-existing condition — Plaintiff likely to work same hours for three more years, and would require personal training and gardening assistance.**

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| Action by Rhodes against Biggar for damages for personal injuries sustained in a motor vehicle accident. Rhodes, a 57-year-old dental hygienist, had an extensive medical history relating to a 1999 crush injury, causing serious neck, shoulder and back problems for which she still underwent treatment at the time of her accident with Biggar. She never returned to full time work. In November 2005, Rhodes' vehicle was struck by Biggar's vehicle. Biggar admitted liability for the collision, conceding Rhodes sustained soft tissues injuries to her neck, back, shoulder, arm and hip. Rhodes missed six months of work after the accident. She was in another motor vehicle accident in 2007. Three weeks after the 2007 accident, Rhodes tried to increase her work hours but found the pain in her pain prevented this. Rhodes used pain medication and several therapies. She described low back pain, shoulder pain and hip pain as the main problems restricting her to working nine hours per week. She was unable to garden. She did not advise the health care practitioners who treated her after the 2005 accident about the extent of her pre-existing problems. She admitted she earned about $17,000 in 2009, in addition to $6,500 in undeclared rental income from a tenant in her home. Her family physician was reluctant to admit the 2005 accident merely exacerbated Rhodes' pre-existing problems, but letters the physician wrote to her disability insurers showed she was aware the 1999 injury had been devastating to Rhodes' ability to work. A massage therapist who treated Rhodes both before and after her accident with Biggar admitted many other dental hygienists came to her for treatment similar to that which Rhodes' received due to the physical demands of the job. An orthopaedic surgeon who saw Rhodes after the 2005 accident opined her condition was not likely to ever completely resolve. He had limited information about Rhodes' pre-accident condition. A doctor who examined Rhodes for the defence initially opined she sustained debilitating injuries in the 2005 accident, but revised his opinion after reviewing Rhodes' pre-accident medical records. The doctor then found the 2005 accident accelerated the deterioration of Rhodes' condition but did not cause it.  HELD: Action allowed.  Rhodes received $144,984 in damages. Rhodes understated the extent to which her problems were attributable to the 1999 injury. She was not credible given that she had concealed income from tax authorities. Rhodes' physician demonstrated such sympathy for Rhodes that the court could not accept her opinion. The orthopaedic surgeon was unable to provide an accurate assessment of the impact of the 2005 accident without a clear picture of Rhodes' pre-accident condition. The defence expert's opinion was the most helpful because he reviewed Rhodes' complete medical history. Rhodes' current condition was not attributable completely to the 2005 accident. The accident accelerated and aggravated her difficulties, but her pre-existing problems would have interfered with her lifestyle in any event. Non-pecuniary damages of $60,000 were discounted by 25 percent to $45,000 to take this into account. She was awarded $63,684 for past income loss, based on the assumption she would have worked 14 hours per week until the trial date but for the 2005 accident. For future income loss, the court assumed Rhodes would work the same hours for three more years until retiring. The figure of $38,100 was discounted by 25 based on her pre-existing condition. Rhodes was awarded $1000 for the cost of a personal trainer and $800 for gardening help. Special costs claimed of $7,939 were also reduced by 25 percent. |

**Statutes, Regulations and Rules Cited:**

Court Order Interest Act, *RSBC 1996, CHAPTER 79*,

**Counsel**

Counsel for Plaintiff: M.L. Pohorecky.

Counsel for Defendant: R.D. Shaw.

[Editor's note: A correction was released by the Court May 31, 2010; the change has been made to the text and the correction is appended to this document.]

**Reasons for Judgment**

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

**1**   On November 26, 2005, the plaintiff was travelling northbound on Highway 97 heading to her home outside Vernon, BC after doing some Christmas shopping.

**2**  As she reached the town of Winfield, she stopped for a red light and then proceeded towards the next traffic light. It turned green and she started through it when the defendant's car, on her right and at a red light, came into the intersection and hit her car's passenger side (the "Accident").

**3**  The plaintiff described the impact as being hard but it did not cause her car's airbags to deploy.

**4**  The plaintiff was extracted from the car with the use of the Jaws of Life. Neither door on her car would open. She was taken to Kelowna General Hospital by ambulance but was not admitted. She was suffering neck and back pain at the accident scene.

**5**  The plaintiff was driving a 1998 Saturn and it was written off. I have no evidence of the kind and age of car the defendant was driving but it was also written off.

**6**  At trial, counsel admitted liability on the part of the now deceased defendant.

**ISSUES**

**7**  The usual heads of damage are sought by the plaintiff in this case.

**8**  The main issue is that of causation, since the defendant alleges the plaintiff suffers from a pre-existing condition which would have resulted in reducing her hours of work as she aged in any event of the Accident.

**9**  It is also alleged that a second accident on June 8, 2007, for which she was at fault, exacerbated her largely resolved injuries. This accident resulted in her 2006 Toyota Corolla being written off due to extensive damage to the driver's side rear passenger door.

**FACTS**

**10**  The plaintiff has an extensive pre-existing medical history relating to a serious crush injury and repair surgery to her left hand in 1999. Associated with this injury are neck, shoulder and back problems resulting from the necessity for her to change the positions in which she performs her work as a dental hygienist since she could no longer hold the mirror with which she works in her left hand.

**11**  The crush injury caused the plaintiff to miss several months of work and then to return to work for a reduced schedule of two days a week, for a total of 14 hours a week.

**12**  From the time of her return to work in 2000 to the time of the Accident in November 2005, the plaintiff was regularly attending for massage therapy and physiotherapy on her back, shoulder and neck.

**13**  This regular use of treatment was in the plaintiff's words, for preventive maintenance. She explained that it helped to deal with the tenderness that develops from muscle tension. Muscle tension is a problem for her since she must stay in one position for long periods of time while working in a patient's mouth.

**14**  Another dental hygienist gave evidence that she goes for massage regularly to deal with the muscle tension that develops in her back and neck as a result of her duties.

**15**  As part of her application to continue receipt of disability benefits related to the substantial loss of function in her left hand, the plaintiff underwent examination of her back, shoulder and neck in 2001 by Dr. Christian, a Vernon orthopaedic surgeon. At that time he opined that he did not think the problems with her back, shoulder and neck were a substantial impediment to her ability to perform part-time work. However, he also indicated that it was his view the plaintiff could well suffer increasing debilitation as she aged and she would have to cut her work hours even more as a result of the injury to her left hand.

**16**  Dr. Christian was called as an expert by the plaintiff and cross-examined by the defendant. I will deal with his current expert report later in my reasons.

**17**  The plaintiff has been able to maintain her lifestyle notwithstanding her much reduced work schedule by way of disability insurance policies she purchased in the early 90s.

**18**  After the Accident, the plaintiff was off work for approximately six months. She returned to work on a graduated basis, first working on friends and family without charge to be certain she could perform her duties safely, and finally returning to her duties for payment on a further reduced schedule of two part-time days a week, a total of nine hours per week.

**19**  Shortly after the second accident, in fact three weeks following it, the plaintiff attempted to increase her hours of work to three part-time days a week. She attempted this new schedule for three weeks before the increased pain and fatigue in her neck, back, arm and hand made it clear she was unable to tolerate the increase in hours.

**20**  The plaintiff is, by all accounts, a dedicated dental hygienist who enjoys her work and is determined to continue with it as long as she is able.

**21**  She gained her qualifications when she was a single mother of three and endured long hours of study on little income.

**22**  At the time of the Accident she was working for a dentist in Vernon at a rate of $39 per hour for 14 hours per week. She has continued to work for him although she states some concern for the security of her employment on such a reduced basis.

**23**  The defendant concedes that the plaintiff suffered soft tissue injury to her neck, back, shoulder, left elbow, right knee and hip, and had headaches which increased in severity and frequency following the Accident.

**24**  The plaintiff was 57 years old at the time of the Accident.

**25**  The plaintiff addressed the pain she felt following the Accident with pain medications prescribed by her long-time family physician, Dr. Grieve, and also with physiotherapy, massage therapy, hydrotherapy, exercise, yoga and pain injections from Dr. Etheridge, a pain control expert.

**26**  The plaintiff also saw a psychologist 8 to 10 times to deal with nightmares, insomnia, depression, lack of concentration and a sense of helplessness over her inability to do what she had previously been able to do.

**27**  She described being unable to make meals or do housework without resting after about 15 minutes of activity. From being an independent active person, she became slow and weak.

**28**  She believes her injuries plateaued in March 2007, 18 months after the Accident, and have become part of her life. They are worse with some activities but generally stay at the same level. She describes the pain in her neck and back as a constant dull ache. The initial trouble she had with swallowing, nausea and dizziness got better after two to three months, about the same time that her knee injury resolved. Her elbow took about six months to heal. Her right hand and arm were very restricted in mobility for three months but are fully resolved now.

**29**  The headaches have continued to date and she states she has never been without a headache since the Accident although the pain has decreased to more of a dull ache.

**30**  She takes anti-inflammatories, antacids, Trazodone,(a painkiller) and Tylenol 3, after work. In addition, she takes sleeping pills since she has difficulty getting comfortable in bed and falling asleep. From her occasional use of sleeping aids before the Accident, she now uses them every night.

**31**  The plaintiff says the Accident has changed her life and the way she has always done things for herself.

**32**  Her low back gives her consistent discomfort which is different from the occasional low back symptoms she suffered from the changes of position occasioned by the crush injury to her left hand.

**33**  The plaintiff described her low back pain as lasting to the present. It is made worse at work and if she attempts to do heavy housework. She acknowledges that she had low back muscle pain after the hand injury but it would come and go and did not affect her activities of daily living. Massage would loosen the muscle tension and she would be free of pain. Before the Accident, she had never had a prescription to address her neck and back pain.

**34**  Pain in her shoulders fluctuates and is located mainly in the back of her right shoulder, and moves up into her skull. It increases when she works on her computer, when she bends, when she cuts vegetables, when she is cooking, and if she attempts to clean windows or floors. When she is at work, holding the same position for a period of time as she is required to do, her shoulder causes pain. Driving aggravates symptoms in her shoulder, neck, head and low back.

**35**  The plaintiff suffered tendonitis in her shoulder before the Accident but not with the same level of pain and not in the same location. The pain from her tendonitis was in her shoulder joint and is now in the shoulder blade towards the spine.

**36**  Her right hip gives her intermittent pain depending on the intensity of her activity.

**37**  The plaintiff described her return to work as the hardest thing she has ever done. She was off for six months and then spent two to three months relearning her job while in pain. This was the period of time she spent working for free on friends and family to demonstrate to her dentist that it was safe for her to work on patients.

**38**  In July 2007, she attempted to increase her hours to 13 a week without success. This was three weeks after her second accident.

**39**  The plaintiff does not have a pension plan of her own. So after her hand injury she determined she would continue to work 14 hours a week as long as she was able. She points to the further reduction in her work hours to nine hours a week as having serious financial consequences for her.

**40**  The plaintiff did not call her employer as a witness. Nonetheless, she asserts that her job is not secure because her employer could earn more money from a hygienist who could work longer hours.

**41**  For a period of time following the Accident, the plaintiff was unable to do housework, make meals or do yard work. Currently, she does a little housework but hires someone to do the heavy work for three hours every two weeks and she maintains the house in the interim. Her daughters occasionally visit and help out with cleaning. Her 87-year old mother vacuumed for her last year. Her ex-husband helps occasionally with yard work since she can no longer rake or prune.

**42**  In cross-examination, the plaintiff proved to be somewhat argumentative when asked about a form she prepared in September 2000 for Heidi Chamberlain, a massage therapist.

**43**  This form (Exhibit 4), the Confidential Case History, is a self-report of the plaintiff's problems for which she was consulting Ms. Chamberlain. The plaintiff was not prepared to agree that her memory of her situation at that time was better than it is at this point. As well, despite the fact the plaintiff indicated that her hand injury and its consequences affected her work, vacuuming, and yard work, she denied the injury affected her life because she could stop the activity which caused her pain. However, she also indicated that the injury interfered with her work, sleep and daily routine.

**44**  The plaintiff agreed that Ms. Chamberlain treated her neck, back, shoulder and arm symptoms on her return to work from her hand injury. She attended Ms. Chamberlain from 1999 to 2002, and then returned after a break in 2003 for preventive purposes. She also went for the occasional flare-up of pain and her visits continued when she had pain in her neck and shoulder right up to the date of the Accident.

**45**  The plaintiff also agreed that her doctor had reported to her disability insurer that the plaintiff suffered from secondary neck, back and shoulder pain as a result of the hand injury.

**46**  When the plaintiff saw Dr. Christian in 2008 at the request of her counsel, she told him she had never had much in the way of back pain in the past. Her explanation for the difference between what her doctor had said and what she told Dr. Christian was that her back pain was only "periodic" before the Accident.

**47**  In her 2008 appointment, she did not recall telling him about her earlier neck and back pain before the Accident. She justified this omission by saying she assumed he had her previous history from her visit to him in 2001 and so there was no need to tell him of her earlier problems.

**48**  However, she also stated she did not tell Dr. Christian about her visit to him in 2001 because she did not feel her hand injury was relevant. As well, when she saw him in 2001, she did not view her back, neck and shoulder problems as the major issue at the time.

**49**  Although she recalled seeing him in 2001, she stated she was not sure he was the same person and she did not think of asking him although the possibility he was the same doctor "entered her mind".

**50**  The plaintiff also saw Dr. Gropper, an orthopaedic surgeon who specializes in hand trauma, in October 2008.

**51**  Dr. Gropper took a medical history in which he indicated at page 4 that the plaintiff had suffered tendonitis in the past but had had no other specific health issues. The plaintiff did not recall if Dr. Gropper had asked her about previous neck, back and shoulder issues. She did not volunteer this information because she did not believe her pre-Accident condition was a major issue.

**52**  The plaintiff argued with defendant's counsel over the characterization of her earlier neck, back and shoulder problems as an "injury" which presumably meant her condition did not need to be raised with the doctors she consulted. She also appeared to feel that because she could deal with her problems through massage and preventive maintenance, she did not need to discuss them as they were not relevant.

**53**  With respect to the neck, back and shoulder symptoms related to her job and caused partly by the change of position occasioned by her hand injury, she agreed that it was not uncommon for dental hygienists to suffer pain in those areas so it was "not a big deal".

**54**  The accident of June 2007 did not cause the plaintiff any injury or aggravate her existing Accident injuries despite the fact there was major damage from the impact to her car. She pulled out from a parking lot and was hit by a pickup truck. The damage to her car was so extensive the car was written off due to the replacement value insurance she carried. An ambulance was called but she did not go to hospital.

**55**  Following her return to work from the Accident, she worked four hours on Wednesdays and five hours on Fridays. In July 2007, she attempted to add another four-hour day to her schedule but without success. She found the extra hours too fatiguing and overwhelming and needed the interval between work times to recover.

**56**  The plaintiff now hires a gardening service for more than 50% of her yard work where before the Accident she did at least 75% of it herself.

**57**  The income tax summary provided by the plaintiff showed income of almost $17,000 in 2009, a figure close to what she earned in 2008. She agreed this was an accurate summary of her income for those years.

**58**  However, she was forced to admit in cross-examination that she had had a tenant in her house paying his rent in cash to her since 2005 which she has not declared on her income tax. Her explanation for her failure to report this income was not satisfactory - "a lot of paperwork", "in my tax bracket it makes almost no difference" and she agreed she had signed the declaration on her income tax returns that its contents were true and accurate. The undeclared rental income is $6,500 per year.

**ANALYSIS**

**59**  The plaintiff presented as a determined person but the underlying flavour of her evidence revealed some tendency to ignore any evidence which could possibly detract from the effects of the Accident.

**60**  Her failure to be forthright with the examining doctors about her history of neck, shoulder and back problems is a concern to the Court and affects the comfort a trier of fact can have with the selective nature of her evidence.

**61**  Her concealment of income is another indicator of a troubling attitude to the truth. While concealing income from the tax authorities may be more common than we care to admit, in my view it is an indicator of a willingness to deceive that undermines the reliability of any controversial evidence provided by the plaintiff. Such an action is not honest and costs those Canadians who declare all the income they receive and pay the taxes they owe, more than they should have to pay.

**62**  I accept that the plaintiff suffered injury in the Accident but I also find that she is not prepared to admit the amount of wear and tear her job exerts on her back, neck and shoulder or the continuing issues from which she suffers as a result of her earlier injury.

**63**  I also accept that because the plaintiff enjoys her work, she would like to continue to work as long as she is able.

**THE MEDICAL EVIDENCE**

**A. Dr. Kim Grieve**

**64**  Dr. Kim Grieve gave evidence for the plaintiff both as an expert in Family Practice and as the plaintiff's treating physician.

**65**  Dr. Grieve is a dedicated physician and has no doubt given substantial support to the plaintiff since 1995 when the plaintiff first came to her.

**66**  Dr. Grieve has written a short report dated February 20, 2009.

**67**  In her report (Exhibit 8), Dr. Grieve makes a brief mention of the plaintiff's crush injury and ensuing back pain. She states:

She had traumatic tendon injuries to her left 3rd and 4th digits in 2000 [sic]. (*corrected in oral evidence by Dr. Grieve to April, 1999*) **As a result of that injury she suffered chronic pain in her affected hand and back.**

(Emphasis and correction added)

**68**  There is no other mention of her previous history of back pain and no mention at all of her history of neck and arm pain following the injury to the plaintiff's fingers.

**69**  However, in cross examination, Dr. Grieve indicated that when she said "back" it was a shorthand way of saying neck and back.

**70**  Dr. Grieve has written many reports to the plaintiff's disability insurers over the years. She agreed that it was important for her reports to be accurate just as she agreed it was her duty to the court to give an accurate, thorough and detailed account of the plaintiff's condition.

**71**  When asked if the plaintiff's injuries received in the Accident exacerbated her pre-existing condition, Dr. Grieve disagreed. However, she had written a letter to Canada Life, one of the plaintiff's disability insurers on October 3, 2006, in which she wrote as follows:

. . . Andree continues to have significant symptomatology in her neck with associated headache. This is exacerbated by her pre-existing claim or injury. As you know, she has decreased mobility in the fingers of her left hand due to a tendon injury. This in itself caused her to be fatigued and have back pain. She was only able to work part-time. (Exhibit 4, tab 3, p. 15).

**72**  When asked about this comment, she stated that the plaintiff had had neck and back pain before the Accident but that they were worse post-Accident. She seemed reluctant to agree to the logical extension of this comment which is what she had written above. I note as well that she stated that the Accident "set her [the plaintiff] back". Although she did not wish to say this, it seems clear that in her view the plaintiff's pre-existing injury was exacerbated by the soft tissue injuries she suffered in the Accident.

**73**  Dr. Grieve was also asked about a comment made in a 2001 report to Maritime Life that it was:

. . . actually surprising that she has not been completely debilitated from her own occupation and that she can work on a part time basis. Her motivation to continue to work has assisted in her at least being able to work part-time. (Exhibit 4, tab 3C, page 23)

**74**  Dr. Grieve repeated this comment in a letter to Canada Life dated July 27, 2001, but prepared by a somewhat less literate transcriber:

As your [sic] aware she works as a dental hygienist. She is there stooped over patients for prolonged periods of time throughout the day. She's had to make some reajustments [sic] in the way she positions her fingers and her body since the injury. This has resulted in some stress in her upper and lower back. She can't sit for prolonged periods of time without getting back, shoulder pain and pain in her fingers. She has been able to sustain working approximately six to eight days per month and if she increases this, she starts to get increase [sic] symptoms in her hands and back. For some one who did not have to use their hands in a very technical way and of such fine proprioception this injury may have not been devastating.

In my opinion, Andree has done very well in being able to sustain the hours she does work considering this. She may well have ended up being on full disability, if she wasn't has [sic] motivated to return to work on a full time basis, has [sic] I had anticipate [sic] her symptoms would exacerbate [sic] and force her to go off on a full disability.

**75**  I take from these comments in the letters to the disability insurers that the plaintiff's tendon injury was particularly damaging to a person in the occupation of a dental hygienist and that the changes to her posture necessitated by substantial limitation on the use of her left hand in a two-handed job, caused her chronic and continuing pain in her neck and back.

**76**  I also take from these letters that it was the plaintiff's determination to continue working which kept her from claiming total disability and that her doctor believed without that determination she would not have been able to continue working.

**77**  Dr. Grieve was also asked whether in her view the plaintiff as she aged would have needed help with her garden and housework in any event of the Accident.

**78**  Her answer was somewhat equivocal. She said the issue had not come up before the Accident and the plaintiff could do shorter hours but still cope with her activities of daily living before the Accident. As well, she stated that even if the plaintiff found such tasks harder as she aged, it is possible she would not have obtained help to do this work anyway.

**79**  I took these answers as an indication Dr. Grieve did not wish to say that this plaintiff with her chronic neck and back pain and her injured left hand could have found it harder to do heavy household and garden tasks as she grew older even if she had not suffered the soft tissue injuries she did in the Accident. I must say that it seems almost self-evident that the plaintiff would have had decreasing capacity to do heavy work as she aged, given her physical difficulties.

**80**  I note that Dr. Grieve testified that after the plaintiff returned to work following the injury to her tendons, she settled into a routine of seeing Dr. Grieve about twice a year to have forms filled out for her insurers. Her condition was relatively stable and there was little change from year to year. By 2004, it seemed her chronic neck and back pain was somewhat under control with rest and exercise and the use of massage therapy.

**81**  After the plaintiff's involvement in a second accident in June 2007 in which she was at fault, Dr. Grieve said that the plaintiff's subjective report was that she did not suffer injury. However, Dr. Grieve was not aware of the extent of the damage to the plaintiff's car and agreed that her vulnerability to injury could have been increased by her pre-existing condition, depending on the mechanics and severity of the impact experienced.

**82**  As evidence of her conclusion the plaintiff did not suffer injury in this accident, Dr. Grieve and the plaintiff agreed to a trial of longer work hours some three weeks later. This trial was not successful and the plaintiff suffered increased pain and fatigue such that she could not continue with more hours at work.

**83**  I found Dr. Grieve to be a witness sympathetic to her patient and somewhat inclined to select her evidence according to the forum in which she found herself. In her reports to the insurers, she emphasized the serious effect of the tendon injuries and its secondary consequences and drew a connection between the plaintiff's pre-existing neck and back condition and her neck and back condition after the Accident, but in her report for the Court and her testimony, she was inclined to minimize the plaintiff's pre-existing condition and omit the connection between it and her post-Accident condition.

**84**  As a result, while I give some weight to Dr. Grieve's opinion, I am not convinced it is without partiality.

**B. Heidi Chamberlain, RMT**

**85**  Ms. Chamberlain is a former Registered Nurse who qualified as a Registered Massage Therapist in 1985. She is 68 years old and sees 8 to 10 clients a day and delivers massage as needed.

**86**  Ms. Chamberlain's report was conceded on objection by defence counsel to have offered opinion beyond her expertise. The report contained medical diagnoses, offered observations which were nothing more than common sense comments, contained argument, relayed the plaintiff's litigation position and advocated in her favour.

**87**  The trial stood down to allow counsel to discuss problems with her report and to redact objectionable portions. The result was a somewhat disjointed report with some still unacceptable medical opinion which I have not considered in my reasons. Neither have I considered as admissible Ms. Chamberlain's opinions expressed in testimony when she went beyond the limit of her qualifications. For example, she opined that when a patient's response to massage is not good, this may mean the presence of impingement, inflammation or that the patient is in an emotional holding pattern. Not only am I uncertain of what these diagnoses mean, Ms. Chamberlain's training does not permit her to draw these conclusions other than for her own purposes. They are not admissible as evidence.

**88**  Ms. Chamberlain testified that the plaintiff had seen her 67 times before the Accident with her last pre-Accident visit taking place November 17, 2005, when the plaintiff had strained her back lifting rocks for a retaining wall she was building in her garden.

**89**  It is clear from her clinical records that the plaintiff sought treatment for her neck, back, shoulder and arms pre-Accident, areas for which she also sought treatment post-Accident.

**90**  No post-Accident clinical records were produced although Ms. Chamberlain's report makes reference to many visits which took place after the Accident. The plaintiff does not seek to recover the cost of these visits since she would have continued to go for massage in any event of the Accident.

**91**  Numbered among Ms. Chamberlain's practice are four or five dental hygienists. She commented that she does a lot of work on their shoulder blades and upper backs because they "are overused in their work".

**92**  I take from this that dental hygienists often suffer neck and back discomfort from the positions they occupy in their work.

**93**  Ms. Chamberlain opined that stress caused difficulty for the plaintiff and on occasion, only the massage she was undergoing kept her at work. She attempted to emphasize the "maintenance" purpose for the plaintiff coming for massage with the inference I was asked to draw being that the plaintiff did not attend because of her symptoms but because she wanted to keep herself in a condition where she would not develop symptoms. However, it cannot be disputed that Ms. Chamberlain worked on areas of the plaintiff's body where she felt tenderness and stress so that I fail to see the distinction argued for by the plaintiff.

**94**  The plaintiff found she benefited from her visits to Ms. Chamberlain with less discomfort in her neck, back and shoulder caused by her work.

**95**  One of the matters raised by the report is that the plaintiff could not tolerate deep massage after the Accident as she had been able to before the Accident. I take from this that the plaintiff's muscles were more painful post-Accident.

**96**  I understand why Ms. Chamberlain had to be called by the plaintiff, but I did not find her evidence to be of great assistance in this matter.

**C. Dr. Keith Christian**

**97**  As noted above, Dr. Christian is an orthopaedic surgeon. He saw the plaintiff on September 16, 2008 with respect to issues arising from the Accident.

**98**  His opinion reveals that he did not have access to much of the pre-Accident medical history of the plaintiff either by way of clinical records or from the plaintiff herself.

**99**  Dr. Christian agreed in cross-examination that it is important to have an accurate and detailed history of a patient in order to provide an accurate diagnosis and prognosis.

**100**  As a result of the lack of pre-Accident history of the patient, I find Dr. Christian's report to be of limited use. It is largely a reiteration of the plaintiff's self-reports without any substantial analysis of the pre-existing injury and its effect or lack thereof on the plaintiff's post-Accident condition.

**101**  I do not fault Dr. Christian for this omission: the plaintiff was not forthcoming about her pre-Accident medical history. Without it, Dr. Christian could not be expected to do the kind of analysis which would have been of assistance to the Court. As well, he did not recall having seen the plaintiff seven years earlier.

**102**  With the limited information available to him, Dr. Christian concludes that the lack of resolution to the plaintiff's condition likely indicates that she will not achieve a full asymptomatic recovery. However, with no indication from him that he was able to consider the plaintiff's pre-Accident medical history, the Court has no way of knowing what Dr. Christian considered her pre-Accident condition to be for purposes of estimating her full recovery from the injuries suffered in the Accident.

**103**  I also find it somewhat puzzling that Dr. Christian opines the following:

The residual symptoms that might be anticipated from this injury would likely include difficulty in being involved in fine work with the hands.

**104**  Dr. Gropper opined that the plaintiff did not suffer injury to her hands as a result of the Accident and hand trauma is his specialty.

**105**  As well, it is not disputed that the plaintiff suffered a loss of proprioception in her left hand as a result of the crush injury in 1999. There is no evidence her right hand is affected as a result of that injury or of the Accident.

**106**  While Dr. Christian does say it is unlikely the plaintiff will be able to return to doing the same level of physical work that she was doing prior to the Accident, he does not "anticipate the necessity for domestic help as a result of this injury".

**107**  It is Dr. Christian's view that the plaintiff will be able to manage her household work but with "somewhat reduced vigor".

**108**  I found Dr. Christian's report to be of little assistance.

**D. Dr. Duncan Laidlow**

**109**  Dr. Laidlow was retained by the defendant to do an independent medical examination of the plaintiff. He has prepared two reports and one brief letter: October 8, 2008 (report) January 9, 2009, (letter inquiring about availability of additional pre-Accident clinical records), and May 28, 2009 (report).

**110**  Dr. Laidlow was qualified as an expert in physical medicine and rehabilitation.

**111**  His medical-legal work is split almost evenly between work for plaintiffs and defendants. This division is carefully maintained by Dr. Laidlow by setting up equal time slots for each side of the bar.

**112**  Dr. Laidlow indicated in his first report that he would be better equipped to give a considered opinion of the difference in the plaintiff's condition as a result of the injuries she suffered in the Accident if he had a better idea of her pre-Accident condition. To do that he suggested it might be helpful were he able to review records from the physiotherapist and massage therapist attended by the plaintiff prior to the Accident.

**113**  It appears from his first report that he is concerned the plaintiff may tend to suffer from neck and lower back pain as a result of the secondary effects of her crush injury but without having seen her records, he makes the assumption such pain was infrequent and short-lived.

**114**  This assumption is based on the relatively sparse historical medical information given to him by the plaintiff that she suffered from "occasional lower back pain" and once had tendonitis in her right shoulder some years ago.

**115**  The objective signs noted by Dr. Laidlow in his first report were restriction in movement in the neck and lower back, tenderness in the musculature in and around the neck and lower back and tenderness over the bicipital area (front of the shoulder) and shoulder musculature.

**116**  Dr. Laidlow linked the plaintiff's ongoing mechanical symptoms in the neck, right shoulder area and head to the musculoligamentous injury she sustained in the Accident and also found the same kind of injury to the lower back resulting in ongoing mechanical pain there.

**117**  He found as well that the Accident had caused an additional level of disability to the plaintiff on top of the problems caused by the adaptations to body postures necessitated by her hand injury.

**118**  However, the above findings were predicated on the relatively restricted access Dr. Laidlow had had to the plaintiff's clinical records which did not include records of Dr. Grieve before 2004, and did not include Ms. Chamberlain's notes or those of Lisa Crockett, a physiotherapist consulted by the plaintiff regarding neck and back issues caused by adaptive body postures related to her hand injury.

**119**  By the time of Dr. Laidlow's next report, dated May 29, 2009, he had reviewed the clinical records of Lisa Crockett, physiotherapist, dated December 28, 2000 to January 25, 2001 and the earlier records of Dr. Grieve, dated January 1, 2001 to June 5, 2005. By then, he had also reviewed some post-Accident physiotherapy records and the notes of Ms. Chamberlain.

**120**  It is clear that Dr. Laidlow was the only expert who had the opportunity to make a comprehensive review of the clinical records of the plaintiff from the time of her hand injury through to and after the Accident.

**121**  Dr. Laidlow states in his report of May 28, 2009, that he had asked the plaintiff about her previous health status, presumably in the independent medical examination on September 26, 2008. As indicated above, she told him she had had occasional lower back pain for which she consulted a physiotherapist and she saw Heidi Chamberlain, a massage therapist, for preventive care.

**122**  Although Dr. Laidlow insisted on calling Ms. Chamberlain's diagrams of treatment areas on the plaintiff's body, "pain diagrams", I am not sure much turns on this. Ms. Chamberlain indicated in her testimony that the diagrams showed areas on the body where she had done massage on the plaintiff. It appears reasonable to assume Ms. Chamberlain would treat areas which were bothering the plaintiff or which Ms. Chamberlain believed were sources of discomfort.

**123**  In his report, Dr. Laidlow does not acknowledge that the plaintiff did not see her doctor for almost two years before the Accident. In cross-examination, he said that the plaintiff found other modalities for treatment such as massage. He points to consistent use of these modalities through to 2005 for arms, neck and mid and lower back issues. He does note that the massage treatment closest in time to the Accident related to the plaintiff hauling rocks with resulting neck and back issues.

**124**  However, the biggest departure in his report relates to his analysis of the plaintiff's previous medical history. He finds that she was prone to neck, mid-back and lower back pain leading up to the Accident.

**125**  Dr. Laidlow confirms his initial finding that the Accident caused "musculoligamentous strain to the neck and upper shoulder area" but that this strain amounted to an aggravation of the plaintiff's pre-existing issues with the same areas and the pain she suffered. His finding with respect to the lower back is the same but adds that the Accident caused musculoligamentous injury superimposed on the pre-existing mechanical lower back pain.

**126**  The conclusion to which Dr. Laidlow comes, based on his review of the records combined with his initial examination, is that the plaintiff would likely have had to cut back her hours of work in any event of the Accident due to the steps she was having to take to manage her symptoms pre-Accident. However, he qualifies this finding by saying that the Accident accelerated this process and aggravated her pre-existing condition. The same rationale would apply to her ability to do yard work and heavy housekeeping tasks - that she would have had to cut back even had the Accident not occurred but the injuries caused by the Accident put this process forward.

**127**  I found Dr. Laidlow on cross-examination to be somewhat rigid in his opinions even when he had reasonable responses to points put to him by plaintiff's counsel. However, it remains the fact that he alone looked at all the clinical records to come to his conclusions. He was able to use Ms. Chamberlain's records and to analyse her notes of "not good" and "not too good" in relation to some acute areas of treatment to determine that the plaintiff was suffering from active neck, shoulder and arm problems in the years leading up to the Accident.

**128**  Defence counsel points out in his submissions that Dr. Grieve's Attending Physician Statements prepared for the plaintiff's disability insurers were not put to Dr. Laidlow in cross-examination because they also revealed "a picture of ongoing and consistent neck and back pain over the six-year time frame between the Left Hand injury and the Accident."

**129**  I will note some of these Attending Physician Statements made by Dr. Grieve. I have arbitrarily chosen to begin with a letter prepared by Dr. Grieve in 2001:

1. November 27, 2001 (Dr. Grieve to Maritime Life): "It's actually surprising she has not been completely debilitated from her occupation and that she can work on a part-time basis."
2. December 18, 2002 (Manulife Physician Statement prepared by Dr. Grieve): Primary Diagnosis: As previous - tendon damage to fingers. Secondary Diagnosis: Back pain due to positioning/posturing. Prognosis: Very motivated has plateaued with respect to recovery.
3. February 23, 2003 (Canada Life Physician Statement prepared by Dr. Grieve): - Primary Damage L 3rd and 4th digits. Additional Conditions: Back pain due to position change required to continue working. Nature of treatment: No new tmt instituted. Chronic Condition. Prognosis: has made maximum recovery.
4. February 26, 2004 (Maritime Physician Statement prepared by Dr. Grieve): Primary Diagnosis: As previous - tendon damage to fingers. Secondary diagnosis: Back pain due to positioning/posturing. Prognosis: plateaued.
5. June 3, 2005 (Maritime Physician Statement prepared by Dr. Grieve) - Primary Diagnosis: As previous - tendon damage to fingers. She is working 2 days per week. This is maximum she can do. This amount causes fatigue and pain and requires additional days to recover so can work the 2 days/wk. the following wk. Prognosis: plateaued. Do not anticipate further recovery.
6. June 5, 2002 (Canada Life Physician Statement prepared by Dr. Grieve) - Her progress/symptoms have plateaued. I do not anticipate any further improvement. I do not anticipate she will be able to increase the number of hours working.
7. May 9, 2006 - 6 months post-Accident (Manulife Physician Statement) - Patient is still unable to return to work. Prior to the accident she was very limited due to the injury in her L hand as gets pain in hand and muscle spasm in back and neck despite working part time (on disability). Therefore with the STI from MVA, recovery time is increased.
8. October 3, 2006 (Letter from Dr. Grieve) - "Andree continues to have significant syptomatology in her neck with associated headache. This is exacerbated by her pre-existing claim or injury. As you know, she has decreased mobility in the fingers of her left hand due to a tendon injury. This in itself caused her to be fatigued and have back pain. She was only able to work part-time."

**ANALYSIS**

**130**  The central issue in this personal injury case is to assess the extent and effect of the plaintiff's injuries caused by the Accident.

**131**  In the assessment of damages, whether she had a pre-existing injury is key.

**132**  I do not think it can be disputed that the plaintiff had coped very well with her tendon injury. As well, I think it is clear she is a hard-working and determined person who could have simply given up her job based on that severe injury to her hand.

**133**  But it cannot also be said that she did not have a pre-existing condition. In my view, Dr. Laidlow puts it well when he says that the injuries caused by the Accident were superimposed upon the pre-existing neck, back and shoulder mechanical pain. The chronic nature of that mechanical pain is clear from Dr. Grieve's reports to the various long term disability insurers and is part of the hand injury the plaintiff suffered in 1999.

**134**  The pre-existing neck, back and shoulder problems were no doubt also related to the awkward and tiring positions required to be held by the plaintiff doing her job of dental hygiene. The evidence from the lay witnesses, including the plaintiff's daughter, a dental assistant, indicated that some dental hygienists use massage therapy regularly to deal with the muscle tension in their necks and backs caused by their jobs.

**135**  I did not have evidence from a functional capacity evaluator, but it does seem to be a common sense proposition that a job like dental hygiene which takes a toll on the neck, back and shoulders would present continuing difficulty for a person who has already developed chronic symptoms in those parts of her body.

**136**  When a musculoligamentous strain is added to those conditions, it is not surprising that recovery from that strain is delayed and complicated.

**137**  I accept Dr. Laidlow's findings with respect to the plaintiff's pre-existing condition and will consider its effect on damages in due course.

**138**  I will say that I find it unlikely the plaintiff's current state of health and her problems can be attributed more than partially to the Accident.

**DAMAGES**

**A. Non-pecuniary damages:**

**139**  In considering damages, one must first consider causation.

**140**  It is now well-accepted law that the statement of the legal test for causation is that set out in the case of *Resurfice Corp. v. Hanke,* [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=), [*[2007] 1 S.C.R. 333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=) at paras. 21-23:

[21] First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory ***negligence*** may be apportioned, as permitted by statute.

[22] This fundamental rule has never been displaced and remains the primary test for causation in ***negligence*** actions. As stated in *Athey v. Leonati*, at para. 14 *per* Major, J., "[t]he general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the ***negligence*** of the defendant". Similarly as I noted in *Blackwater v. Plint*, [*[2005] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=), at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."

[23] The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell,* [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=), at p. 327, *per* Sopinka, J.

**141**  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. Hon 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.

**142**  The plaintiff submits that the appropriate range of damages for non-pecuniary loss in this case should be in the range of $60,000 to $70,000 based on the following cases: *Gold v. Joe*, [*2008 BCSC 865*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G363-00000-00&context=); *Clark v. Stricker*, [*2001 BCSC 657*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-6376-00000-00&context=); *Jopling v. Brodowich*, [*2009 BCSC 653*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2KK-00000-00&context=); *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=); and *Suzuki v. Bain*, [*2005 BCSC 1276*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1FP-00000-00&context=).

**143**  The defendant submits that the case law supports non-pecuniary damages being awarded in the amount of $50,000: *Corrado v. Mah*, [*2006 BCSC 1191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3CS-00000-00&context=) ["*Corrado"*]; and *Naidu v. Mann*, [*2007 BCSC 1313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X43W-00000-00&context=). It is the defendant's position that the $50,000 should be reduced by 50% to take into account the plaintiff's original position.

**144**  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,* [*[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=)).

**145**  In the circumstances of this case, I must also consider the plaintiff's history of a pre-existing condition. I say this notwithstanding the requirement that the defendant must take the plaintiff as she finds her.

**146**  The role that damages plays is to place the plaintiff, as much as possible, in her original position. It is not the obligation of the defendant to put the plaintiff in a better condition than she was in. As noted in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at para. 35, [*140 D.L.R. (4th) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), *per* Mr. Justice Major:

[35] ... The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not for the pre-existing damage. ... Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence***, then this can be taken into account in reducing the overall award. ... This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

**147**  Also, as noted by the Court of Appeal in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, [*2003 BCCA 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=) at para. 28, [*22 B.C.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=):

[28] ... a pre-existing condition, whether it is quiescent or active, is part of the plaintiff's original position.

**148**  The Court goes on, at para. 48, to say:

[48] ... Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

**149**  First, can we say in this case that "but for" the ***negligence*** of the defendant, the plaintiff's damages would have been incurred?

**150**  Causation is established because the defendant's negligent act resulted in an exacerbation of the plaintiff's pre-existing condition through the injuries she suffered when the defendant's car came through the red light and collided with the plaintiff's car.

**151**  The assessment of her damages must take into account the fact that the injuries she did suffer were "superimposed upon the pre-existing mechanical pain" caused by the postural changes the plaintiff had been forced to use to adapt to her left hand injury in 1999, and exacerbated by the wear and tear caused by the positions she must use in her job over the years since 2000, her return to work from the hand injury.

**152**  The plaintiff was 57 years old at the time of the Accident. Her age is relevant to the fact that it may have extended the time she took to heal. She did not have the "resilience of youth".

**153**  The plaintiff suffered pain at the scene of the Accident. She was not admitted to hospital but was sent home with painkillers. She missed six months of work in a job she loves and for which she had sacrificed considerably in returning to work from her severe hand injury in 2000.

**154**  After the Accident, the plaintiff could not get out of her car. She had to be extracted with the use of the Jaws of Life by emergency personnel. This was frightening to say the least and no doubt contributed to a period when she was a very nervous driver. This did not endure indefinitely because the plaintiff made herself carry on with her life. She also wisely sought help from a psychologist to deal with her trauma.

**155**  The plaintiff has suffered serious pain in her neck, back and shoulder and initially also had pain in her elbow and right knee. Both the knee and elbow resolved within six months of the Accident although there remains some soreness in her knee.

**156**  The inability of the plaintiff to maintain her house and garden to the level she had before the Accident has caused her emotional distress. Her daughters both testified that before the Accident she had been an exacting housekeeper and her garden was beautiful. She is now simply unable to carry on at that level.

**157**  There is no doubt the plaintiff has suffered a loss of lifestyle. She is able to work only two half days a week, Wednesdays and Fridays, where before the Accident she worked two full days. She has concerns about the security of her employment since her work space is now empty for two half days a week and her employer could earn more money if that room were occupied for two full days as before.

**158**  There is little evidence about her recreational activities pre-Accident except for gardening and that she tried to use a kayak post-Accident and found it caused her pain.

**159**  It appears unlikely that the plaintiff will ever be free of symptoms in her neck, back and shoulder.

**160**  However, it is my view that there is a measurable risk that the plaintiff's pre-existing condition would have detrimentally affected her in the future in any event of the Accident. This is not a risk which can be proven but based on the chronic nature of her condition pre-Accident, there is a high probability she would have continued to suffer symptoms in her neck, back and shoulder and as she aged, to have had to cut back on her lifestyle and her work.

**161**  As noted in *Corrado,* at para. 54, there is difficulty in applying the crumbling skull rule to a situation such as this where there is a chance, but not a certainty that the plaintiff would have suffered the harm but for the defendant's conduct.

**162**  In this case, the plaintiff's difficulties were accelerated and aggravated by the Accident but would likely have interfered with her work and her lifestyle in any event of the Accident.

**163**  As a result, although the injuries the plaintiff suffered in the Accident are not the sole cause of her current condition, she did incur soft tissue injuries which continue to cause her suffering and which are somewhat disabling but which are connected with the pre-existing condition inherent in her original position. This must be considered in the assessment of both non-pecuniary damages and damages for loss of earning capacity.

**164**  I have considered all of these factors in determining that I would award the sum of $60,000 to the plaintiff for non-pecuniary damages and discount it by 25% taking into account the plaintiff's original position, for a total of $45,000.

**B. Past Wage Loss**

**165**  The plaintiff was off work for approximately six months following the Accident.

**166**  She was working two seven-hour days before the Accident and her wage loss is agreed to be $63,684.08 to the date of trial on the assumption she would have continued to work 14 hours per week instead of the nine hours to which she was reduced by reason of her injuries.

**167**  I am aware that the defendant has argued that the plaintiff should only be awarded her past wage loss on a make-whole basis up to the date of her second accident in June 2007 and then only 50% thereafter on the basis that but for the second accident, it is more probable the plaintiff could have increased her hours of work to a schedule resembling her pre-Accident schedule.

**168**  There is some appeal to this argument but there is simply no evidence before me to support such a proposition. While I am somewhat sceptical that the plaintiff suffered no ill effects from the June 2007 accident in which she was at fault, I do not believe her doctor would have ignored any objective signs of injury to encourage the plaintiff to increase her hours of work. It may be this action was designed to do away with any negative effect on the plaintiff's claim but I am unable to make this finding.

**169**  Therefore, I find it to be a reasonable assumption that the plaintiff would have continued to work 14 hours per week up to the trial date and was unable to do so as a result of the Accident. I award $63,684.08 on the understanding that counsel will be able to agree on the net wage loss figure after deduction for income tax. If they are unable to agree, they may make an application before me.

**C. Loss of future earning capacity**

**170**  In *Hooper v. Nair,* [*2009 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S09W-00000-00&context=), I set out the elements to be proved to demonstrate a loss of future earning capacity as follows, at paras. 119-125:

[119] In order to be successful under this head of damages, the plaintiff must prove a substantial possibility of future income loss: see *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=); *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=), [*[1990] B.C.J. No. 1158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=) (C.A.); *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=).

[120] The purpose of this damage award is to compensate the party for the loss of earning capacity as a capital asset, not to compensate for the lost earnings themselves: see *Palmer v. Goodall* [*(1991), 53 B.C.L.R. (2d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) at 59, [*[1991] B.C.J. No. 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) (C.A.); *Parypa* at para. 63.

[121] In considering this claim, a court must determine the extent of the future loss of income-earning capacity by taking into account all substantial possibilities and assessing the likelihood of their occurrence, based on the evidence: *Parypa* at para. 67; *Steward* at para. 17.

[122] There are, of course, inherent difficulties in assessing such damages which were recognized by Justice Dickson (as he then was) in *Andrews*, where he stated at 251:

We must now gaze more deeply into the crystal ball. What sort of 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: A capital asset has been lost: what was its value?

[123] To assist in this assessment, there are four considerations which are often cited in determining the value of the loss and are set out in the decision of *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=), [*[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=) at para. 8 (S.C.):

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.

[124] While a first step in this determination may involve some element of mathematical calculation, "the law is clear that in these cases the task of the court is to assess damages, not to calculate them on some mathematical formula": *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=), [*[1995] B.C.J. No. 1823*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) at para. 43 (C.A.).

[125] A court must consider all of the evidence that is reasonable in the circumstances in assessing such an award; reference to projections, calculations and formula may be useful insofar as determining what is "fair and reasonable": *Parypa* at para. 70. It is important for courts to "look at all relevant factors, especially general incapacity, before fixing an amount": *Morris v. Rose Estate* [*(1996), 23 B.C.L.R. (3d) 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3P5-00000-00&context=), [*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=) at para. 24. A court should also be guided, to some extent, by the claimant's actual earnings prior to the accident: *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=), [*247 D.L.R. (4th) 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0MH-00000-00&context=) at para. 34.

**171**  The British Columbia Court of Appeal has recently restated the principles a court must consider in determining awards for loss of future earning capacity in *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=). Madam Justice Garson, speaking for a unanimous Court, made the following comments at para. 32:

[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.

**172**  As noted in *Steward v. Berezan,* [*2007 BCCA 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=), [*64 B.C.L.R. (4th) 152*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=) at para. 17:

[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 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=)], at para. 65.

**173**  The plaintiff argues that she has demonstrated a commitment to her job such that she would continue working to age 70. She points out that except for a small amount of Canada Pension income she will receive from her ex-husband's pension and her own Canada Pension payment, she does not have an employment pension. She says that it is her desire to continue on in a job she enjoys and there is some economic impetus to encourage this.

**174**  If that were the case, and the plaintiff proved to be unable to work longer hours than she is currently doing, then her loss would be substantial over the eight years or so she has said she would have remained in her job.

**175**  However, there are many contingencies to consider including the impact of the plaintiff's pre-existing condition on her ability to continue to work to age 70.

**176**  While I am aware of Ms. Freeman's evidence that it is "not uncommon" for dental hygienists to work past 65 and she knows of one who recently retired at age 68, I am also aware of the evidence that it is very common for dental hygienists to have continuing problems with their necks, shoulders and backs because they are overused in their work, and I find that such problems would be even greater for the plaintiff with her history.

**177**  It is my view that the plaintiff would have worked to age 65 had the Accident not happened. In coming to this finding, I have considered her pre-existing history and its likely effect on her stamina which would not be helped over time.

**178**  I have also considered the factors set out in *Golaiy* as follows: the plaintiff is rendered less capable overall from earning income from all types of employment. Certainly, at this point in her life it would not be probable she could retrain for other employment at which she could earn a similar amount and at which she would be capable of working.

**179**  Hiring a person known to have difficulty with and propensity for problems with her neck, back and shoulders is a risky decision for an employer and one which an employer is unlikely to make. Hence, the plaintiff is less marketable to potential employers.

**180**  The plaintiff is less valuable to herself in that she has lost the confidence she had when she was able to return to work and relearn her job to a standard of performance which merited her assessment as an excellent hygienist by her fellow employee. She is now reduced to a very part-time employee.

**181**  However, the part played by her pre-existing condition must come into consideration in determining her loss of future earning capacity. It is a substantial contingency which could have affected her ability to continue working.

**182**  It is possible that the injury to the plaintiff's left hand coupled with the aging process would have resulted in further loss of proprioception so that she would no longer be able to perform as a dental hygienist. It is indeed fortunate that Dr. Christian's gloomy prognosis in 2001 was not fulfilled by the plaintiff's complete debilitation but the seriousness of her hand injury was what led him to come to that prognosis.

**183**  The assessment of lost earning capacity is not a mathematical calculation but is an assessment based on the many considerations set out in the case law.

**184**  I estimate that the plaintiff would have continued to work for another three years from the date of trial. Her loss of hours, if she continues to work for two half days, results in a loss of approximately $12,700 per year (gross). Over the three years I estimate she would continue working, this amounts to $38,100.

**185**  I will deduct from that an amount of 25% for the measurable risk that her pre-existing condition would have resulted in her early retirement for a total award of $28, 575. I have also figured into this assessment the possibility that she will be able to increase her hours of work somewhat in the next three years.

**186**  I will leave it to counsel to deal with the necessary income tax deduction calculations.

**D. Cost of future care**

**187**  The medical evidence regarding the need for future care is not supportive of the plaintiff's position that she should receive an award of $20,000.

**188**  Dr. Christian states she does not require domestic help but can carry on her former tasks although with less vigour.

**189**  Dr. Laidlow believes she should undertake a substantial exercise programme to improve her flexibility.

**190**  I will award the plaintiff $1,000 for the cost of 10 sessions with a personal trainer to help develop an exercise programme tailored to her particular needs.

**191**  In addition, I will award her $800 for the cost of pruning and heavy gardening over the next few years. Were it not for the plaintiff's pre-existing condition, I would have awarded the sum of $1,200.

**E. Special Damages**

**192**  The plaintiff claims the amount of $7,939.08 as special damages.

**193**  The defendant argues that any amount incurred past June 2007 when the plaintiff's Accident injuries had plateaued and in the defendant's view, resolved, and the plaintiff was involved in the second accident, should not be awarded as the costs of housekeeping and yard work claimed for should reasonably be attributed to the plaintiff's pre-existing condition and the second accident.

**194**  However, I am again faced with a lack of evidence on the effect of the second accident.

**195**  The defendant puts forward a figure of $4,851.98.

**196**  In keeping with my analysis under non-pecuniary damages and damages for lost earning capacity, I will begin with the plaintiff's figure rounded off to $7,900.00 and deduct 25% or $1,975 as recognition that some of these costs would be related to the plaintiff's pre-existing condition for a total award of $5,925.00.

**SUMMARY**

**197**  I award the plaintiff the following damages:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages: | $45,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past wage loss: | $63,684.08 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of future earning | $28,575.00 |  |
|  | capacity: |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of future care: | $1,800.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special damages: | $5,925.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Total:** | **$144,984.08** |  |

plus interest under the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*.

**198**  The plaintiff will have her costs subject to any offers made which, if necessary, can be dealt with before me as well as any issues of deduction, including no fault benefits and net income calculations.

L.D. RUSSELL J.

\* \* \* \* \*

Correction

Released: May 31, 2010

Please be advised that the attached Reasons for Judgment of Madam Justice Russell dated May 28, 2010 have been edited. as follows

On the first page of the Reasons, the spelling of counsel for the plaintiff's name has been corrected from M.L. Porohecky to M.L. Pohorecky.

**End of Document**

[***932422 Alberta Ltd. v. Gordon's Home Sales Ltd., [2019] B.C.J. No. 1123***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5WDS-HC71-FG68-G0H8-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

R. Johnston J. (In Chambers)

Heard: February 21 and 22, March 27, 2019.

Judgment: June 18, 2019.

Docket: S151766

Registry: Victoria

**[2019] B.C.J. No. 1123** | 2019 BCSC 986

Between 932422 Alberta Ltd., Plaintiff, and Gordon's Home Sales Ltd., Defendant

(111 paras.)

**Case Summary**

**Contracts — Remedies — Damages — Amount — Consequences of breach — Application by plaintiff for judgment on summary trial allowed — Plaintiff and defendant entered into contract for supply, delivery and installation of manufactured home on property owned by plaintiff — Issues arose with respect to location of home and defendant cancelled contract — Repudiation was breach of contract — Plaintiff was able to have another home installed within four months — Plaintiff was awarded damages of $4,000 for lost rent or opportunity to rent, $600 for lost appliances and interest on deposit — Manufactured Home Act, s. 1.**

**Tort Law — *Negligence* — Duty and standard of care — Duty of care — Application by plaintiff for judgment on summary trial allowed — Plaintiff and defendant entered into contract for supply, delivery and installation of manufactured home on property owned by plaintiff — Issues arose with respect to location of home and defendant cancelled contract — Plaintiff claimed damages for *negligence* — No *negligence* flowed in relation to placement of home as location was responsibility to plaintiff — Any obligation related to time of performance was contractual obligation — There was no breach of duty to defendants' employees or subcontractors — Claims in *negligence* were dismissed — Manufactured Home Act, s. 1.**

|  |
| --- |
| Application by the plaintiff, 932422 Alberta Ltd. (422), for judgment on summary trial. 422 and the defendant, Gordon's Home Sales Ltd. (GHS), entered into a written contract for the supply, delivery and installation of a manufactured home. The total price was $155,500 before taxes. There were delays in determining the exact location for the home. GHS cancelled the contract. The new manufactured home had not been delivered to 422's property at the time the contract was cancelled. 422 brought an action in ***negligence*** and breach of contract. 422 alleged that GHS breached its duty to exercise all reasonable care, skill, diligence and competence as a manufactured home dealer and seller. 422 also claimed that GHS repudiated the contract. GHS countered that there was no contract formed because there was no completion date.  HELD: Application allowed.  No ***negligence*** flowed in relation to the placement of the manufactured home. The decision on location belonged to 422 and its representatives. Any obligation related to the time of performance was a contractual obligation. There was no evidence of a breach of duty to take reasonable care in selecting, training or supervising employees, servants, agents, contractors, subcontractors, consultants, suppliers, vendors and others that could lead to a finding of ***negligence*** on the part of GHS. Nor was there any evidence of damage that might arise from such a breach. The claims in ***negligence*** were dismissed. The repudiation of the contract was a breach of contract. GHS's breach of contract caused 422 to lose four months' rent, allowing two months for 422 to contract for another manufactured home, and two months to deliver and install the home. GHS was to pay 422 $4,800 for lost rent or opportunity to rent. 422 was also entitled to $600 for the loss of nearly new applicants. GHS failed to promptly return the deposit to 422 and was responsible for interest on the amount owed. |

**Statutes, Regulations and Rules Cited:**

Manufactured Home Act, [*S.B.C. 2003, c. 75, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-DXHD-G1F8-00000-00&context=), s. 1

**Counsel**

Counsel for the Plaintiff: A.P.M. Berns.

Counsel for the Defendant: P.K. McMurchy.

**Reasons for Judgment**

|  |
| --- |
| **R. JOHNSTON J.** |

**1**   This is an application for judgment on summary trial brought by the plaintiff.

**2**  On July 31, 2014, the plaintiff, 932422 Alberta Ltd. (422), and the defendant, Gordon's Home Sales Ltd. (GHS), entered into a written contract which provided that for an agreed price, GHS would supply, deliver and install a manufactured home on land near Qualicum Beach, British Columbia. That property was owned by Ms. Mannhardt, who, along with her spouse and business partner, Mr. Eason, controlled 422.

**3**  On February 19, 2015, GHS wrote to 422 and Ms. Mannhardt, cancelling the contract. 422 now sues GHS for damages in ***negligence*** and breach of the contract.

**4**  GHS's sales manager, Mr. Wagner, negotiated and signed the contract on behalf of GHS. Ms. Mannhardt signed on behalf of 422.

**5**  The contract is in what appears to be a standard form. Clause 5.0 provides, subject to other terms:

... the Dealer shall deliver the Home to Lot 1, VIP 1969, DL 80, Plan 20696 (1599 Rodgers Road), (the "**Home Site**"), on or about 2014-Sep-01, (the "**Delivery Date**") and shall have provided all material additional services on or about 2014-Sep-30 (the "**Completion Date**").

**6**  Clause 6.0 deals with additional services:

6.0. Additional Services - The Dealer shall perform Home delivery, set-up, installation and other work as described in a Schedule of Delivery and Set-Up (the "**Additional Services**"). The Purchaser shall perform or cause to be performed all Purchaser's work described in the Schedule of Delivery and Set-Up and any work that is not described as Purchaser's Work in that schedule but that is required for provision by the Dealer of the Additional Services; including, without limitation, all work required for delivery of the Home to the Home Site, and its location, set-up, installation and occupation at the Home Site.

**7**  There is no Schedule of Delivery and Set-Up that describes the purchaser's work referred to in clause 6.0. An addendum describes what may have been intended as the material additional services referred to in clause 5.0 as:

... block and level, mate walls, raise roof, finish interior of the home, and finish exterior of the home.

In addition dealer will supply the additional setup services as per Addendum "B". Any other additional work to be pre-authorized either in writing or verbally by Purchaser.

**8**  Addendum B is a typed list as follows:

Addendum "B" - July 31, 2014 for 932422 Alberta LTD

Cut one cedar tree *- tree to be decided on depending on placement*

Excavator time for footings prep *- 1300*

concrete strip footings at 6" deep *- 2500.00*

Engineered seismic tie downs *- 850.-*

pit run gravel at strips *- 1,000.-*

Skirting supply and install *- 1400.-*

New electrical connection from existing meter base and pole *- 750.00*

Electrical crossover connections in attic *- 400.-*

Sewer and water connections to existing services *- 1500.00*

Eavestrough w. down spouts *- 900.-*

Building permit - RDN Fee *- 1500.00 (could be less)*

Project management, 90 days *- 2,900.-*

4 x 6 landing and stairs at each door *- 1800.00*

Upgrade BC Hydro to 200 amp service with allowance of $600.00 Cost to be determined by Hydro

Remove existing singlewide

Demolish attached addition to singlewide

*2-3 suntubes to be installed after placement @ no additional cost (professionally)*

**9**  Clause 16 provides:

16.0. Entire Agreement - **This Agreement replaces all previous agreements between the parties relating to the subject matter hereof and there are no representations, warranties, collateral agreements, or conditions with respect to the same, except as herein specified**.

**10**  The contract lists the total price as $155,500.00 without tax, or $162,775.00 including taxes.

**11**  The property defined as the Home Site in the contract is a 14 acre parcel of land owned by Ms. Mannhardt. Ms. Mannhardt has sworn that the company 422 bought this land in 2006, but in the same paragraph of the affidavit she identifies as an exhibit an Assessment Roll Report that names her as owning the property in her sole name, a fact that is confirmed by a copy of a title search conducted in 2018. The Notice of Application bringing this matter to summary trial repeats the assertion that 422 purchased the property in 2006. Ms. Mannhardt repeats her assertion that the company owns the land in paragraph 21 of her affidavit. There has been no assertion or evidence that Ms. Mannhardt holds title to the land on behalf of, or in trust for, 422. Neither 422 nor GHS raised ownership of the property in their pleadings.

**12**  When the contract was formed, there was already a manufactured home located on the property, and the contract contemplated that GHS was to remove and replace the existing home with the new home. The existing home was referred to as "singlewide", apparently referring to its size, and the home that was the subject of the contract was larger, referred to as a "doublewide".

**13**  The existing singlewide home was located in a triangular portion of land the parties referred to as the "building envelope", which was a small part of the 14 acre parcel.

**14**  The evidence is not completely clear whether the building envelope was a constraint dictated by some sort of restriction imposed by easement, right of way or other legal impediment, by local government requirements, or was simply the preference of Ms. Mannhardt as the landowner.

**15**  The contract does not specify just where on the property GHS was to install the new manufactured home, and the new home's location, as well as alleged delays in its selection, underlie some of the disputes over which party is responsible for which damages. The contract simply calls for delivery and installation on the property. Neither party suggests that it was left to GHS to decide where on the 14 acres it was to install the manufactured home. The factual matrix in which this contract was formed makes it clear that both parties understood that the new manufactured home was to replace the existing manufactured home in the triangle referred to as the building envelope.

**16**  Ms. Mannhardt has sworn that she and Mr. Eason had not chosen the precise location for the new home before they contracted with GHS, but that she understood it would be placed within the triangular building envelope unless something unforeseen prevented that placement. She says that Mr. Wagner suggested to her that the new home be placed in the same location as the existing home, but assured her that the location of the new home could be modified "without too much issue", and its orientation could be modified without much cost.

**17**  Mr. Wagner has sworn that he believed GHS was to put the new home in the same location and with the same orientation as the home it was replacing.

**18**  This was all part of the negotiations and discussions leading to the formation of the contract.

**19**  As it turned out there was more than a little trouble settling on a final location for the new home. Ms. Mannhardt has sworn that when she and Mr. Eason met with Mr. Wagner on the property on or about August 16, 2014, Mr. Eason, who had previously worked as a surveyor, paced the property where he thought the new home should go, and they were told by GHS (I assume this meant Mr. Wagner) that the new home could not be reoriented within the footprint of the existing singlewide home. She claims there was an agreement to place the new home close to where the singlewide home was situated.

**20**  Placement of the new home affected whether existing water, power and septic services could be connected at little or no additional cost; any significant change in placement away from the site of the existing singlewide home raised the question of responsibility for increases in the cost of hooking up water, power and septic.

**21**  As well, to place the new doublewide home in the same place as the existing singlewide home would require removing one tree as set out in Addendum B. Ms. Mannhardt swears that preserving the existing trees was very important to her and to Mr. Eason, and part of 422's claims at trial relate to the fact that five trees were eventually felled, rather than the one contemplated in Addendum B.

**22**  I am satisfied on the evidence, particularly emails exhibited to affidavits, which were exchanged contemporaneous with events, that the additional trees were cut down because of decisions made by Ms. Mannhardt and Mr. Eason as to where they wanted the new home placed, and that Ms. Mannhardt was very much involved in directing the process of cutting down the trees. As an example, on September 16, 2014 Ms. Mannhardt sent an email to Mr. Wagner that contained this: "We will be removing 3/4 trees and are getting a quote from Chris Wilson at Anu Enterprises on that and should be able to have all that done in short order. We will keep you updated on the tree and pumphouse progress and schedule." On September 25, 2014 Ms. Mannhardt and Mr. Wagner exchanged emails that indicate that Ms. Mannhardt was having difficulty finding someone to take the trees down, Mr. Wagner had someone available, but Ms. Mannhardt wanted a quote that showed the cost to fell the trees and set them aside, or to sell the trees to someone who would cut them down and take them away.

**23**  GHS removed the singlewide home from the site on October 22, 2014.

**24**  Mr. Sullivan, an owner of GHS, replaced Mr. Wagner as the project manager on this contract some time around the end of October or early November 2014.

**25**  Ms. Mannhardt sent an email to Mr. Sullivan on November 23, 2014, to say that she intended to travel to the site to meet with Mr. Sullivan in order to fix the 'exact' placement of trailer". Mr. Sullivan replied November 24 with a plan showing that if placed in the location preferred by Ms. Mannhardt and Mr. Eason, the home would extend beyond the building envelope. This exchange indicates that Ms. Mannhardt and Mr. Eason had not yet reached a final decision on the location of the home. Mr. Sullivan has sworn that it was early December 2014 before a site for placement of the new manufactured home was chosen.

**26**  It was raining by December, and soil conditions had changed as a result.

**27**  On December 10, 2014, a building inspector for the Regional District of Nanaimo required the proposed home site to be drained and unsuitable soils removed. As an alternative, the building inspector wanted a geotechnical engineer to approve the site. Mr. Sullivan reported this to Ms. Mannhardt and Mr. Eason. Ms. Mannhardt emailed Mr. Sullivan January 7, 2015 to say that Mr. Eason was a geotechnical engineer and felt that to require a geotechnical report was totally ridiculous.

**28**  Mr. Sullivan arranged for a geotechnical engineer to inspect the proposed site and on January 28, 2015, the engineer reported informally that there was an area that was too soft to support the mobile home. The engineer recommended that footing areas be compacted and fill added and recompacted. When Mr. Sullivan reported this to Ms. Mannhardt, he got a reply dated January 29, 2015, from Mr. Eason saying:

Dave this is really beginning to get to me. I would like to know HOW this guy knows that it will not support a mobile home. Has he done a CPT or any other in situ test other than stomping on the ground or some other such scientific method. Also, since the piezo level is high there my feeling is that if you put a 1000 lb plate tamper on this you will only draw up the ground water and bury the tamper. Dumb idea. There are two options here. First, wait for a couple weeks and I will have my BC accreditation and I will do the geotech letter. Second option is to refund our cash and forget it. There is way too much pain here. Larry.

**29**  Mr. Sullivan has sworn that he would not continue on the basis of Mr. Eason's geotechnical certification because he knew and respected the geotechnical engineer who had provided the opinion to which Mr. Eason was objecting.

**30**  Mr. Sullivan has sworn that 422 was not paying contractors or subcontractors either recommended or arranged by GHS, and they were complaining about not being paid. He says that Mr. Eason was refusing to pay the costs associated with building the pump house, was threatening to sue over things 422 was being asked to pay that he claimed should be part of the contract price, and was questioning the opinion of the surveyor who had said that Mr. Eason's proposed siting of the new manufactured home would encroach on setbacks and a right of way. Mr. Sullivan decided to terminate the contract.

**31**  On February 19, 2015, Mr. Sullivan wrote to 422 and Ms. Mannhardt to say that GHS no longer intended to honour the agreement. Mr. Sullivan states:

I agree with you that this project is becoming an aggravation to you as a purchaser and Gordon's Home Sales Ltd. as seller.

I have reviewed the file and realize it has become "unmanageable". I believe that we are heading for an unsatisfactory conclusion for both parties. We are therefore canceling our contract with you ...

**32**  He goes on to say that he believes this has been caused by continuous changes requested by 422, by the Regional District requirements, by extreme weather conditions, and "as well as your continued position that changes don't cost more". Mr. Sullivan states that GHS was not clear which of Ms. Mannhardt or Mr. Eason made decisions on the project, then lists the following sources of aggravation as reasons for GHS's decision to terminate the contract:

1. We are now on our fourth and final location of home.
2. Initially, remove old single wide home and replace with a new double wide on same location using existing services.
3. Adding new services i.e.: power & pump shed, trenching to building site.
4. Removal of trees and roots, root removal causing issues with building site i.e.: bring back to usable levels for fill.
5. Set up concrete forms 3 times due to location of home change.
6. Continued requirements for quotes, when there is no reason to do so i.e.: excavator on site, cost effective to continue project or our experience tells us who to use.
7. The regional district demanding a geotech and a survey of the building site.
8. Changing deck size etc. after we have permit, your plans don't meet code.
9. Asking GHS to request 3 quotes for geotech. I could not even get a response from other firms for this request. (just wasting my time) Then you challenge Lewkowich Eng. advice.
10. I've made 8 trips to your site, most of which were caused by changing location of home.
11. Unpaid bills i.e: Ranger Elec, Bedard Excavating, Red Williams Well, GHS has paid these bills. We have also paid Bowers & Associates (survey) and expect a bill for a visit from Lewkowich Engineering. As well we have paid for the building permits.

Taking these and other factors into consideration, you are obviously unhappy with project to date. GHS are withdrawing from this project and returning your deposit less direct expenses paid on your behalf.

Please find attached an accounting of what we have paid to date on your behalf.

**33**  The attached accounting claims $10,763.82 for expenses paid to February 19, 2015.

**34**  The new manufactured home had not been delivered to the plaintiff's property when GHS terminated the contract.

**35**  422 had paid $40,000 as a deposit. In spite of Mr. Sullivan's assurance that GHS would return the balance of the deposit after deductions, that was not done, leading counsel for 422 to demand the difference of $29,236.18 in a letter dated May 8, 2015. GHS did not repay that amount until September 2018, when it sent a cheque directly to 422.

***NEGLIGENCE***

**36**  422 pleads ***negligence***, alleging that GHS owed it a duty "to exercise all reasonable care, skill, diligence and competence as a manufactured home dealer and seller".

**37**  422 also pleads that the same duty is an implied term of the contract between the parties.

**38**  422 has pleaded that the standard of care that should be applied to GHS is "that which may reasonably be expected of a professional of ordinary competence, measured by the professional standard of the time." By pleading that the standard to which GHS, as seller and installer of a manufactured home, should be held is that of a professional, 422 seems to want GHS held to a higher standard such as that ordinarily applied to what used to be called the "learned professions", such as law or medicine. That this is the case that can be seen in the Notice of Application where in Part 3: Legal Basis 422 cites and relies on *Wilson v. Swanson* [*(1956), 5 D.L.R. (2d) 113*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M12J-00000-00&context=) (S.C.C.), for the standard of care to be applied to a medical specialist.

**39**  422 further clouds the issue by arguing that the principle on which it relies was applied by Lord Denning M.R. in *Hancock v. B.W. Brazier (Anerley), Ltd.*, [1966] 1 W.L.R. 1317, 2 All E.R. 901 (C.A.). That case was not framed in ***negligence*** at all, but rather breach of contract, and the passage relied upon by 422 deals with implied terms that a builder who contracts with a buyer must honour: that the builder will do its work in a good and workmanlike way, using good and proper materials, and the home will be reasonably fit for human habitation (at 903).

**40**  The contract here in question contemplated that GHS would do some building; once the home was delivered to the site, the Addendum required that GHS "... block and level, mate walls, raise roof, finish interior of the home, and finish exterior of the home". But this is not a case where GHS as builder or supplier of a manufactured home, supplied a home with defective or dangerous materials, or a home unfit for human habitation. GHS did not supply a home at all. Rather, the plaintiff alleges that GHS did not do the work it contracted to do in a good and workmanlike manner.

**41**  This is not a case where the record lends itself to an analysis of the intersection between tort and contract. Negligent misrepresentation is not pleaded, nor was it argued. Whether GHS owed a duty of care outside the duties it assumed in its contract need not be decided, as counsel conceded during argument that 422 has led no evidence that would establish what the standard was to be applied to a seller and installer of manufactured homes. I conclude that GHS did not owe a duty of care to 422 outside any duties created by or flowing from the contractual relationship between them.

**42**  If I am wrong in that conclusion, and there is a case in ***negligence***, the particulars are alleged as:

1. Failing to properly install the Manufactured Home on the Home Site (previously defined as the entire parcel of land owned by Ms. Mannhardt);
2. Failing to complete their Contractual duties within a reasonable time, or at all;
3. Failing to properly determine whether the Home Site was a suitable location for the Manufactured Home;
4. Failing to conduct proper Home Site surveys, inspections, and prepare site drawings;
5. Failing to consult local and regional statutes, laws, regulations, bylaws, ordinances and codes to determine whether the Manufactured Home can be installed on the Home Site as per the terms of the Contract;
6. Failing to conduct research and investigation into the easement and setback requirements of the Home Site;
7. Failing to advise the Plaintiff that the Manufactured Home was not a suitable structure for the Home Site;
8. Failing to perform the duties of the Contract on budget;
9. Advising the Plaintiffs to cut down and remove trees on the Home Site;
10. Removing, damaging, destroying or otherwise disposing of the Singlewide trailer;
11. Failing to adequately train and/or supervise their employees, servants, agents, contractors, subcontractors, consultants, suppliers, vendors and others who were involved in performing the duties under the Contract;
12. Failing to employ employees, agents, or servants who could competently complete the duties under the Contract; and
13. Such further and other particulars as are within the knowledge of the Plaintiff and/or their agents, servants and employees which shall become known to the Plaintiff prior to the trial of this proceeding.

**43**  Of these, a), c), d), e) and f) all relate to or flow from the decision where to place the manufactured home. I find that the responsibility to select the site was that of Ms. Mannhardt or Mr. Eason, or both, on behalf of 422, and any delays in making the selection were caused by them. Given the generality in the contractual description of the "Home Site", and allowing for the mutual understanding that the home was to be placed in the building envelope, the evidence still does not establish either the existence of a duty of care with respect to these particulars, the standard of care if a duty arose, or any breach of the applicable standard of care. I find no ***negligence*** on the part of GHS in these particulars.

**44**  As to b), I find any obligation related to the time of performance was a contractual obligation only, and not one that flows from any duty of care that might have been owed by GHS to 422. The same can be said for particular h) as pleaded.

**45**  As to g), there is no evidence that the manufactured home was not suitable for either some part of the 14 acre home site, or the smaller triangular building envelope.

**46**  I have already dealt with i), and 422 has abandoned the claim raised in j).

**47**  There is no evidence of a breach of duty to take reasonable care in selecting, training or supervising "employees, servants, agents, contractors, subcontractors, consultants, suppliers vendors and others" that could lead to a finding of ***negligence*** on the part of GHS nor is there any evidence of damage that might arise from such a breach, so particulars l) and k) do not lead to a finding of ***negligence***.

**48**  The claims in ***negligence*** are dismissed.

**BREACH OF CONTRACT**

**49**  422 also claims breach of contract. It argues that GHS repudiated the contract when it wrote the letter of February 19, 2015, quoted earlier. GHS counters that there was no contract formed because there was no completion date, citing *Jurik v. Fontile's Counterpoint Kitchen Systems Inc.*, [*2011 BCSC 233*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B18H-00000-00&context=). That case involved a contract for installation of cabinets. The contract did not state a completion date. Citing *Fame Construction. Ltd. v. 430863 B.C. Ltd.*, [*(1997), 30 B.C.L.R. (3d) 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F7VM-S31V-00000-00&context=), the court confirmed that for a building contract to be enforceable, "there must be agreement on the subject matter, the timeline for completion and the price." (para. 39). The court in *Jurik* found that both claim and counterclaim failed due to the absence of a completion date in the contract.

**50**  This decision does not assist GHS. The contract in issue here states its subject matter as the supply and installation of an identified manufactured home, identifies the price to be paid by 422, and sets a completion date of September 30, 2014. The contract did not complete by that date primarily because 422 had not selected a site for installation of the new home. There were further delays because additional trees had to be removed to accommodate choices by Ms. Mannhardt and Mr. Eason, and because a pump house became required to service not only the new manufactured home but another residence. All of these delays in completion were accepted at the time by both parties, and I infer that both parties agreed to extend the completion date from time to time, without fixing a new date certain. That resulted in a varied agreement to complete within a reasonable time after the site was selected in early December 2014, and what was reasonable was affected by the circumstances, including weather conditions, and Regional District requirements.

**51**  Mr. Eason's ill-tempered email of January 29, 2015, might be construed as an offer to terminate the contract by agreement, but if it were, that offer was not accepted by GHS. If Mr. Eason was offering to terminate the contract by agreement, it was conditional on GHS returning the deposits paid by 422, and GHS did not "refund [the] cash", which was a condition imposed by Mr. Eason. Instead GHS used some of the cash to pay those it felt were owed money by 422, and held on to the balance until September 2018.

**52**  The reasons advanced by GHS for terminating the contract at the time are as set out in the February 19, 2015 letter from Mr. Sullivan. He has added in his affidavit his reservations about Mr. Eason issuing his own geotechnical approval of the proposed site (once Mr. Eason was qualified to do so in British Columbia), Mr. Eason's threat to sue over what he claimed were extra costs 422 should not have to pay, Mr. Eason's refusal to pay for the pump house, and Mr. Eason's rejection of a surveyor's work. Mr. Eason's suggestion that he would provide his own geotechnical approval carries with it an implied, if not expressed, rejection of the geotechnical report obtained by GHS.

**53**  With the possible exception of the accounts unpaid by 422 to contractors, the reasons listed in Mr. Sullivan's February 19, 2015 letter do not, individually or in the aggregate, amount to breach of contract by 422 that would excuse GHS from performing its contractual obligations.

**54**  As for the unpaid bills, it is not clear on the evidence whether the unpaid contractors were in a contractual relationship with GHS or with 422. If GHS contracted with others on behalf of 422 for goods or services outside the contract, it would seem that GHS would have been liable to pay for those goods or services and then claim any extra costs from 422. The record is inadequate as a basis on which to determine whether GHS acted as agent for 422 in arranging for goods or services outside the contract so as to bind 422 to paying directly for those goods or services. Mr. Sullivan equivocates in his affidavit, at para. 19:

In order to preserve our good company reputation GHS had paid the subcontractors who had not been paid. We had asked to do the work in our job as managing the project and we had dealt with these tradespeople for years.

**55**  In saying that GHS had asked the subcontractors to do work, Mr. Sullivan does not make clear whether GHS contracted with them, or acted as agent for 422.

**56**  The unpaid accounts, taken together with the other reasons stated in the February 19, 2015 letter, do not constitute a sufficient basis on which to conclude that GHS was free to abandon its contractual obligations.

**57**  I find that GHS breached the contract by its letter of repudiation dated February 19, 2015.

**58**  The Notice of Civil Claim pleads as damages:

1. Damages for lost rental revenue from October 1, 2014 at $1,200 per month;
2. Damages for the added cost of completing the project measured by the difference between the contract price and the cost to have the project completed by another contractor;
3. Damages for the loss of at least five old-growth trees;
4. Return of a washer and dryer that were in the singlewide removed by GHS, or in the alternative, damages to replace them;
5. Damages for out of pocket expenses identified as falling and moving five trees, new electrical disconnect and reconnect charges by BC Hydro, new pump house (materials and labour), and cost of Bobcat services for work on the property, totaling $3,690.50;
6. Additional economic loss suffered "by the Plaintiff for travel and accommodations and other damages and loss which shall be made known to the Defendant prior to the trial of this proceeding".
7. A further claim for the value of the singlewide home removed by the defendant was abandoned at the trial.

**59**  The plaintiff has added a claim for interest on the balance of its deposit that was not returned until September 2018, at prejudgment interest rates.

**60**  Some of the damages sought by 422 are affected by the question of ownership of the land on which the manufactured home was to be installed. Land ownership was not pleaded by either party, but was raised by GHS in its Application Response, and argued at trial. GHS submitted that claims arising from alleged damage to the property, such as from the loss of five trees, or the results of digging and trenching for services, are not claimable by 422 because the land and the trees on the land belonged to Ms. Mannhardt, and not to 422.

**61**  422 argues that GHS should not be heard to argue the ownership issue as a way to avoid some damages because GHS did not raise the issue in its pleading, and it is too late to raise it at trial.

**62**  Nowhere in the Notice of Civil Claim does 422 assert that it owns, owned, or had an interest in the land referred to as the Home Site. There was nothing specific to ownership of the property in question for GHS to gainsay in its Response to Civil Claim.

**63**  In its Notice of Application 422 alleges as fact that it purchased the property in question, which it refers to as the Dashwood Property, in 2006. In its Application Response GHS denies that 422 owns the property. Thus, 422 had adequate notice that ownership of the land was in issue, and I find that GHS is not precluded from arguing that some of the damages claimed against it do not flow from its breach of contract.

**64**  The burden on 422 as plaintiff is to show, on a balance of probabilities, that it suffered loss as a result of GHS's breach of contract. To the extent that losses claimed by 422 arise from loss or damage to the land, whether referred to as the Home Site, or the Dashwood Property, the burden is on 422 to prove that it has lost by reason of damage to Ms. Mannhardt's land.

**65**  422 claims damages for rent lost from October 1, 2014 to date at $1,200 per month. In argument, it modified this claim to twelve months lost rental beginning either October 1, 2014, when the contract was originally to have been completed, or in the alternative from February 2015 when GHS repudiated the contract.

**66**  The evidence to support a claim for lost rent is found in Ms. Mannhardt's affidavit where she has sworn that in September 2014 she asked a Ms. Russell to let it be known that the new manufactured home would be available for rent. The email correspondence she exhibits in support shows that Ms. Mannhardt realized that it would be some time before the new home was delivered, installed, and ready for tenants. The email suggests that Ms. Mannhardt wanted $1,400 or $1,500 per month, and more if a garage was also built or installed.

**67**  Ms. Mannhardt has sworn that there has been a loss of rental revenue of $1,200 per month since September 30, 2014, when the installation of the new home was supposed to have been completed.

**68**  Entitlement to damages for loss of rents from a manufactured home does not require that 422 own the land on which the home sits. 422 bought a manufactured home to place on land owned by Ms. Mannhardt, one of its principals. There is some evidence from Ms. Mannhardt supporting a wish to rent the manufactured home once installed. The evidence does not show what, if any, formal agreement existed between Ms. Mannhardt as owner of the land and 422, the company that would own the home Ms. Mannhardt contemplated renting. Once installed, the manufactured home would be 422's to rent. I find that 422 has a right to claim for damages for loss of rental, or opportunity to rent, the home.

**69**  As to the quantum of those damages, the evidence shows that Ms. Mannhardt and Mr. Eason had not finally selected a site for the new home until December 2014. The evidence also establishes that by December 2014 rain had affected soil conditions, leading to the intervention of the building inspector, then further delay brought on by the dispute over the opinion of the geotechnical engineer retained by GHS.

**70**  The evidence does not show that the site finally chosen by Ms. Mannhardt and Mr. Eason would have been approved for the new home, or when that approval would have been effective. It is therefore not possible to accurately establish when rental income could reasonably have been expected to begin.

**71**  The evidence from the contract does establish that GHS was prepared to agree to have a manufactured home installed and habitable in two months from when the contract was signed. That suggests that had 422 proceeded to contract with another seller, it could expect to begin receiving rent two months after Ms. Mannhardt's property was fit to take a new home.

**72**  I conclude that GHS's breach of contract caused 422 to lose four months' rent, allowing two months for 422 to contract for another manufactured home, and two months to deliver and install it. GHS shall pay 422 $4,800 for lost rent or opportunity to rent.

**73**  Next, 422 claims in its Notice of Application for "compensatory damages" for the additional costs to complete, measured by the difference between the contract price it agreed with GHS and what it will cost to obtain and have installed the same or a similar home from another supplier.

**74**  GHS submits that in order to recover the cost of completion, 422 must establish two things: that the costs claimed are reasonable, and that 422 genuinely intends to carry out the work. GHS relies on passages from R. Snyder and H. Pitch, *Damages For Breach of Contract*, 2nd ed. (Thompson Reuters), and *514953 B.C. Ltd. v. Leung*, [*2007 BCCA 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S40R-00000-00&context=). The excerpt from the text relates to building contract cases, and *Leung* arose out of a contract in which the numbered company agreed to build a house for Mr. Leung. GHS's argument assumes that this case should be treated as a building contract case so far as assessment of damages is concerned.

**75**  Claims for damages for breach of building contracts present a choice in how to approach measuring damages in cases where one party has failed to perform, or has imperfectly performed, its contractual obligation to build on land owned by the other party. The usual starting position is to consider any diminution in the value of the property caused by the breach, with the cost of remedying deficiencies being an alternate approach. The selection of the right approach depends on the circumstances of the case.

**76**  But the contract in issue in this instance is not a building case, although there are elements of building set out in the addendum. GHS sold, and 422 bought, a manufactured home and the work necessary to move it to its installation site and to install it there. A manufactured home is a chattel, not real property, as can be seen by these definitions contained in the *Manufactured Home Act*, [*S.B.C. 2003, c. 75, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-DXHD-G1F8-00000-00&context=):

"**manufactured home**" means any structure, whether ordinarily equipped with wheels or not, that is designed, constructed or manufactured to provide residential accommodation and to be moved from one place to another by being towed or carried;

"**security agreement**" means a security agreement to which section 2 of the *Personal Property Security Act* applies;

**77**  The work described in the addendum is more assembly of the manufactured components than building, and is not sufficient to bring this case into the category of building contract cases, so as to require the court to decide whether the cost of performance as opposed to diminution in value is the proper measure of damages.

**78**  Instead, this case concerns a contract for the sale of goods, with the goods being the manufactured home described in the contract. For that reason, 422 is not required to prove that it intends to carry out the purchase of a manufactured home.

**79**  The usual measure of damages when a seller fails or refuses to supply goods contracted for is the cost of obtaining those goods in the market.

**80**  422 has put forward two bases on which its damages should be assessed: a quote from Amco Homes, another supplier of manufactured homes, offering to provide an alternative manufactured home, and the opinion of the quantity surveyor, Mr. Stregger.

**81**  The Amco Homes quote obtained by 422 is for $169,900 plus GST, or $178,395, including the tax, which is $14,400 more than the price for which GHS contracted to supply its manufactured home, or a difference of $15,620 including the tax.

**82**  In Mr. Stregger's opinion, the cost to provide a manufactured home of similar size would be substantially less. He arrives at a total of $137,190 plus GST, or $144,030 with GST, for what he says is the same scope of work as in the contract, but priced independently.

**83**  The Amco quote does not include the sun tubes GHS had agreed to install; they are included in Mr. Stregger's opinion at $2,460 including installation labour.

**84**  So on the plaintiff's evidence, it lost $18,080 if the Amco quote is taken as the basis of assessment and the cost of the sun tubes is added, or nothing at all if Mr. Stregger's opinion is accepted.

**85**  The plaintiff's evidence does not persuade me it suffered a loss as a result of GHS's refusal to deliver and install its manufactured home.

**86**  Mr. Stregger's opinion also contains an estimate for the cost of replacing the septic system, which he says is likely necessary because of current code requirements. He does not say when these current requirements became effective, but links this additional cost to the expiry of the building permit taken out by GHS. This was not addressed in argument, perhaps because 422 is not able to attribute delay leading to expiry of its building permit to GHS.

**87**  422 has failed to prove that any increase in the cost of replacing the septic system resulted from breach of the contract by GHS.

**88**  The Notice of Application seeks damages for the loss of at least five oldgrowth trees cut down to accommodate the new manufactured home. The original contract contemplated removal of one tree, and both Ms. Mannhardt and Mr. Eason have sworn that the trees on the property were very important to them.

**89**  Emails exhibited by Ms. Mannhardt to her affidavit show that the additional trees had to be removed to accommodate the site she and Mr. Eason finally decided upon for the manufactured home. They also show that Ms. Mannhardt contemplated having the logs milled for their lumber. These emails do not support the claimed importance of the trees to either Ms. Mannhardt or Mr. Eason.

**90**  The additional trees were removed because of choices made by Ms. Mannhardt or Mr. Eason, not because of any breach by GHS of the contract. In any event, the evidence does not show that the trees belonged to anyone other than Ms. Mannhardt as the owner of the land on which they stood, so 422 has no claim for their loss.

**91**  Next, the Notice of Application seeks damages for the return of the washer and dryer that were in the existing singlewide home and were to be moved to and installed in the new doublewide home.

**92**  The evidence makes it quite clear, and I find, that there was a washer and dryer in the singlewide home GHS removed from the property, that the contract included a term that the singlewide home was sold by 422 to GHS for $500, and that sale did not include the washer and dryer. The evidence establishes that the washer and dryer remained the property of 422 and that GHS agreed to remove them from the singlewide home and install them in the doublewide home it was to supply under the contract.

**93**  When GHS terminated the contract it was obliged to return the washer and dryer to 422. It did not do so. That amounted to a breach by GHS.

**94**  Ms. Mannhardt swears that the washer and dryer were nearly new, without being specific on their age. To award damages based on the cost of new appliances would put 422 Alberta in a better position than if the contract had been performed. Of the $781.20, inclusive of taxes, claimed for new appliances, the reasonable damages for loss of "nearly new" appliances I assess at $600, again including taxes, and award that amount.

**95**  The Notice of Application next seeks damages for the cost of a new pump house, falling and moving the five trees dealt with earlier, disconnecting and reconnecting electricity, and the cost of ditching, earth moving and installing wiring for the new pump house.

**96**  I find that the contract originally contemplated that the new manufactured home would be placed where the old home was removed, requiring very little to connect the new home to existing power, water and septic services. I find further that the shared expectation that the new home could be reoriented with "little issue" meant turning or twisting the new home on the old site to improve aspect or sight lines.

**97**  I find further that the pump house was needed because in the process of arranging water to the proposed new site of the new home, Ms. Mannhardt and Mr. Eason decided to alter in some way the water services that were being provided to another home on the property. Someone with whom 422, or Ms. Mannhardt or Mr. Eason were dealing directly recommended the construction of a pump house, and they agreed. This was not part of the original contract and it is not something for which GHS is liable in damages.

**98**  The same reasoning applies to the claims for ditching, wire installation and earth moving, which I understand to have been connected to the pump house construction.

**99**  422 claims for the cost of replacing stairs and a landing that were removed with the singlewide, and to be replaced on the new doublewide by GHS as part of its contract when it delivered the new home. Mr. Stregger has included new stairs and landings at entrances in his estimate of the cost to complete, and Mr. Stregger's estimate is still below the contract price. 422 has shown no damages related to stairs and landing.

**100**  422 claims the cost of supplying and installing sun tubes, which GHS had agreed to do. These are also part of Mr. Stregger's lower estimate of cost to complete, and 422 has failed to prove this aspect of its claimed loss.

**101**  422 claims the costs incurred by Ms. Mannhardt and Mr. Eason of travelling from Alberta on several occasions as consequential damages. See A. Swan, *Canadian Contract Law*, 2nd ed. (LexisNexis, 2009) at p. 348-9:

The term "direct" damages or "direct" loss or harm ... is also referred to as a "loss in value", i.e., the difference between what the promise should have received and what it actually recovered. The terms "consequential", "incidental" and "indirect" damages refer to damages that are in addition to or that arise as a consequence of the direct damages of the promisor's breach.

**102**  I find that the travel was almost entirely attributable to the indecision on the part of Ms. Mannhardt and Mr. Eason over where to place the new manufactured home. These travel costs were not caused, nor are they connected with, the breach by GHS.

**103**  422 claims the cost of restoring the property, which Mr. Stregger estimates at $8,730. This claim relates to work required to undo some of the work done while GHS was managing the project, such as ditching and site preparation. As earlier stated, the evidence is not sufficiently clear to allow a finding that work done by contractors or sub-contractors was work that was part of the contract, work arranged directly by 422 with the contractors involved, or extra work arranged by GHS at the request of 422. This claim would not succeed on the basis that 422 had failed to prove it, but it seems that it must fail in any event on the basis that the land alleged to have been damaged was Ms. Mannhardt's and did not belong to 422, so 422 lost nothing as a result of the condition in which the land was left.

**104**  422 claims interest on the balance of its deposit withheld by GHS until September 2018. The claim put forward is for interest at the contract rate of 18%, or in the alternative, at the prejudgment interest rate. The contract rate is stated in the agreement to be payable by 422 on any overdue balance; the agreement says nothing about interest payable by GHS to 422. During argument, counsel appeared to agree that 422 did not have a contractual claim for interest, and presented a schedule showing that prejudgment interest would amount to $1,632.27. During argument, counsel for GHS properly acknowledged that interest was payable on the withheld deposit at prejudgment rates.

**105**  This requires determination whether interest is payable on the entire deposit, or the balance after deduction of the $10,763.82 which GHS used to pay various accounts.

**106**  It has not been suggested that the various contractors paid by GHS were not owed the money they received, but that is not the point. The point is whether, when GHS paid these accounts, it was doing so because it had contracted with those it paid, or, as Mr. Sullivan seems to suggest, it had acted as agent for 422 in arranging contracts for goods or services between 422 and the suppliers it paid out of 422's deposit. For reasons already stated, I find that Mr. Sullivan's suggestion that GHS acted on behalf of 422 is too equivocal to establish an agency relationship with respect to the contractors involved.

**107**  The evidence strongly suggests that some of the contractors, such as the surveyor and the geotechnical engineer, were brought to the job and instructed by GHS. Others, such as the carpenter who built the pump house, or the person who felled the trees, are not so clear.

**108**  If all of the people paid by GHS out of 422's money were contracted by GHS, then GHS should have paid for their services and claimed the cost from 422. If, on the other hand, 422 contracted with these people directly, GHS had no basis on which to pay them out of 422's deposit, without agreement from 422.

**109**  But 422 has not asserted that any of those who were paid as part of the $10,763.82 were not owed the money they were paid. This suggests that 422 accepts that it benefited from the payments made by GHS in that it ultimately would bear the cost of those payments. On balance, I conclude that GHS must pay interest at prejudgment rates on the balance of $29,236.18, being the deposit of $40,000 less the amounts paid by GHS to the various contractors, from the time each installment was paid by 422 until the balance was repaid by GHS.

**CONCLUSION**

**110**  Having breached the contract, GHS is responsible for damages as follows:

1. $4,800.00 for lost rent;
2. $600.00 for the washer and dryer; and,
3. Interest at prejudgment rates on the balance of $29,236.18 from the time each installment was paid by 422 until the balance was repaid by GHS.

**111**  422 is entitled to an opportunity to establish that the costs of this action should not be governed by Rule 14-1(10).

R. JOHNSTON J.

**End of Document**

[***Birrell v. Providence Health Care Society (c.o.b. Providence Health Care), [2007] B.C.J. No. 990***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24GM-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Russell J.

Heard: April 4, 2007.

Judgment: May 11, 2007.

Vancouver Registry No. L050414

**[2007] B.C.J. No. 990** | 2007 BCSC 668 | [2007] 12 W.W.R. 673 | 72 B.C.L.R. (4th) 126 | 49 C.C.L.T. (3d) 122 | 43 C.P.C. (6th) 79 | 157 A.C.W.S. (3d) 702 | 2007 CarswellBC 1009

Between Margaret Birrell, Plaintiff, and Providence Health Care Society dba Providence Health Care and dba St. Paul's Hospital and dba The B.C. Ear Bank, and Vancouver Coastal Health Authority dba Vancouver General Hospital and dba Vancouver Hospital and dba The B.C. Ear Bank, and the University of British Columbia dba The B.C. Ear Bank, and John Doe, Defendants

(130 paras.)

**Case Summary**

**Civil procedure — Parties — Adding or substituting — After expiry of limitation period — Class or representative actions — Representative plaintiff — The plaintiff in this class proceeding successfully moved to add two proposed plaintiffs, after it was discovered she had no personal claim against the defendants — The claims were exactly the same as the plaintiff's claims, and related to the same allegedly negligent acts; the addition of the proposed plaintiffs did not change the scope of the claims faced by the defendants.**

**Health law — Hospitals and health care facilities — Liability -- *negligence* — The plaintiff in this class proceeding seeking damages against the defendants for allegedly having maintained incomplete and insufficient records of screening donors or tissues donated, successfully moved to add two proposed plaintiffs after it was discovered that she had no personal claim against the defendants.**

**Limitation of actions — Time — When time begins to run — The plaintiff in this class proceeding successfully moved to add two proposed plaintiffs after it was discovered that she had no personal claim against the defendants — The court could not conclusively determine if the limitation period had expired based on the evidence before it, but if it had not expired, it would have been just and convenient to simply add the plaintiffs.**

**Limitation of actions — Jurisdiction — British Columbia — The plaintiff in this class proceeding successfully moved to add two proposed plaintiffs after it was discovered that she had no personal claim against the defendants — The court could not conclusively determine if the limitation period had expired based on the evidence before it, but if it had not expired, it would have been just and convenient to simply add the plaintiffs.**

**Professional responsibility — Professional duties — Duties of care and *Negligence* — The plaintiff in this class proceeding seeking damages against the defendants for allegedly having maintained incomplete and insufficient records of screening donors or tissues donated, successfully moved to add two proposed plaintiffs after it was discovered that she had no personal claim against the defendants.**

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| In the underlying action, the plaintiff, on her own behalf and on behalf of all those who had received transplants supplied by the B.C. Ear Bank, sued for damages for ***negligence*** and nervous shock, claiming the Bank had maintained incomplete and insufficient records of whether the donors or tissues had been screened for various infectious diseases -- Subsequent to commencing the action, however, it was discovered that the plaintiff had actually received a transplant of her own tissue, which meant the defendants owed her no duty of care -- The plaintiff presently moved to add two further plaintiffs, or alternatively she sought to continue as representative plaintiff -- In the second motion, the defendants Providence and Coastal sought to have the claims against them summarily dismissed -- HELD: The plaintiff's motion seeking to add the proposed new plaintiffs was granted, while the original plaintiff was, upon consent, to be removed as a party to the action -- The ultimate six-year limitation period had not expired against the hospital defendants as the plaintiffs had only suffered nervous shock, and not physical injury -- While there were no positive reasons to explain the delay in adding the proposed plaintiffs except possibly unreasonable reliance on the existence of the plaintiff's action, there was likewise no evidence of voluntary dilatory behaviour or a deliberate and informed choice not to sue by the proposed plaintiffs -- The court could not conclusively determine if the limitation period had expired based on the evidence before it -- If it had not expired, it would have been just and convenient to simply add the plaintiffs, who alternatively could have simply just begun their own action -- There was no evidence of prejudice to the defendants from the delay -- The presumption of prejudice was weakened by the fact that the plaintiff's action was commenced as a class proceeding -- Finally, the claims were exactly the same as the plaintiff's claims, and related to the same allegedly negligent acts; the addition of the proposed plaintiffs did not change the scope of the claims faced by the defendants -- Overall, it would be just and convenient to add the proposed plaintiffs. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 15, Rule 18A, Rule 24(1)

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=), s. 2(4), s. 38(1), s. 39, s. 40

Limitation Act, R.S.B.C. 1996, c. 266, s. 3, s. 4, s. 6, s. 8

**Counsel**

Counsel for Plaintiff: D.A. Klein.

Counsel for Defendant Vancouver Coastal Health Authority: R. Harper.

Counsel for Defendant Providence Health Care Society: C.L Woods, Q.C.

Counsel for Defendant University of British Columbia: R.B. Kennedy.

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| **RUSSELL J.** |

**INTRODUCTION**

**1**  These are the reasons for decisions in two separate motions. The underlying action is brought by the plaintiff, Margaret Birrell, on her own behalf and on behalf of all other persons who received transplants with tissue and/or bone supplied by the British Columbia Ear Bank (the "Ear Bank"). It involves claims in ***negligence*** arising from the operation of the Ear Bank by the defendants. In late 2002, Health Canada conducted a review of the Ear Bank's operations and found that the Ear Bank was maintaining incomplete and insufficient records relating to whether donors of tissue had been screened for various infectious diseases.

**2**  As a result of this review, Health Canada issued a public health warning. Tissue recipients were advised by letter from their treating physicians to undergo testing for certain diseases including HIV, Hepatitis B and Hepatitis C as a precautionary measure. The letter also advised that the risk of infection was extremely low. It is common ground that no person has yet come forward with infection as a result of receipt of tissue from the Ear Bank. As a result of these events, the plaintiff claims damages for loss of life expectancy, loss of income, cost of care, medical expenses and nervous shock.

**3**  However, after the plaintiff initiated this action, it was discovered that she had not actually received tissue from the Ear Bank. She had, in fact, received an autologous transplant, which means a transplant of her own tissue. Therefore, the defendants argue, and the plaintiff does not disagree, that she has no cause of action against the defendants because no duty of care was ever owed by the defendants to the plaintiff. However, the plaintiff argues that, pursuant to sub-section 2(4) of the ***Class Proceedings Act***, *R.S.B.C. 1996, c. 50*, she can still be a representative plaintiff in this action even if she is not a class member.

**4**  The first motion is brought by the plaintiff to add further plaintiffs, Thomas Little and Robert Corfield (the "Proposed Plaintiffs") who actually received transplants of tissue from the Ear Bank. The defendants Providence Health Care Society ("Providence") and the Vancouver Coastal Health Authority ("Coastal") (together the "Hospital Defendants") oppose this motion and the University of British Columbia ("UBC") has taken no position.

**5**  The second motion is an application under Rule 18A of the ***Rules of Court*** by Providence and Coastal to have the plaintiff's claims against them dismissed. UBC has likewise taken no position with respect to this application.

**6**  If the plaintiff's motion to add plaintiffs is allowed, then the plaintiff Margaret Birrell consents to the action against her being withdrawn. Otherwise, she seeks to continue as the representative plaintiff to ensure the continuation of this class proceeding. These two motions are highly interrelated and, in particular, the issue of whether the limitation period has expired and against what class of plaintiffs plays a significant role in both applications. In earlier reasons at, [*[2006] B.C.J. No. 3162*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X34N-00000-00&context=), [*2006 BCSC 1814*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X34N-00000-00&context=), I gave reasons for deciding to hear these two applications together, prior to the certification hearing.

**FACTS**

**7**  The plaintiff, Margaret Birrell, received an ear tissue transplant on July 6, 1994. Although she alleges in her statement of claim that she received an ear tissue transplant with tissues and bones supplied by the Ear Bank, evidence was subsequently pointed to by the defendants that showed that she had, in fact, received a transplant of her own tissues. Ms. Birrell does not dispute that the evidence clearly establishes that her own tissue was used in the surgery to repair her ear drum and, therefore, that she never received tissue from the Ear Bank.

**8**  The Ear Bank commenced operations in 1974 and collected bone and tissue which were used in transplant operations for patients suffering from hearing loss. Tissue and bone were sent to various hospitals across North America, for both transplant and teaching purposes. In late 2002, Health Canada initiated a review of the procedures followed by the Ear Bank and on February 19, 2003, Providence, in cooperation with Health Canada, issued a public health advisory regarding the operations of the Ear Bank. Tissues that had been sent to various institutions were recalled and patients who had received transplanted tissues were advised to undergo testing for various diseases as a precautionary measure. Following the public health advisory, there was significant media coverage of the issue in late February of 2003.

**9**  In January of 2005, Ms. Birrell received a letter from her surgeon informing her of documentation problems at the Ear Bank, as identified by Health Canada, and relayed to her the advisory from Health Canada that she should undergo testing for various infectious diseases as a precautionary measure. The wording of that letter is as follows:

I am writing to you following a recent notification from Health Canada regarding the use of bone and tissue samples from the British Columbia Ear Bank. A review of my records reveals that tissue from the BC Ear Bank was used during your ear surgery.

The BC Ear Bank has been in existence since 1974, and served as a combination teaching lab and transplant tissue bank under the medical direction of the University of British Columbia. The BC Ear Bank collected, processed, sterilized and stored bone and tissue. The Bank then sent these materials to hospitals across the country and the United States, who requested them for both teaching purposes and for use on transplant operations in patients suffering from hearing loss. Records from 1985 to 2002 show that 6,016 individual specimens of tissue and bone were distributed by the British Columbia Ear Bank for such purposes.

Due to incomplete documentation, the BC Ear Bank was not able to confirm that all proper procedures were followed in the donor screening process in each case, and some patients may have been exposed to a risk of disease transmission. Consequently, Health Canada suggests that individuals who have undergone surgery involving tissue from the BC Ear Bank, as a precautionary measure, may wish to seek testing for HIV, Syphilis, Hepatitis B, and C and Human T-lymphotropic virus types I and II.

I stress that since the inception of the BC Ear Bank in 1975, there have been no reports of Disease transmission due to transplantation of the bone and tissue samples. Health Canada has assessed that recipients of tissues processed and distributed by the British Columbia Ear Bank are at an extremely low risk for disease transmission. I stress again that this advisory is a precautionary one, and that there have been no reports of disease transmission due to the transplantation of these tissues.

My primary wish is not to cause you undue concern. Based on the information provided by various infectious diseases experts and Health Canada, I am of the opinion that the possibility of disease transmission through the tissue used in your surgery is extremely low. Once you have had time to consider this information, I would be pleased to answer any questions and concerns that you may have, and to arrange the appropriate testing.

The possibility of disease transmission in this situation is extremely remote and I am satisfied that you and your family can be assured that the probability of developing any disease as a result of the transplant is very unlikely. Please see your family doctor for further advice if needed.

**10**  Similar letters were sent by treating physicians to other patients who had tissue supplied by the B.C. Ear Bank. The letters appear to have been sent across a fairly large time span and in a somewhat sporadic manner, with one letter being sent as late as February 2007.

**11**  The proposed new plaintiffs, Thomas Little and Robert Corfield (the "Proposed Plaintiffs"), received ear tissue transplants with tissue supplied by the Ear Bank on April 19, 1996 and in 1991, respectively. Mr. Little received a letter in March of 2005 informing him of the documentation problems and advising him to undergo testing for various communicable diseases. Mr. Corfield received a similar letter in January of 2006.

**12**  The letter sent to Mr. Corfield quotes in part the statement released by Health Canada:

Health Canada therefore recommends that all recipients of dura mater, pericardium and ear bone, sourced from the BC Ear Bank, presently located at St. Paul's Hospital, be tested, as a precautionary measure, as there may be a low risk of contracting one or more of the following: HIV 1 and 11; Hepatitis B, Hepatitis C; there may also be a theoretical risk of contracting HTLV 1 and 11 and Syphilis. Furthermore, as there is insufficient information available currently to determine whether the donors of these tissues were assessed for the risk of Creutzfeldt-Jacob Disease (CJD) (i.e. family history, travel to countries at risk of CJD), there may be an additional theoretical risk in this respect.

**13**  There is no evidence that either the plaintiff or the Proposed Plaintiffs, or anyone, has actually been infected as a result of tissues received from the Ear Bank. Additionally, an affidavit from an employee of the plaintiff's counsel states that there exist two potential plaintiffs who would have been minors at the time of their surgery. One was born September 4, 1981; had surgery on May 27, 1994 and reached the age of majority on September 4, 2000. In February 2007, he received a letter informing him that tissue from the Ear Bank was used during his surgery.

**14**  A second individual was born on January 20, 1981, had surgery on September 26, 1995 and reached the age of majority on January 20, 2000. On April 19, 2006, he received a letter from his surgeon informing him that tissue from the Ear Bank was used during his surgery. However, these individuals are not seeking to be added as plaintiffs in this proceeding.

**15**  Ms. Birrell filed her writ on February 18, 2005. It was served on the defendants in January of 2006. The application to add the Proposed Plaintiffs pursuant to Rule 15(5) was served on the defendants on August 16, 2006. There was correspondence between the parties in June and July of 2006 relating to the possible lack of a valid cause of action on the part of the plaintiff, and the plaintiff's intention to attempt to add further plaintiffs or have Ms. Birrell continue as the representative plaintiff pursuant to sub-section 2(4) of the ***Class Proceedings Act***, regardless of the validity of her cause of action.

**RELEVANT LEGISLATION**

***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=)

**Limitation periods**

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

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

**Counterclaim or other claim or proceeding**

4(1) If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to ...

1. adding or substituting a new party as plaintiff or defendant,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

**Running of time postponed**

6(4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that

1. an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
2. the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
3. For the purpose of subsection (4),
4. "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
5. "facts" include
6. the existence of a duty owed to the plaintiff by the defendant, and
7. that a breach of a duty caused injury, damage or loss to the plaintiff,

**Ultimate limitation**

8(1) Subject to section 3 (4) and subsection (2) of this section but despite a confirmation made under section 5, a postponement or suspension of the running of time under section 6 or 11(2) or a postponement or suspension of the running of time under section 7 in respect of a person who is not a minor, no action to which this Act applies may be brought

1. against a hospital, as defined in section 1 of the *Hospital Act*, or against a hospital employee acting in the course of employment as a hospital employee, based on ***negligence***, after the expiration of 6 years from the date on which the right to do so arose

...

1. in any other case, after the expiration of 30 years from the date on which the right to do so arose.
2. Subject to section 7(6), the running of time with respect to the limitation periods set by subsection (1) for an action referred to in subsection (1) is postponed and time does not begin to run against a plaintiff until the plaintiff reaches the age of majority.

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

1 In this Act: ...

"class proceeding" means a proceeding certified as a class proceeding under Part 2;

**Plaintiff's class proceeding**

2(1) One 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. The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

**Limitation period for a cause of action not included in a class proceeding**

38.1(1) If a person has a cause of action, a limitation period applicable to that cause of action is suspended for the period referred to in subsection (2) in the event that

1. an application is made for an order certifying a proceeding as a class proceeding,
2. when the proceeding referred to in paragraph (a) is commenced, it is reasonable to assume that, if the proceeding were to be certified,
3. the cause of action would be asserted in the proceeding, and
4. the person would be included as a member of the class on whose behalf the cause of action would be asserted, and
5. the court makes an order that
6. the application referred to in subsection (1) (a) be dismissed,
7. the cause of action must not be asserted in the proceeding, or
8. the person is not a member of the class for which the proceeding may be certified.
9. In the circumstances set out in subsection (1), the limitation period applicable to a cause of action referred to in that subsection is suspended for the period beginning on the commencement of the proceeding and ending on the date on which
10. the time for appeal of an order referred to in subsection (1)(c) expires without an appeal being commenced, or
11. any appeal of an order referred to in subsection (1)(c) is finally disposed of.

**Limitation periods**

39(1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a proceeding that is certified as a class proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when any of the following occurs:

1. the member opts out of the class proceeding;
2. an amendment is made to the certification order that has the effect of excluding the member from the class proceeding;
3. a decertification order is made under section 10;
4. the class proceeding is dismissed without an adjudication on the merits;
5. the class proceeding is discontinued or abandoned with the approval of the court;
6. the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.
7. If there is a right of appeal in respect of an event described in subsection (1)(a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

**Rules of Court**

40 The Rules of Court apply to class proceedings to the extent that those rules are not in conflict with this Act.

***Rules of Court***, *B.C. Reg. 221/90*

**Removing, adding or substituting party**

15(5)(a) At any stage of a proceeding, the court on application by any person may ...

1. order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and
2. order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
3. with any relief claimed in the proceeding, or
4. with the subject matter of the proceeding,

which in the opinion of the court it would be just and convenient to determine as between the person and that party.

**ANALYSIS -- THE LIMITATION ISSUE**

**16**  The central debate between the parties on both applications is whether the claims of the plaintiff and the Proposed Plaintiffs are statute-barred by reason of the ***Limitation Act***. In particular, there is considerable debate about whether the limitation period applicable to claims for nervous shock began to run at the time of the original negligent act, or at the time that each plaintiff received notice that proper documentation procedures had not been followed.

**17**  There is also some debate as to whether the limitation period should run from the time of receipt of the letter from the treating physician, or at the time of the original Health Canada notice. Both parties appeared to be willing to proceed on the assumption that time began to run from the date of receipt of the letter. The plaintiff seemed to adopt this position to suggest that the Proposed Plaintiffs should be added as the limitation period had not expired, while the Hospital Defendants were content to follow this assumption because it suggested less prejudice to the Proposed Plaintiffs if the plaintiff's claim was dismissed.

**18**  However, in suggesting prejudice to the class members due to the loss of the benefit of the date of filing Ms. Birrell's writ, one day short of the expiration of two years after the public health notice, the plaintiff seemed to recognize that there was a risk that the two year limitation period for damages for personal injury could have begun to run as at the date of the public health notice. Regardless of the submissions of counsel, neither party evinced any intention to be bound by any assumption as to when the limitation period may have started to run. I consider that the matter remains a live issue between the parties.

**19**  The defendants contend that receipt of the notice informing the plaintiff and Potential Plaintiffs of the possible risk of infection is a discoverability issue. As the ultimate limitation periods are not subject to postponement by reason of a lack of discoverability, the Hospital Defendants submit that the ultimate limitation period of six years for an action in ***negligence*** to be brought against a hospital pursuant to paragraph 8(1)(a) of the ***Limitation Act*** applies to bar the claims of the Proposed Plaintiffs.

**20**  The plaintiff agrees with the law regarding limitation periods as set out by the defendants, but disagrees as to how it applies to the facts of this case. The plaintiff submits that the cause of action in tort does not arise until damage occurs. In the case of damages for nervous shock, the damages are suffered when the shock is received - at the time of receiving the warning letter.

**21**  The plaintiff further submits that there are individuals who received transplants of tissue as minors, and against whom the running of the ultimate limitation period would be suspended until they reached the age of majority; and that other individuals in other jurisdictions with longer ultimate limitation periods may also have received tissue and, therefore, would have claims that are not statute-barred.

**22**  The plaintiff acknowledges that under her interpretation of when the limitation period begins to run, those individuals who suffered physical harm as well as nervous shock would be barred by the expiration of the ultimate limitation period from pursuing a claim, while those who suffered only nervous shock would be able to pursue their claims.

**Relevant Law**

Scheme and Object of the ***Limitation Act***

**23**  The purpose of limitation statutes, including the significance of the ultimate limitation period, was set out by McLachlin J. (as she then was) in ***Novak v. Bond***, [*[1999] 1 S.C.R. 808*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M428-00000-00&context=), [*63 B.C.L.R. (3d) 41*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M428-00000-00&context=). After stating the traditional rationales of limitation statutes, which typically favoured defendants, and setting out the evolution of limitations statutes to ensure fair consideration of the plaintiff's interests, she stated at paras. 66-70:

Contemporary limitations statutes thus seek to balance conventional rationales oriented towards the protection of the defendant - certainty, evidentiary, and diligence - with the need to treat plaintiffs fairly, having regard to their specific circumstances. As Major J. put it in *Murphy, supra*, "[a] limitations scheme must attempt to balance the interests of both sides" (p. 1080). See also *Peixeiro, supra*, at para. 39, per Major J.

The result of this legislative and interpretive evolution is that most limitations statutes may now be said to possess four characteristics. They are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff's own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. To the extent they are reflected in the particular words and structure of the statute in question, the best interpretation of a limitations statute seeks to give effect to each of these characteristics.

The general scheme of the British Columbia *Limitation Act* reflects this evolution. Section 3 provides concrete limitation periods for most actions. Depending on the cause of action, an action must be commenced within two, six, or ten years after the date on which the right to bring it arose, i.e., the date on which all the elements of the cause of action came into existence: see s. 3(2), (3), (5) and (6); ***Bera v. Marr*** [*(1986), 1 B.C.L.R. (2d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-K0BB-S057-00000-00&context=) (C.A.).

At the same time, the Act contains provisions aimed at treating plaintiffs fairly. For example, s. 6(3) to (5) reflect the common law view that it is unfair to the plaintiff if the running of time commences before the existence of the cause of action is reasonably discoverable ... Section 7 of the Act allows the running of time to be postponed if the plaintiff is under a legal disability, a provision that is also directed to ensuring fairness to plaintiffs.

Certainty and diligence, however, remain important goals. The running of time cannot be postponed indefinitely. Therefore, s. 8 of the Act sets forth a series of ultimate limitation periods, the length of which depends on the particular type of action in issue. Generally, regardless of whether the running of time has been postponed or the cause of action confirmed by the defendant, no action can be brought after the expiration of -- depending on the classification of the action -- six or thirty years after the date on which the right to bring the action arose. Where the plaintiff is a minor, the running of time for the purposes of the ultimate limitation period is postponed until he or she reaches the age of majority: see s. 8(2). Only upon the expiration of the relevant ultimate limitation period can the potential defendant truly be assured that no plaintiff may bring an action against him or her. At that time, any cause of action that was once available to the plaintiff is extinguished: see s. 9(1) ... [Emphasis in original.]

**24**  Thus, the need to provide fairness to plaintiffs by postponing the beginning of the limitation period, until the plaintiff ought reasonably to be able to commence an action, is counterbalanced by a desire to provide fairness and certainty to defendants by imposing an absolute limitation period, beyond which defendants can be sure they will be free of claims.

**25**  In British Columbia, expiration of the limitation period extinguishes the cause of action. In the case of hospitals and medical practitioners, the Legislature has concluded that an ultimate limitation period of six years, from the date on which the right to bring an action in ***negligence*** arose, is the appropriate balance between the rights of plaintiffs and defendants (see paragraphs 8(1)(a) and (b)). This period is significantly shorter than the 30 year ultimate limitation period provided against all other defendants in paragraph 8(1)(c), indicating that the Legislature places significantly greater value on finality and certainty for hospitals.

A Single Cause of Action Arises for Damages Arising from a Single Negligent Act

**26**  One of the difficulties in the present case is that the damages suffered by reason of nervous shock would have occurred much later than any physical injury. The physical injury of infection would have occurred at the time of the original surgery, while damages for nervous shock would not occur until a patient received notification of a risk of infection.

**27**  However, it is clear that only one cause of action can arise out of a single negligent act, and that the suffering of different or more serious damage at a later time cannot form the basis of a new cause of action. In this regard, the decision of the Supreme Court of Canada in ***Cahoon v. Franks***, [*[1967] S.C.R. 455*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22NG-00000-00&context=), [*63 D.L.R. (2d) 274*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22NG-00000-00&context=), makes clear that a single tortious act gives rise to only a single cause of action, even if different types of damage are suffered.

**28**  In that case, the plaintiff was permitted to amend his statement of claim, which initially claimed only for damage to property, to add a claim for damages for personal injury after the limitation period had passed. It was held that to do so did not set up a new cause of action and that damages, resulting from a single tort, create only a single cause of action and must be assessed in the same proceeding.

**29**  In the realm of the law of personal injuries, this decision has been interpreted to mean that a plaintiff cannot further recover for increased damages where his or her injuries subsequently turn out to be much worse than thought at the time of trial, provided that the injury was sufficiently serious to justify bringing an action from the beginning: see ***Craig v. Insurance Corporation of British Columbia*** [*(2003), 46 M.V.R. (4th) 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60WP-00000-00&context=), [*2003 BCSC 1856*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60WP-00000-00&context=) at paras. 26-28, aff'd [*2005 BCCA 275*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0YM-00000-00&context=).

**30**  Expiration of the limitation period will act to bar all types of damage claims in ***negligence*** arising as a result of one original breach of duty: see ***410727 B.C. Ltd. v. Dayhu Investments Ltd.*** [*(2004), 30 B.C.L.R. (4th) 157*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X03T-00000-00&context=), [*2004 BCCA 379*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X03T-00000-00&context=) (holding that the expiration of the ultimate limitation applies to bar causes of action, both for economic loss and for the subsequent destruction of a building that was negligently constructed and inspected, and that the limitation period began to run at the time that the building first suffered damage, even though this damage remained undetected).

**31**  In the case at bar, although physical injury and nervous shock may be suffered at significantly different times, only one action may be brought to claim damages in respect of both types of injuries. Once the limitation period has expired, no action may be brought, even if there is subsequent damage of a different type arising from the same negligent conduct. The disagreement between the parties centres on when the limitation period began to run in this case for those persons who did not become infected as a result of the original transplant - at the time of the original transplant, or at the time nervous shock was allegedly suffered.

The Ultimate Limitation Period

**32**  The six-year ultimate limitation period in place for doctors and hospitals has been strictly construed by the courts, and there is no principle of discoverability applicable to this ultimate limitation period that would extend time, even if the plaintiff remains unaware she has a cause of action: see ***Bera v. Marr*** [*(1986), 1 B.C.L.R. (2d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-K0BB-S057-00000-00&context=) at 27, [*27 D.L.R. (4th) 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-K0BB-S057-00000-00&context=) (C.A.) [cited to B.C.L.R]; ***Letvad v. Fenwick*** [*(2000), 82 B.C.L.R. (3d) 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2DF-00000-00&context=), [*2000 BCCA 630*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2DF-00000-00&context=) at para. 48; ***Wittmann v. Emmott*** [*(1991), 53 B.C.L.R. (2d) 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F2P-NNN1-JCRC-B0CN-00000-00&context=) at 237, [*77 D.L.R. (4th) 77*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X26P-00000-00&context=) (C.A.), leave to appeal to S.C.C. refused, [*[1991] 3 S.C.R. xii*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SB1-JPP5-24RJ-00000-00&context=); ***Clover v. Hurley*** [*(1993), 23 B.C.A.C. 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1MX-00000-00&context=) at para. 2, leave to appeal to S.C.C. refused, [*[1993] S.C.C.A. No. 322*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-FJTD-G03R-00000-00&context=), [*[1993] 4 S.C.R. v*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-FJTD-G04C-00000-00&context=).

**33**  The ultimate limitation period begins to run once all elements of a cause of action are present, even if the plaintiff remains unaware of their existence. For example, ***Bera v. Marr***, *supra,* involved a claim for medical malpractice where the writ was filed approximately 7 1/2 years after the performance of the allegedly negligent surgical procedure. The plaintiff had not sought medical advice in relation to his injury until approximately seven years after the date of the surgery, and the parties agreed that this was the date on which he became aware of the relevant facts. An appeal was brought by way of stated case to the Court of Appeal to determine the limitation period applicable to the plaintiff's action. In giving reasons for a majority of the Court, Esson J.A. stated at 14:

The Limitations Act, as appears from ss. 3(2) and 8(1), defines the beginning of the period of limitation as being the date on which the right to bring action arose. That must mean the date upon which the cause of action was complete; the date upon which all of the elements of the cause of action had come into existence, whether or not the person entitled to the cause of action was aware of all the facts upon which its existence depended. [Emphasis added.]

**34**  Esson J.A. based this analysis of when the limitation period commences to run on an analysis of previous case law, as exemplified in the English decision of ***Cartledge v. E. Jopling & Sons Ltd.***, [1963] A.C. 758, [1963] 1 All E.R. 341. In ***Cartledge***, the House of Lords held that the cause of action accrued in tort at the time that the plaintiff first suffered significant damage, even if that damage remained undetected and undetectable for a significant period of time.

**35**  Esson J.A. noted that the addition of section 6 to the ***Limitation Act*** avoided the injustice in ***Cartledge*** by postponing the commencement of the limitation period until the plaintiff had knowledge of the facts, giving rise to a cause of action (at 15). In view of the balance created by sections 3, 6 and 8 of the ***Limitation Act***, Esson J.A. refused to construe the date on which the right to bring the action arose in a manner different from the previous jurisprudence-thus, the ultimate limitation period began to run on the date on which the damage occurred (which was the date of the surgery in that case), not on the date the plaintiff had knowledge of the damages (at 27-28).

**36**  The distinction between the date on which the right to bring the action arose and the date on which the plaintiff has knowledge of the damages is well-illustrated by the often-cited English decisions in ***Sparham-Souter v. Town & Country Dev. (Essex) Ltd.***, [1976] Q.B. 858, [1976] 2 All E.R. 65 (C.A.) and ***Pirelli Gen. Cable Works Ltd. v. Oscar Faber & Partners***, [1983] 2 A.C. 1, [1983] 1 All E.R. 65 (H.L.).

**37**  In ***Sparham-Souter***, the English Court of Appeal held that a cause of action in ***negligence*** accrues to the purchaser of a building that is negligently constructed at the time that the actual plaintiff suffers damage, and not at the time that damage, such as unnoticeable cracks in the foundations, first appears. The rationale was, in part, that the plaintiff could have no cause of action, at least until it was the owner of the building at issue.

**38**  However, this decision was overruled by the House of Lords in ***Pirelli***. In that case, it was held that a cause of action accrues in ***negligence*** at the time that damage is first suffered by the building, even if such damage cannot be detected. Thus, the cause of action accrues at the same time for all future owners of the building, regardless of the fact that the owner at the time that the damage becomes manifest would not have been capable of bringing an action at the time damage was first suffered by the building. This decision emphasizes that it is the time at which damage is suffered that is critical to a determination of when the limitation period began to run.

**39**  In this case, the difficulty is that many people, including the plaintiff, may suffer no damage until the time of the nervous shock and, consequently, have no cause of action in ***negligence*** until well past the expiration of six years from the date of the original negligent act. The cases in which damages have been awarded for nervous shock have tended to focus on those who witness the aftermath of a negligent act and suffer a recognized psychiatric illness as a direct consequence of what they observed (see *e.g.* Allen M. Linden, *Canadian Tort Law*, 8th ed. (Markham: Butterworths, 2006) at 425-427).

**40**  The damages from nervous shock in these cases arise essentially at the same time as the negligent act and, therefore, the limitation period would start to run at that time. However, that is not the scenario posed in the case at bar, where the nervous shock arose many years after the alleged negligent act.

**41**  The plaintiff has cited several cases in which class actions, including claims for nervous shock, have been certified: see *e.g.* ***Fakhri v. Wild Oats Markets Canada, Inc. (c.o.b. as Capers Community Markets)*** [*(2004), 34 B.C.L.R. (4th) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G070-00000-00&context=), [*2004 BCCA 549*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G070-00000-00&context=); ***Anderson v. Wilson*** [*(1999), 44 O.R. (3d) 673*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4GP-00000-00&context=), [*175 D.L.R. (4th) 409*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4GP-00000-00&context=) (C.A.), leave to appeal to S.C.C. denied, [*[1999] S.C.C.A. No. 476*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-F8D9-M2HK-00000-00&context=) (QL); ***Rose v. Pettle*** [*(2004), 23 C.C.L.T. (3d) 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDM1-JJSF-21HP-00000-00&context=), [*43 C.P.C. (5th) 183*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDM1-JJSF-21HP-00000-00&context=) (Ont. S.C.J.); ***Rideout v. Health Labrador Corp.*** [*(2005), 12 C.P.C. (6th) 91*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8X1-FBV7-B4KV-00000-00&context=), [*2005 NLTD 116*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8X1-FBV7-B4KV-00000-00&context=); ***Healey v. Lakeridge Health Corp.***, [*[2006] O.J. No. 4277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDV1-FCSB-S2SB-00000-00&context=) (S.C.J.) (QL).

**42**  However, the issue of expiration of the limitation period does not appear to have been raised in these cases, nor was the issue of how to deal with the prospect of liability for an indeterminate period of time for nervous shock, particularly in the context of hospitals and medical doctors.

**43**  To complicate matters further in this case, the Proposed Plaintiffs received notice of the negligent conduct more than six years after the original negligent act. This means that if they were actually infected at the time of their transplant, they have no cause of action against the Hospital Defendants by virtue of section 8 of the ***Limitation Act*** - they suffered damage at the time of the original surgery when they received the infected tissue. The limitation period began to run at the date of the original negligent conduct and their actions are statute barred.

**44**  However, if they were not infected, as counsel advise, they would be able to assert a cause of action against the Hospital Defendants, as they would have suffered no damages until receiving notice of the risk of infection, causing nervous shock. Ironically, this means that a person who suffers transient shock on receipt of the letter may assert a cause of action, while a person who receives the same notice and suffers the same shock, only to go on to find out that they have a permanent, infectious and life-threatening illness, which will drastically affect them, has no claim for damages. The plaintiff acknowledges this is an absurdity that flows from this interpretation of the ***Limitation Act***.

**45**  While the absurdity caused by the commencement of the running of the ultimate limitation period from the date damage is suffered is acutely demonstrated by the present case, the problem has not escaped prior notice. The British Columbia Law Institute in ***The Ultimate Limitation Period: Updating the Limitation Act*** (Vancouver: BCLI Report No. 19, July 2002) at 16-18 has noted that sub-section 8(1) provides that the ultimate limitation period starts to run from the date the cause of action arose which, in the case of ***negligence***, means that time runs from when the damage occurs. The BCLI notes several problems with this position and recommends amending section 8 of the ***Limitation Act***, so that the ultimate limitation period commences from the date an act or omission that constitutes a breach of duty occurs, regardless of the basis of the cause of action.

**46**  However, the Legislature has not acted upon these recommendations. The wording of section 8 speaks in terms of *the date on which the right to bring an action arose*. Despite the strong arguments of the Hospital Defendants, to the effect that the nervous shock head of damages relates to the issue of discoverability and, therefore, that the ultimate limitation period of six years has expired for both the plaintiff and the Proposed Plaintiffs, I cannot agree that the plain and clear language of the section allows such an interpretation.

**47**  In an action for ***negligence***, there is no cause of action and, consequently, no right to bring an action until after the plaintiff suffers damages. In the case of a plaintiff who suffers no physical injuries, there is no right to sue until harm causing nervous shock creates damages. If the nervous shock never occurs, the plaintiff has not suffered any damages and, consequently, never has a right to bring an action.

**48**  While I find this interpretation to result in an absurdity that is irreconcilable with the scheme and object of the ***Limitation Act***, not to mention unjust for those who have actually suffered physical harm, I cannot see that the right to bring an action for uninfected persons arose at any time before the nervous shock was suffered. Consequently, the ultimate six-year limitation period has not expired against the Hospital Defendants if, as counsel agree, the plaintiff and Proposed Plaintiffs suffered not physical harm, but only nervous shock, as a result of the alleged ***negligence*** on the part of the defendants.

The Two Year Limitation Period for Personal Injury

**49**  The issue of whether the two-year limitation period for damages for personal injury, provided by paragraph 3(2)(a) of the ***Limitation Act***, has expired for the Proposed Plaintiffs cannot be determined on the evidence before the Court.

**50**  If either of the Proposed Plaintiffs suffered physical injury, as explained above, the six-year ultimate limitation period would have expired several years before Ms. Birrell filed her writ. However, if the Proposed Plaintiffs suffered only nervous shock, then a determination of when the limitation period began to run requires an individual determination of when each of them suffered nervous shock. If neither of them learned of the risk of infection until after receiving the letter, then the plaintiff's application to add the Proposed Plaintiffs would have been brought within the two-year limitation period, since the Proposed Plaintiffs had allegedly suffered nervous shock due to the receipt of their letters.

**51**  However, the Hospital Defendants submit that there was widespread public notice of the health advisory in February of 2003 and that, therefore, every resident of Canada knew, or could have known, of the potential cause of action against the Ear Bank at that time. However, it is not clear if either of the Proposed Plaintiffs, or any putative class member, suffered nervous shock at the time of the public notice, or at the time of receipt of the individual letters.

**52**  Consequently, I cannot determine whether the limitation period had expired, as against the Proposed Plaintiffs, at the time that the application to add them was brought. However, given my conclusions on the issue of joinder, a determination of whether the limitation period had expired is not necessary in order to decide the issues on the present application.

**ANALYSIS - JOINDER OF PARTIES PURSUANT TO RULE 15(5)(a)**

**Adding Plaintiffs to a Proposed Class Action**

**53**  The issue of adding plaintiffs to a proposed class action does not appear to have been discussed in previous B.C. cases. Ballance J. dealt with a motion to add defendants to a proposed class action pursuant to Rule 15(5)(a)(iii) in ***MacKinnon v. Vancouver Savings Credit Union*** [*(2004), 24 B.C.L.R. (4th) 340*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S39Y-00000-00&context=), [*2004 BCSC 125*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S39Y-00000-00&context=) ("***MacKinnon v. VanCity***").

**54**  That case involved a proposed class action against VanCity Credit Union for charging criminal rates of interest on overdraft loans. In that case, the plaintiff sought to add seven further credit unions as defendants, although neither he nor any member of the proposed VanCity class had a cause of action against those credit unions.

**55**  The plaintiff conceded that the only basis upon which joinder of the additional credit unions could be justified was on the basis of the Court of Appeal's holding in ***Campbell v. Flexwatt*** [*(1997), 44 B.C.L.R. (3d) 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=), [*15 C.P.C. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=) (C.A.), leave to appeal to S.C.C. refused, [*[1998] S.C.C.A. No. 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-FC1F-M366-00000-00&context=) (QL), that a representative plaintiff in a class proceeding need not have an individual cause of action against each named defendant - it is sufficient if members of the class can assert such a claim.

**56**  Ballance J. denied the motion to add further defendants as there was no person in the VanCity class who had a cause of action against any of the proposed defendants. Further, the subject matter of the claims involved specific contracts between VanCity and the members of the VanCity class, which would be different from contracts entered into with other financial institutions. Therefore, Ballance J. concluded there was not a sufficient degree of connection to justify adding further defendants.

**57**  The Court of Appeal in ***MacKinnon v. National Money Mart Co.*** [*(2004), 33 B.C.L.R. (4th) 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2X8-00000-00&context=), [*2004 BCCA 472*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2X8-00000-00&context=) ("***MacKinnon v. Money Mart***"), specifically noted at para. 58 that its reasons did not deal with Ballance J.'s reasons in ***MacKinnon v. VanCity***.

**58**  The matter of adding plaintiffs to a proposed class action, where it subsequently turns out that the named and proposed representative plaintiff has no legitimate cause of action, was dealt with in Ontario in the case of ***Segnitz v. Royal & SunAlliance Insurance Co. of Canada*** [*(2003), 66 O.R. (3d) 238*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGY5-M3M2-00000-00&context=), [*40 C.P.C. (5th) 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGY5-M3M2-00000-00&context=) (S.C.J.), which presents a similar scenario to the case at bar. That case involved a proposed class action against a group of insurers who paid the value of salvage for vehicles after deducting the deductible amount. The plaintiffs claimed that if the insurer exercised the option of taking possession of a vehicle for salvage, it should be required to pay the insured the entire value of the vehicle without subtracting the deductible.

**59**  The representative plaintiff had no cause of action, as he had been paid the entire value of the salvaged vehicle, and the insurer had not deducted the deductible. The defendants, therefore, brought a motion for summary judgment dismissing the action against them, while the plaintiff brought a motion to add several plaintiffs who had been paid the value of salvaged vehicles, minus the deductible.

**60**  Haines J. held that the proposed representative plaintiff had no claim against the defendant. However, he went on to consider the plaintiff's application to add further plaintiffs, who could assert a valid cause of action, and stated at paras. 17 and 19:

However, I do not agree with the defendant's contention that a finding that Mr. Giuliano has no cause of action ends the matter. Indeed, the reason for seeking the amendment pursuant to r. 5.04(2) is to sustain the action. Although the motions to add or substitute plaintiffs in *Mazzuca* and the other cases referred to therein were apparently not heard in conjunction with motions for summary judgment, there is little doubt that those actions would have perished had the amendments been refused. The issue here is whether this action, commenced in the name of a person with no tenable claim, can continue in the name of another with a tenable claim ...

...

Further, I do not see that considering a motion to add or substitute a party in tandem with a motion for summary judgment offends any principle enunciated in either *Hughes* or *Stone*. Obviously, if there is a finding that the named plaintiff has no cause of action against the named defendant, and no substitute plaintiff with a tenable claim is being proffered, then the action must be dismissed. However, where there is a viable alternative plaintiff, circumstances may dictate that the action be continued with appropriate amendments.

**61**  Haines J. further stated in relation to his decision to grant the amendment and add further plaintiffs (at paras. 21-22):

... The commencement of this action, defective though it may have been, put the defendant on notice with respect to potential claims on behalf of numerous past and current policyholders. If the substitution of a plaintiff with a tenable claim is not permitted, many claims may be lost to a limitation defence. I am satisfied, therefore, that special circumstances do exist to support the granting of the amendment requested provided it is established that the proposed plaintiffs have a tenable cause of action.

Before moving on to consider the specific claims of both Japetco Corporation and Cheryl Barash, I should deal with the defendant's legitimate concern about the naming of token representative plaintiffs to toll the limitation period. I agree that such a practice would constitute an abuse of process, but there is no evidence to support any finding that that was the intention of counsel in this case. In my view, the presence of such evidence might well constitute sufficient grounds for refusing to add or substitute a party and could also attract appropriate costs consequences for the offending counsel.

**62**  Although that case was decided in Ontario, the issues discussed and principles applied are highly relevant in British Columbia. In particular, the fact that sections 38.1 and 39 of the ***Class Proceedings Act*** have the effect of suspending the limitation period for all class members, if a certification application is dismissed or if the proceeding is certified, means that the concern regarding the use of token representative plaintiffs, to act as litigation vehicles for others with legitimate claims, is similarly applicable in this province. Such a practice is to be avoided.

**63**  The Hospital Defendants pointed to another decision from Ontario, ***Menegon v. Philip Services Corp.***, [*[2001] O.J. No. 5547*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDF1-JKHB-61FH-00000-00&context=) (S.C.J.) (QL), in which certification was denied where the proposed representative plaintiff had no valid cause of action, even though counsel assured the Court that he had other proper plaintiffs who could be substituted as the representative plaintiff. Gans J. commented on the unfairness of allowing a stranger to the litigation to take over the plaintiff's position where the representative plaintiff has no cause of action (at para. 53):

... why should the defendant not be able to avail itself of a limitation period prescribed by statute? Put another way, why should a stranger to the current litigation be able to take over someone else's place in the queue when his own cause of action might long since be statute barred? This result would be manifestly unfair.

**64**  ***Menegon*** was affirmed on appeal, although on the issue of the insufficiency of the pleadings ([*167 O.A.C. 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDH1-JCJ5-2440-00000-00&context=), leave to appeal to S.C.C. refused, [*[2003] S.C.C.A. No. 95*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-JKPJ-G27K-00000-00&context=) (QL)).

**65**  The Hospital Defendants argue that here the Proposed Plaintiffs are likewise queue-jumping with their statute-barred claims. However, I would distinguish ***Menegon*** on the basis that the plaintiff in that case appeared to be incapable of asserting that particular cause of action from the commencement of the proceedings. That is unlike the situation in ***Segnitz***, *supra*, where the action was commenced under the *bona fide* belief that the plaintiff had a valid cause of action.

**66**  Certification was also denied in ***Koo v. Canadian Airlines International Ltd.***, [*[2000] B.C.J. No. 329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X25Y-00000-00&context=), [*2000 BCSC 281*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X25Y-00000-00&context=), where neither of the proposed representative plaintiffs could validly assert the cause of action set out in the Statement of Claim and, therefore, could not act as representative plaintiffs. This result was reached despite the fact that counsel assured the Court that others had since come forward who could be substituted as representative plaintiffs. However, I would observe that this decision was reached before the judgment of the Court of Appeal in ***MacKinnon v. Money Mart***, *supra*, and that sub-section 2(4) of the ***Class Proceedings Act*** appears not to have been discussed in that case. There were also other features of the action that made it unsuitable for determination as a class proceeding, in particular the fact that the majority of the issues relating to liability were individual issues and, therefore, the lack of a representative plaintiff was not the only consideration in reaching that determination.

**67**  The Hospital Defendants also cite the case of ***Kimpton v. Canada (Attorney General)*** [*(2002), 9 B.C.L.R. (4th) 139*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3GF-00000-00&context=), [*2002 BCSC 1645*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3GF-00000-00&context=), where Macaulay J. rejected an application for certification on the ground that it was plain and obvious that the proposed representative plaintiff's causes of action were bound to fail. Her attempt to amend her statement of claim to set out claims not available to herself, but that might be available to other members of a proposed class, was rejected as an attempt by the plaintiff to provide a vehicle for others who may have an underlying claim.

**68**  Macaulay J. concluded that it was not sufficient for a plaintiff to plead a cause of action that may be available to other persons in different circumstances and that, where there is a single plaintiff, she must demonstrate a personal cause of action against each defendant (at para. 81). I note that his comments were made in the context of an application for certification and not in the context of a pre-certification motion, pursuant to Rule 19(24), as was the case in ***MacKinnon v. Money Mart***, *supra*.

**69**  The concern with not allowing actions to be brought by token representative plaintiffs must be balanced with language from the Court of Appeal's decision in ***MacKinnon v. Money Mart***, *supra*. While that decision expressly did not deal with the discretion to add parties pursuant to Rule 15(5)(a) (see para. 58) and the Hospital Defendants argue that it, therefore, does not apply here, some clear statements of law were made that are applicable to the present application. In previous reasons in this action, at [*2006 BCSC 1814*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X34N-00000-00&context=), I dealt with the impact of that decision on the application of the ***Rules of Court*** to a proposed class proceeding as follows, at paras. 6-9:

The decision of a five member panel of the B.C. Court of Appeal in ***MacKinnon***, [*2004 BCCA 472*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2X8-00000-00&context=), is important to consider in this context. That case dealt with the defendants' motion to strike the statement of claim under r. 19(24). The action was based in contract, and the plaintiff had contractual dealings with only some of the named defendants. The basic issue was whether the plaintiff had standing to bring an intended class action against some defendants solely to benefit persons other than himself. The Court rejected the Ontario position that for every defendant, there must be a representative plaintiff who has a valid cause of action against that defendant. The Court held that a representative plaintiff need not have a cause of action against all defendants, relying on the earlier decision of ***Campbell v. Flexwatt*** [*(1997), 44 B.C.L.R. (3d) 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=), [*15 C.P.C. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=) (C.A.). At paras. 34-35, Saunders J.A. stated for the Court:

It is true that in one sense the action, before certification, is an ordinary action. And s. 40 of the ***Class Proceedings Act*** expressly provides that the ***Rules of Court*** apply. It does so, however, with the caveat "to the extent those rules are not in conflict with this Act". I think it is also clear that an action commenced under the ***Class Proceedings Act*** is, even before the certification application, more than just "any old action": it is an action with ambition. That ambition, by Rule 4(4.1), must be reflected on the face of the pleadings. The question is whether that ambition stated on the face of the pleadings affects the application of Rule 19(24)(a) to the question before this Court.

I turn then to Rule 19(24). No doubt Rule 19(24)(a) can be invoked prior to a certification hearing. But what does it mean in the context of an action started under the ***Act***? Obviously if the pleadings disclose no cause of action between any persons, whether or not named, the action may be dismissed. But that is not the case here. The statement of claim alleges a cause of action between members of the potential class and the defendants, even though those members have as yet no personal identity. Is this sufficient pleading to escape dismissal under Rule 19(24)?

Ultimately, the Court concluded that the determination of whether the action had no chance of success was to be "considered in the context of its stated ambition to be a class proceeding" (at para. 38), as there was a prospect that the action would be certified as a class action, and that further representative plaintiffs could be appointed to represent a sub-class of persons who did have contractual dealings with those defendants. Therefore, the defendants could not succeed on their r. 19(24) application. Saunders J.A. bolstered this conclusion by looking to the context of the ***Class Proceedings Act***, and particularly to sub-section 2(4), which provides:

2(4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

She interpreted the significance of this provision at paras. 50-51 as follows:

Although s. 2(4) only allows a non-member of a class to be the representative plaintiff where it is necessary "to avoid a substantial injustice to the class", the fact that the ***Act*** allows such a situation at all indicates, in my view, that the cause of action nexus is not solely between defendants and the representative plaintiff, but also between defendants and the plaintiff class as a whole. This shifts the focus in the cause of action analysis from the representative plaintiff onto the class, and is consistent with a litigation process that seeks to resolve common issues, rather than to resolve entire claims.

I conclude that while the ***Act*** requires a cause of action against each named defendant, that cause of action must be held by class members, not necessarily the representative plaintiff.

She noted that there was a possibility of flushing out a representative plaintiff with a cause of action against a defendant by establishing subclasses, through the section 4 certification application, and through the discovery process.

From this decision, I take the following principle: a proposed class proceeding is subject to the ordinary ***Rules of Court***, but those rules are to be applied in the context of considering its potential future as a class action ... [Emphasis added.]

**70**  Thus, while a court must not permit persons to act as litigation vehicles for others, the statements of Saunders J.A. in ***MacKinnon v. Money Mart*** clearly indicate that the ***Rules of Court*** should be applied to a proposed class proceeding by considering the claims of the class as a whole, rather than just the named plaintiff.

**71**  In ***MacKinnon v. VanCity***, *supra*, the issue was whether the plaintiff could join defendants against whom no member of the proposed class had a cause of action, simply because the claims against those defendants arose under the same section of the ***Criminal Code***. Ballance J. concluded that joinder would enable the named plaintiff to act as a litigation vehicle for others, who were unconnected to the proceeding, to join defendants who had no connection with the action and she, therefore, rejected the plaintiff's application.

**72**  That situation, on which the Court of Appeal in ***MacKinnon v. Money Mart***, *supra*, made no comment, is quite different from the one in the case at bar. In particular, here the cause of action asserted against the defendants is for the same ***negligence*** and the proceeding was commenced as a class action. The Proposed Plaintiffs themselves are members of that potential class.

**73**  As discussed below, unlike in ***MacKinnon v. VanCity***, *supra*, the requisite degree of interconnectedness for joinder is present. It is only through a careful consideration of the rules relating to the exercise of a judge's discretion, to permit or refuse joinder in particular circumstances that a decision can be reached in the present case. The fact that the proceeding is a proposed class action will have an impact on that decision, in particular because of the potential prejudice to putative class members and the fact that notice of a class proceeding, not just the plaintiff's action, was given to the defendants at the time they were served with the writ.

**74**  The decision in ***MacKinnon v. Money Mart***, *supra*, is filled with references to the fact that the cause of action analysis is shifted from the representative plaintiff onto the class. These are words with broad implications for many of the ***Rules of Court*** and, of relevance here, for Rule 15(5). Although the Hospital Defendants contend that the decision has no impact on a discretionary decision to add parties, I can see no way of distinguishing the impact of the reasons of Saunders J.A. in ***MacKinnon v. Money Mart*** on that basis.

**Adding Plaintiffs to an Action Generally**

**75**  The approach to be followed by a court in deciding whether to add parties to an existing action has been the subject of many decisions. Generally, if the limitation period has not expired, the application for joinder will be granted if there are common issues to be determined. However, the expiration, or possible expiration, of a limitation period complicates the analysis.

**76**  The recent decision of the Court of Appeal in ***Strata Plan LMS 1463 v. Krahn Bros. Construction Ltd.*** [*(2004), 25 B.C.L.R. (4th) 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B260-00000-00&context=), [*2004 BCCA 190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B260-00000-00&context=), clarifies the correct approach to be taken by a court when it is unclear whether a limitation period has expired. If, on the assumption the limitation period has expired it is, nonetheless, just and convenient that a party should be added, then that party should be added. Joinder then precludes the assertion of a limitation defence.

**77**  However, if a court concludes that it would not be just and convenient to add a party if the limitation period has expired, and the limitation issue cannot be resolved on the application for joinder, the party seeking joinder should be given an opportunity to establish that the limitation has not expired, since that may tip the balance in favour of joinder.

**78**  In this case, it is not possible to ascertain with certainty whether the limitation period has expired as against the Proposed Plaintiffs on the basis of the evidence before the Court. However, I proceed with the following analysis on the assumption, most favourable to the defendants, that the limitation period had expired as against both of the Proposed Plaintiffs (*i.e.* on the assumption that the two-year limitation period began to run at the time of the public health notice). If the limitation period had not expired, it would clearly be just and convenient to add both of the Proposed Plaintiffs to this action, because they could have simply filed a new writ and commenced an action against the defendants on their own behalf, and applied to have the actions tried together.

**79**  Although the plaintiff relies on both Rule 15(5)(a)(ii) and (iii), it is really Rule 15(5)(a)(iii) that applies. Rule 15(5)(a)(ii) is construed disjunctively, so that either the person to be added ought to have been joined as a party, or it is necessary to add the person as a party in order to ensure there is effective adjudication of all matters in the proceeding: ***Lawrence Construction Ltd. v. Fong*** [*(2001), 18 C.P.C. (5th) 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23M6-00000-00&context=), [*2001 BCSC 813*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23M6-00000-00&context=) at para. 22.

**80**  This provision has been interpreted as mandating a narrow approach to joinder: either a person should have been a party in the first place, but for some compelling reason was not included, which is a test greater than mere convenience but less than necessity; or the question to be adjudicated between the original parties cannot be determined without the addition of the new party: ***Lawrence Construction***, *supra*, at paras. 24-26.

**81**  In the case at bar, it cannot be said that the Proposed Plaintiffs ought to have been named as parties in the first instance, nor that the question to be adjudicated between Ms. Birrell and the defendants requires that they be added. Their claims against the defendants are independent of Ms. Birrell's claim and there is nothing that would require their presence to fairly determine matters between Ms. Birrell and the defendants. Therefore, if the Proposed Plaintiffs are to be added, they must meet the broader requirements of Rule 15(5)(a)(iii).

**82**  The principles to be applied by courts in determining whether a party should be joined in an action were summarized 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=), [*71 B.C.A.C. 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=) by Finch J.A. At para. 45, he stated that the discretion to permit such amendments is completely unfettered, subject only to the general rule that it is to be exercised judicially, and in accordance with the evidence adduced and such guidelines as may appear from the authorities. Relevant factors to be considered in exercising that discretion include the length of delay, the reasons for delay, the expiry of the limitation period, the presence or absence of prejudice, and the extent of the connection between the existing claims and the proposed new cause of action (at para. 67). McEachern C.J.B.C. in a concurring judgment stated at para. 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.

**83**  In discussing what is just and convenient, he noted that it was significant that the issue of insurance coverage for the cost of building repair would be tried between the plaintiff and the defendant broker and, therefore, it would not be inconvenient to include the plaintiff's claim against the insurers in the same litigation. Although ***Teal Cedar*** dealt with an application to add a new cause of action against the defendants under Rule 24(1), those same principles apply to the addition of a party pursuant to Rule 15(5)(a)(iii): see *e.g.* ***Teal Cedar***, *supra*, at paras. 37-39; ***J.C. Kerkhoff & Sons Construction Ltd. v. British Columbia and Yukon Territory Building and Construction Trades Council*** [*(1987), 17 B.C.L.R. (2d) 338*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3YD-00000-00&context=) at 343, 24 C.P.C. (2d) 299 (S.C.) ("***J.C. Kerkhoff & Sons***" cited to B.C.L.R.); ***Letvad v. Fenwick***, *supra*, at para. 24.

**84**  In ***Lui 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=) (C.A.) ("***Lui No. 1***" cited to B.C.L.R.), the significance of the expiration of the limitation period was considered in the context of third party proceedings. In that case, the plaintiffs brought an action against the defendants and 18 months later two of the defendants issued a third party notice against two of the other defendants. The third party notice included a claim against them by West Granville Manor for its own claims for damages for injury to property, including economic loss, from those two defendants. Other claims for indemnity in the third party notice were not challenged.

**85**  Lambert J.A. observed that the relief or remedy claimed by West Granville was not substantially the same as that claimed by the plaintiffs, despite the fact that the damages arose from the same incident. However, the issues of law and fact to be determined in the original action were substantially the same as those in the third party proceedings, namely the relevant standard of care and whether it was complied with. Lambert J.A. went on to consider the principles that govern the exercise of the discretion under Rule 22 and further noted that Rule 15(5)(a)(iii) presented a very close parallel to Rule 22 in respect of section 4 of the ***Limitation Act*** (at 329).

**86**  On the facts of ***Lui No. 1***, Lambert J.A. was particularly concerned that the claim by West Granville for damages was not closely connected with the original claim of the plaintiffs. He emphasized that there was no reason in justice and fairness for allowing West Granville to piggy-back its claim over the limitation barrier on the back of the plaintiffs' claim (at 330-331). There was no real and substantive connection between the third party proceedings and the original action, except through a technical point of law. Lambert J.A. indicated that, in cases 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 the defendant must explain both the delay and the dependence of the third party proceedings on the original action.

**87**  The same case was back before the Court of Appeal in ***Lui and Lui v. West Granville Manor Ltd.*** [*(1987), 11 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3V4-00000-00&context=), [*[1987] 4 W.W.R. 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3V4-00000-00&context=) (C.A.) ("***Lui No. 2***" cited to B.C.L.R.). There, the Court made clear that the effect of sub-section 4(1) of the ***Limitation Act*** was to revive a cause of action where a cause of action in subordinate proceedings is begun without being struck out. However, a court could consider the fact that a consequence of permitting a new party to be added would eliminate a fully accrued limitation defence.

**88**  Pursuant to Rule 15(5), the court has the power to permit or prevent the proceedings (at 297) and the expiration of the limitation period is a relevant factor to consider in exercising this power. Thus, the court has the power to prevent abuse by having parties dress up an independent action as if it were a subordinate proceeding for which there is no limitation period. As an example, Lambert J.A. provided the following (at 299):

Suppose a car and a bus collide. Ten out of the twenty bus passengers are injured. The driver of the car is entirely at fault. All ten injured bus passengers are represented by the same lawyer. He misses the basic limitation period. But all is well. One of the passengers is an infant. By s. 7 of the ***Limitation Act***, the running of the limitation period is postponed during the period of the infant's minority. So an action is brought on behalf of the infant. It does not matter whether the infant is one of the passengers who was injured. The only thing that matters is that the action on behalf of the infant is brought within the extended limitation period that applies to him. All the other passengers arrange to be joined as plaintiffs. The effect of the joinder, if it is permitted, is to sweep away the defendant's fully accrued limitation defence against all the adult passengers.

I cannot believe that it was intended that s. 4 of the ***Limitation Act*** should be open to that kind of abuse. Neither the mischief nor the legislative purpose requires such an interpretation.

**89**  In defining the mischief at which section 4 of the ***Limitation Act*** was aimed, Lambert J.A. noted that the mischief to be avoided was that claims could be brought at the last moment, before the expiration of the limitation period, so that legitimate counterclaims and third party proceedings would be prevented, thereby simplifying the proceedings for the plaintiff. He stated at 300 that:

The legislative purpose must surely have been to permit those proceedings which are brought within the applicable limitation period to go ahead, and to permit all subordinate proceedings which are dependent on the main proceedings to go ahead with them, but to prevent any proceedings which are truly independent from using bogus subordinate status to avoid a limitation period which would otherwise be applicable. In the example I have given, the principal action by the infant should go ahead, as the Limitation Act allows; any claim by the infant's mother or father that is closely dependent on the infant's claim should probably go ahead; any claim by the car driver against a mechanic for contribution should probably go ahead; but the independent claims of the injured adult bus passengers should not be permitted outside their own limitation period. [Emphasis added.]

The Meaning of "Dependence" When Adding Parties

**90**  A consideration of the meaning of "a question or issue relating to or connected with the subject matter of the proceeding" in Rule 15(5)(a)(iii) was provided by the Court of Appeal in ***Daco Developments Ltd. v. Edwards*** [*(1982), 33 B.C.L.R. 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JTNR-M3F7-00000-00&context=), [*[1982] 2 W.W.R. 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JTNR-M3F7-00000-00&context=) (C.A.).

**91**  That case involved an application to add a plaintiff, whose cause of action was statute barred, where the failure to commence the action in time was because an insurance file had inadvertently not been sent to the solicitors. The person seeking to be joined as a plaintiff had suffered losses in the same fire, caused by ***negligence*** on the part of the defendants, that was at issue in the present action, although his claim was not dependent on that of the other plaintiffs. His losses had been paid by his insurer, who had an interest in the claim by subrogation.

**92**  The subject matter of the action was characterized as "the damages flowing from the negligent conduct", which involved two components: damages and ***negligence*** (at para. 12 and 14). In the case of the fire, the ***negligence*** component of the claim was the same for both the existing plaintiffs and the person seeking to be joined as a plaintiff. The Court further held that it would be just and convenient to determine the question in issue and added the new party. The delay in seeking to add the plaintiff beyond the expiration of the limitation period was approximately three months, and the defendants did not show any facts or circumstances that would make it unjust or inconvenient to have the questions determined in the action.

**93**  An opposite result with respect to independent causes of action was reached in ***J.C. Kerkhoff & Sons***, *supra*, a case relied on by the Hospital Defendants. Relying on the decision in ***Lui No. 2***, Lysyk J. stated at 345-346:

... amendments to add a plaintiff after the expiry of a limitation period for an original action stemming from the same incident should be refused if they relate to a cause of action capable of standing alone unless it is established by the proposed plaintiff (1) that there is a real and substantial connection between the proposed plaintiff's claim and the original action; (2) "such that" the proposed plaintiff's claim is to some degree dependent on the required action; and (3) "such that" the failure to take independent proceedings within this limitation period is explained by that dependence.

**94**  These statements of the requirement for a connection to the original cause of action are consistent with the statements of Lambert J.A. in ***Lui No. 2*** regarding the mischief at which the legislation was aimed, as discussed above, and with the bus accident example of the inappropriate use of joinder given in that case. However, a strict application of these requirements, as prerequisites for adding an additional plaintiff, would seem to be inconsistent with the decision of the Court of Appeal in ***Daco Developments***, *supra*, in which the claim of the person seeking to be added as a plaintiff was entirely independent of the claims of the plaintiffs in the existing ***negligence*** action, and the failure to take independent proceedings within the limitation period would not be explained by any dependence on the existing action (the actual cause having been inadvertence). Yet the person was joined as a plaintiff. The correctness of the decision in ***Daco Developments*** was affirmed by the Court of Appeal in ***Lui No. 2***.

**95**  An explanation for this apparent discrepancy was provided in ***Cementation Co. (Canada) 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=), [*36 C.P.C. (2d) 147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F4GK-M1MX-00000-00&context=) (C.A.). Lambert J.A. held for a majority of the Court of Appeal that the use of "dependent", in relation to third party proceedings in ***Lui***, should be interpreted as "some degree of interrelationship" in the context of adding a party and that the interrelationship must explain why the claim ought to be made in the same proceedings, as well as providing an explanation for the delay arising from the broad circumstances that explain the interrelationship, subject always to the paramount consideration of the interests of justice and convenience.

**96**  He observed that in the earlier decisions of ***Knight Towing Ltd. v. General Motors of Canada Ltd.*** [*(1981), 27 B.C.L.R. 335*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1NR-00000-00&context=), 23 C.P.C. 8 (C.A.) and ***Daco Developments***, *supra*, the action involving the new party could have been brought entirely separately and without reference to the other action involved in the proceedings so, although the new action was not entirely dependent on the original action, it was closely interrelated with the existing proceeding. In that case, the fact that the defendant and proposed defendant were two insurers of the same risk, being sued for the same loss, was held to provide a close connection to the existing proceeding.

**97**  The fact that the plaintiff had not sued the second defendant because it had not known of the existence of the second insurer, although that insurer's name appeared on a copy of a proof of loss form, did not bar the addition of the second defendant. In contrast, the chambers judge had struck out the joinder because, on a consideration of ***J.C. Kerkhoff & Sons***, *supra*, the claim against the second insurer was not in any way dependent on the claim against the existing defendant insurer.

**98**  For a more recent example of a case where the Court of Appeal has overturned a chambers judge's decision not to add a party because the claims were not sufficiently connected (although other factors were also relevant), see ***McIntosh v. Nilsson Bros. Inc.*** [*(2005), 48 B.C.L.R. (4th) 124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0PB-00000-00&context=), [*2005 BCCA 297*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0PB-00000-00&context=) (see para. 11), rev'd, [*[2004] B.C.J. No. 1701*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X0HY-00000-00&context=), [*2004 BCSC 1101*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X0HY-00000-00&context=) (see para. 69).

**99**  In ***Cementation***, *supra*, Southin J.A. gave dissenting reasons in which she considered that, the inadvertent impact of the addition of Rule 15(5)(a)(iii) to the ***Rules of Court*** in 1980, was to change the effect of section 4 of the ***Limitation Act***. Specifically, she looked to the mischief that section 4 of the ***Limitation Act*** was intended to address and, consistent with the conclusions reached by Lambert J.A. in ***Lui No. 2*** discussed above, considered that the provision was aimed at allowing a defendant to raise a set-off or counterclaim where the plaintiff's late filing of the writ means that such claims would be statute-barred. The provision, thereby, avoided injustice by ensuring that all claims relating to the subject matter of the action, not just the plaintiff's claim, could be adjudicated.

**100**  At the time that the ***Limitation Act*** was passed, only the narrower Rule 15(5)(ii) existed, meaning that only parties who ought to have been joined, or whose presence was necessary, could be added. Presumably, this would have restricted the joinder of new parties to the class of persons required, to avoid the type of injustice section 4 was intended to prevent. However, on the addition of Rule 15(5)(iii) to the ***Rules of* Court**, in response to the decision of the Court of Appeal in ***Enterprise Realty 81 Ltd. v. Barns Lake Cattle Co. Ltd.*** [*(1979), 13 B.C.L.R. 293*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-F2F4-G1JJ-00000-00&context=) (C.A.) (a case which did not involve a limitation issue), a much broader class of persons and causes of actions could be joined, even after the expiration of the limitation period, subject to the overriding considerations of what is just and convenient.

The Presumption of Prejudice Arising Upon the Expiration of a Limitation Period

**101**  The matter of adding a plaintiff to an action for damages for ***negligence*** was also before the Court of Appeal in ***Tri-Line Expressways v. Ansari*** [*(1997), 30 B.C.L.R. (3d) 222*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F7VM-S324-00000-00&context=), [*86 B.C.A.C. 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F7VM-S324-00000-00&context=). In that case, the plaintiff had commenced an action against the defendant for his ***negligence*** in causing an accident involving a tractor-trailer. The plaintiff owned the trailer and had paid for certain repairs to the truck, but another person was the actual owner of the tractor.

**102**  After examination for discovery of an officer of the plaintiff, which occurred after the expiration of the limitation period, it came to the attention of counsel that the tractor was owned by the proposed plaintiff. The defendant said it would resist the claim on this basis. The plaintiff applied at trial to join the owner of the tractor as a plaintiff. After reviewing the principles set down in a number of earlier cases, Lambert J.A. stated that the presumption of prejudice, where the limitation period has expired, should be confined to the context in which it was originally mentioned in ***Lui No. 1***: third party proceedings against a new party on an entirely new cause of action. In analyzing the facts before him, Lambert J.A. stated at para. 18:

In this case the party sought to be added was to be added as a plaintiff; the total scope of the claim against the defendant was not to be affected in any way by the addition of the plaintiff; the defendant had full notice of the circumstances of ownership of the tractor; and the balance of justice and convenience falls heavily against permitting an admittedly negligent defendant from escaping liability on the basis of an artificial restriction of the Court's power to remedy injustice through a sensible application of Rule 15(5)(a).

**103**  In that case, the application for joinder was granted.

**104**  The issue of whether a presumption of prejudice arises due to the expiration of the limitation period does not appear to have been definitively settled by the Court of Appeal. While some comments in *obiter*, including those in ***Tri-Line Expressways***, *supra*, have questioned such a presumption, the position appears to be that a presumption of prejudice does arise on the expiration of the limitation period: see ***ASM Capital Corp. v. Mercer International Inc.*** [*(1999), 69 B.C.L.R. (3d) 177*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4DM-00000-00&context=), [*1999 BCCA 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4DM-00000-00&context=) at para. 21; ***Letvad v. Fenwick***, *supra*, at para. 30; ***Lawrence Construction***, *supra*, at para. 44; ***Nandha v. Singh***, [*[2001] B.C.J. No. 940*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X3RJ-00000-00&context=), [*2001 BCSC 638*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X3RJ-00000-00&context=) at paras. 21-22.

**105**  Additionally, other cases state that the prejudice that must be presumed should be restricted to situations where the period that has passed since the cause of action arose, is the length of the limitation period plus one year for service of the writ: ***McIntosh v. Nilsson Bros. Inc.*** [*(2005), 48 B.C.L.R. (4th) 124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0PB-00000-00&context=), [*2005 BCCA 297*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0PB-00000-00&context=); ***Link v. Texas Oil & Gas Inc.***, [*[2006] B.C.J. No. 2671*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1RN-00000-00&context=), [*2006 BCSC 1520*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1RN-00000-00&context=) at para. 36. Thus, a presumption of prejudice arises after the expiration of the limitation period plus one year.

**Application to the Facts of This Case**

**106**  In the case at bar, the plaintiff argues that the defendants were notified of the intention to bring a motion to add two additional plaintiffs as soon as it was learned that she may have received the letter from her surgeon in error. The plaintiff emphasizes that this is a proceeding brought under the ***Class Proceedings Act*** and relies on the decision in ***Segnitz***, *supra,* to argue that the application to add plaintiffs with a tenable claim, should be allowed to ensure continuation of the action and avoid the risk of prejudice to class members due to the expiration of the limitation period. Further, the plaintiff argues that there is minimal prejudice to the defendants, as commencement of the action under the ***Class Proceedings Act*** put the defendant on notice of the claims of all class members.

**107**  The Hospital Defendants counter that it would be manifestly unjust to add the Proposed Plaintiffs to an action which is itself a nullity. They argue that the ultimate limitation period had expired many years previously as against them (an argument that I have concluded fails as a matter of law), and that a non-existent claim should not be permitted to act as a shell vehicle to which other potentially more legitimate plaintiffs can be added at will. They further contend that it should have been obvious to Ms. Birrell from an examination of her chart that she had no cause of action against the defendants, and that there is no evidence of substantial injustice to the class if she is not permitted to act as the representative plaintiff.

**108**  The Hospital Defendants also observe that, given the structure of the ***Class Proceedings Act***, which does not suspend the operation of the limitation period until certain orders have been made in relation to the certification hearing, any reliance by other potential class members on Ms. Birrell's action was unreasonable.

**109**  Below, I discuss each of the factors relevant to the determination of whether joinder should be permitted. Given that the subject matter of the proceeding is damages for the ***negligence*** of the defendants in the operation of the Ear Bank, it is clear that there is a question or issue relating to, or connected with, any relief claimed in the proceeding and with the subject matter of the proceeding. The negligent conduct alleged by the Proposed Plaintiffs is the same conduct as that alleged by the plaintiff in her statement of claim. The damages claimed for that ***negligence*** are claimed on behalf of all class members and, therefore, the relief claimed in the proceeding is identical. Thus, the key issue in whether joinder should be granted is whether it would be just and convenient to determine those issues as between the Proposed Plaintiffs and the defendants.

Length of the Delay

**110**  The delay in this case, on the assumption that the limitation period began to run on the date of the public health warning and, therefore, expired on February 19, 2005, was approximately 18 months. While the defendants urged significantly longer periods of delay of many years beyond the expiration of the ultimate limitation period, this would apply only if either of the Proposed Plaintiffs suffered physical injury.

Reasons for the Delay

**111**  The reasons for the delay are more difficult to assess. The plaintiff urges that, prior to being informed of the potential problems with her claims, there was no reason for Mr. Corfield and Mr. Little to file claims on their own behalf, as she had already done so. The plaintiff argues that the purpose of the ***Class Proceedings Act*** is to avoid a multiplicity of actions and, therefore, to have only one member of a class file a writ of summons. The defendants were given notice within a few weeks that the plaintiff intended to bring a motion to add other plaintiffs.

**112**  The defendant counters that, because the limitation period is not suspended until after the certification hearing, there cannot have been any reliance by the Proposed Plaintiffs on the plaintiff's action. The actions are independent. Further, the Proposed Plaintiffs have offered no explanation for the delay. Counsel for the plaintiff responded that the legislation is the explanation, that notice to class members is contemplated after the certification hearing and that it is not his role to contact other potential plaintiffs, *e.g.* those who may have been minors at the time of their surgery.

**113**  I agree with the defendants that any reliance by the Proposed Plaintiffs on Ms. Birrell's action, prior to the certification hearing, would be unreasonable given the provisions of s. 38.1 and 39 of the ***Class Proceedings Act***. However, as discussed above with respect to ***Daco Developments*** and ***Cementation***, *supra*, in the context of adding parties, dependence of one action on another does not seem to be required to explain the delay-what is required is an interrelationship between the claims.

**114**  While, as discussed by Southin J.A. in ***Cementation***, that may have been what the Legislature intended when enacting section 4 of the ***Limitation Act***, that is not its effect as it has been interpreted by the Court of Appeal. In this case, while there are no positive reasons to explain the delay in adding the Proposed Plaintiffs except, possibly, unreasonable reliance on the existence of the plaintiff's action, there is likewise no evidence of voluntarily dilatory behaviour or a deliberate and informed choice not to sue by the Proposed Plaintiffs. Consequently, I find that this is a neutral factor.

Expiry of the Limitation Period

**115**  Here, as I have stated, I have assumed that the limitation period expired, although that fact cannot be conclusively determined on the evidence before the Court. This assumption is the most favourable assumption for the defendants as, if the limitation period had not expired, it would have been just and convenient to simply add the Proposed Plaintiffs.

Presence or Absence of Prejudice

1. *Actual Prejudice*

**116**  While the defendants claim to be obviously severely prejudiced by the expiration of six years from the date of the original negligent conduct, they have not brought forward any evidence of actual prejudice, such as, for example, the destruction of clinical records. Therefore, I proceed on the basis that actual prejudice has not been demonstrated.

1. *Deemed Prejudice*

**117**  As explained above, there is a presumption of prejudice that arises after a period of one year from the expiration of the limitation period (to allow for service of the writ). In this case, the application to add the Proposed Plaintiffs was served on the defendants approximately six-months after the expiration of that one-year period and, consequently, a presumption of prejudice arises.

**118**  The plaintiff argues that the defendants were put on notice of the claims of the entire class by the commencement of Ms. Birrell's action and, therefore, cannot assert that they could not have known or expected that the Proposed Plaintiffs would be pursuing their claims. The defendants counter that they only received notice of a statute-barred and defective claim, and could not possibly have expected that a court would permit joinder of further plaintiffs with statute-barred claims to such a nullity.

**119**  In this case, the presumption of prejudice against the defendants is somewhat weakened by the fact that the plaintiff's action was commenced as a class proceeding. This did give the defendants notice of the claims against them prior to the expiration of the limitation period (within the time for service of the writ). In this regard, the defendants had notice of both the nature of the claims, specifically ***negligence***, and the total scope of the claim, being a potential class action.

**120**  The fact that the plaintiff did not have a cause of action against the defendants, while not known to her at the time the writ was filed, was raised within the space of a few months and, shortly thereafter, the plaintiff brought a motion to add further plaintiffs. While I accept that the Hospital Defendants should legitimately expect to be free from claims after six years based on the scheme of the ***Limitation Act***, as I have explained, the current language of section 8 leaves them open to claims such as the present one for an indefinite period of time.

**121**  Further, on the basis of ***MacKinnon v. Money Mart***, *supra*, a court is left with more limited scope to strike out class proceedings, prior to the certification hearing, because the cause of action nexus is between class members and the defendants and not simply the proposed representative plaintiff and the defendants. Therefore, upon being served with the plaintiff's writ of summons, the defendants could not reasonably have expected to be free from the claims of the Proposed Plaintiffs and other putative class members, on the basis of the expiration of the limitation period, even if they quickly realized that the proposed representative plaintiff had no personal cause of action against them.

**122**  Had I concluded that the six-year ultimate limitation period had expired against the Hospital Defendants, I would have concluded that the presumption of prejudice was extremely strong in this case, due to the significant emphasis placed on finality for such defendants by the Legislature (see also ***Letvad v. Fenwick***, *supra*, at para. 48).

1. *Prejudice to Potential Class Members*

**123**  The plaintiff argues that her action must be permitted to continue, or many other potential class members will have their claims statute-barred by the expiration of the limitation period. As I noted previously in [*2006 BCSC 1814*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X34N-00000-00&context=), the unique language of the B.C. ***Class Proceedings Act*** means that the mere assertion of a cause of action as a class proceeding will not operate to suspend the limitation period. Thus, if the plaintiff's action is dismissed prior to the certification hearing, the limitation periods for many class members would have expired. The defendants counter that there could have been no reasonable reliance on Ms. Birrell's action, as the running of the limitation period would not be suspended until the certification hearing.

**124**  As I explained at [*2006 BCSC 1814*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X34N-00000-00&context=) at para. 17, the expiration of a limitation period has been relied on by some courts as a factor in granting certification because of the risk of prejudice to prospective class members if the proceedings are not certified. The loss of a right to bring a claim, even a weak one, could cause prejudice to many class members, although I agree that many of them would not be relying on, or even aware of, Ms. Birrell's action.

Extent of Connection Between Existing Claims and Those of the Proposed Plaintiffs

**125**  The final factor, the extent of the connection between the claims, weighs in favour of adding the Proposed Plaintiffs. Their claims are the same as those set out in Ms. Birrell's statement of claim and relate to the same allegedly negligent acts of the Ear Bank. The same evidence would be used to establish all of their claims. Further, the claims of the Proposed Plaintiffs have already been asserted to some degree in the present action, because it was commenced on behalf of all class members. Finally, because the relief sought by the plaintiff is damages for the entire class, the addition of the Proposed Plaintiffs does not change the scope of the claims faced by the defendants.

**126**  Overall, considering all of the factors enumerated in ***Teal Cedar***, *supra*, and related cases, it would be just and convenient to add the Proposed Plaintiffs to the present action. While it does seem unfair that the hospitals are facing claims for which more than six years have elapsed from the date of the original negligent conduct, as I have stated, the law compels the conclusion that the ultimate limitation period has not expired. Likewise, the Court of Appeal jurisprudence favours the addition of parties having independent causes of action after the expiration of the limitation period, on the basis of Rule 15(5)(a)(iii), provided the test of interrelatedness is met and there are no overriding factors that would preclude joinder.

**127**  In the case at bar, the presumed prejudice to the Hospital Defendants by reason of the expiration of the limitation period, in view of the fact that they had notice of the claims against them by all potential class members, is outweighed by the extent of connection between the claims. Further, as explained in ***MacKinnon v. Money Mart***, *supra*, the fact that a proposed class proceeding is something more than just an ordinary action also favours joinder in these circumstances. Consequently, the plaintiff's motion to add Mr. Little and Mr. Corfield as plaintiffs is granted.

**ANALYSIS - MOTION TO DISMISS THE PLAINTIFF'S CLAIM**

**128**  In view of my conclusion on the plaintiff's motion to add parties, it appears that she consents to being removed as a party to this action. Had she not consented, I would have granted the Hospital Defendants' Rule 18A application as it is clear that the plaintiff has not proven a claim in ***negligence*** against them. As Ms. Birrell received no tissue from the Ear Bank, the defendants never owed her a duty of care. Consequently, her claim in ***negligence*** cannot succeed against them.

**CONCLUSIONS**

**129**  The plaintiff's motion to add Thomas Little and Robert Corfield as plaintiffs is granted. Margaret Birrell is to be removed as a party to this action.

**130**  The plaintiff shall have her costs on the motion to add plaintiffs. The Hospital Defendants shall have their costs on their Rule 18A application.

RUSSELL J.

**End of Document**

[***Carlsen v. Southerland, [2005] B.C.J. No. 143***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S12B-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

Bouck J.

Heard: November 15 - 18, 2004.

Judgment: January 19, 2005.

Victoria Registry No. 01/0349

**[2005] B.C.J. No. 143** | 2005 BCSC 74 | 47 B.C.L.R. (4th) 388 | 137 A.C.W.S. (3d) 641 | 2005 CarswellBC 178

Between Koren Frances Carlsen, plaintiff, and Stephen Southerland and Capital Health Region, defendants

(40 paras.)

**Case Summary**

**Health law — Health care professionals — Liability (malpractice) — *Negligence* — Specialists — Particular professions — Doctors — Surgeons.**

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| Action by Carlsen against Southerland for damages for ***negligence***. Southerland was a surgeon. Carlsen had undergone surgery for a herniated disc in her back. During the surgery, her iliac artery was severed. Carlsen was 35 years old and was unable to work following the surgery. Carlsen argued that Southerland used the improper surgical instruments.  HELD: Action allowed.  Carlsen had shown prima facie proof of ***negligence***. Southerland had not demonstrated that he had met the standard of care in this case. |

**Counsel**

Counsel for the Plaintiff: M.J. Velletta and G.T. Rhone

Counsel for the Defendants: D.W. Pilley and J.K. Gibson

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| **BOUCK J.** |

INTRODUCTION

**1**  Ms. Carlsen alleges that Dr. Southerland was negligent when he operated on her spinal disc at the Royal Jubilee Hospital on 28 January 1999. She suffered serious personal injuries and is permanently disabled. Dr. Southerland contends that he met the appropriate standard of care in the circumstances.

**2**  Counsel advised me that Ms. Carlsen discontinued her action against the Capital Health Region. The remaining parties agreed to the amount of damages. Only liability is in dispute.

FACTS

**3**  Ms. Carlsen is 35 years old. She has a grade 11 education and is a qualified nurse's aid. She is a single mother with a 15-year-old child. Because of the spinal surgery, she can no longer work. Prior to her operation, on 28 January 1999, she consulted Dr. Southerland, an experienced orthopaedic surgeon. She complained of significant pain in her right leg. He concluded she had a disc herniation at the L4/5 level. She had previous disc surgery at the L4/S1 level in May 1996.

**4**  On 28 January 1999, nurses placed her on the operating table with her stomach down. For better surgical access to her spine, the doctor raised the centre part of the table. The operation involved a delicate touch. During part of the surgery, Dr. Southerland could not see the area where he placed his instruments. He relied on his sense of feel and touch and not on his sense of vision. He attempted to scrape or pick loose fragments from the top side of the disc so that they would no longer impinge upon a nearby nerve that was causing her pain.

**5**  Unfortunately, he went too far forward with the instruments and cut both her iliac artery and the common iliac vein. At that location, they run vertically down the body just in front of the spinal discs. He immediately noticed some bright red blood in the disc space but the bleeding soon stopped. He concluded nothing untoward had happened. He closed the wound and sent Ms. Carlsen to the post-anesthetic recovery room.

**6**  Shortly after, Ms. Carlsen's heart rate rose from 90 to 165 beats per minute. She complained of left leg pain and she was tender in the abdomen. The medical staff undertook intravenous resuscitation. They decided there was a cut in the left anterior iliac artery. It had allowed blood to flow freely into the abdominal cavity.

**7**  Dr. Southerland then called Dr. Griswold, a vascular surgeon. He was on his way to perform surgery at another Victoria hospital. He cancelled that planned operation and drove over to the Royal Jubilee Hospital. When he arrived, he began urgent vascular exploration and repair. Dr. Griswold found cuts to the iliac artery and the common iliac vein. During and after completion of the repair, Ms. Carlsen received 13 units of blood.

**8**  For some time after the surgery, Ms. Carlsen complained of left leg pain and thigh sensitivity. She went to see Dr. Southerland a few times after she left hospital. On one occasion, he apologized to her for what had happened. She showed gradual improvement over the next year or so. In January 2000, an MRI examination revealed a lesion on the left at L3/4 that may have caused her agonizing pain in her right leg. Ms. Carlsen did not want any further back surgery. At the time of trial, she was taking morphine to control the pain.

ISSUE

**9**  Was Dr. Southerland negligent for failing to meet the appropriate standard of care when performing disc surgery on Ms. Carlsen?

ANALYSIS

**10**  As an orthopaedic surgeon, Dr. Southerland's standard of care was: "to have and exercise the degree of skill of an average specialist in his field": Wilson v. Swanson [*(1956), 5 D.L.R. (2d) 113*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M12J-00000-00&context=) at 124 (S.C.C.).

**11**  Expert witnesses testified about the type of surgical instruments they might use in this kind of surgery. They did not all agree. The plaintiff did not prove to my satisfaction that Dr. Southerland failed to meet the necessary standard of care in performing the operation by allegedly using the wrong instruments.

**12**  Similarly, the parties introduced evidence about the after care treatment Dr. Southerland gave Ms. Carlsen once the doctors and nurses discovered the reason for the excessive bleeding. Again, the plaintiff did not prove to my satisfaction that Dr. Southerland failed to meet the appropriate standard for after-care treatment in these circumstances.

**13**  What matters is whether Dr. Southerland met the necessary standard of care when he inadvertently cut the vein and the artery while attempting to clean out the disc. The cutting of the vein and artery were the cause of Ms. Carlsen's disability. If Dr. Southerland used the instruments suggested by the plaintiff and still cut the vein and the artery, he could be liable to Ms. Carlsen for failing to meet the appropriate standard of surgical care and causing her injury. Similarly, if Dr. Southerland provided perfect after-care treatment but still cut the vein and the artery, he could be liable to Ms. Carlsen for failing to meet the appropriate standard of surgical care and causing her injury.

**14**  The plaintiff called Dr. George S. Aitken, orthopaedic surgeon, to testify as to the standard of care that Dr. Southerland should have followed. He appears in court from time to time on behalf of both plaintiffs and defendant doctors. He concluded that the surgical injury to Ms. Carlsen could have been avoided. He felt that Dr. Southerland should not have penetrated beyond the front of the disc or the annulus fibrosus into the area of vein and artery. He questioned Dr. Southerland's choice of surgical instruments. He was of the opinion that Dr. Southerland used pointed cutting instruments instead of blunt ones. He said he had done many of these operations over 22 years and never ventured past the front of the annulus fibrosus. He favoured the technique of marking the surgical instruments to avoid penetrating past the annulus fibrosus.

**15**  In support of his opinion that Dr. Southerland was negligent he relied in part upon a 1986 text, Charles H. Epps, "Vascular or Visceral Injury During Lumbar Disc Excision: in Complications in Orthopaedic Surgery, 2nd Edition, vol. 2 (Philadelphia: J.B. Lippincott, 1986) at 1197. The learned author stated that surgeons "must be constantly aware of the possibility of anterior penetration of the annulus allowing vascular or visceral injury." The author wrote: "Vascular injury, when it occurs, is more often sufficient to produce exsanguination if not controlled quickly. This is reflected by the mortality rate reported in the literature (23%-50%). The surgeon should exercise constant care to try to avoid this complication in lumbar disc excision."

**16**  The defendant called two eminent specialists to rebut Dr. Aitken's opinion. The first defence orthopaedic surgeon gave evidence by way of video. For several reasons, that method of taking evidence is something to be avoided where possible. Contrary to what happens in a courtroom, the witness faced sideways to the camera and the questioner was out of camera sight. The witness answered questions while seated at a boardroom type table dressed in casual clothes. Since the witness was not in the courtroom, I did not have the opportunity to question him in order to clear up any misunderstandings. This artificial method of presenting evidence cannot begin to duplicate the necessary formality and importance of the task created by a courtroom.

**17**  This first defence surgeon criticized Dr. Aitken's evidence. He said there was no need for Dr. Southerland to mark his surgical instruments as a check in ascertaining the depth of penetration. He supported the type of surgical instruments used by Dr. Southerland during the operation.

**18**  In this regard, he wrote that the anatomic challenges presented by Ms. Carlsen's body increased the risk of injury to the artery and the vein despite the due care of Dr. Southerland. He said in the past there was a tendency to more aggressive removal of disc material from the disc space but currently, most spine surgeons restrict disc removal to fragments of the disc that are loose or unstable. He admitted that the complication of cutting the vein or the artery can occur with experienced spine surgeons, although that does not happen frequently.

**19**  The second defence doctor's evidence was more to the point. He agreed with the first defence doctor that about ten years ago, surgeons stopped using aggressive techniques in cleaning out the disc. Now, surgeons just pick up the loose material that may impinge upon a nerve. He conceded there was a known risk of injury to the vein and the artery in this type of surgery. He said the medical literature contains examples of a significant number of cuts to the vein and the artery arising from disc surgery and that there is a high death rate unless the patient receives instant care.

**20**  He also agreed that Dr. Southerland's instruments penetrated beyond the front part of the disc. Nonetheless, he said Dr. Southerland's techniques were within the standard of care of a specialist surgeon since the cutting of the vein or artery was only a misadventure.

**21**  The second surgeon relied in part upon an article written by Robert Goodkin M.D. and Lewis L. Laska Ph.D. J.D. titled "Vascular and Visceral Injuries Associated with Lumbar Disc Surgery: Medicolegal Implications" (1998), 49 Surg.Neurol 358. The authors suggest that lumbar disc surgery involving injury to a major vessel or viscera in which litigation results, giving the impression that it is caused by ***negligence***, is not borne out by the literature. At page 364, the learned authors wrote:

Today, a surgeon performing lumbar discectomies should be aware of this complication and, theoretically, with due care should be able to avoid it, because neither the retroperitoneal vessels nor intra-abdominal viscera are within the immediate operative field. Most surgeons, however, consider this occurrence a known complication that can occur even with careful attention to the operative technique and, therefore does not represent malpractice.

And, at page 367:

Although a perforation of the anterior annulus fibrosus/anterior longitudinal ligament causing a vascular and or visceral injury may be caused by ***negligence***, it is difficult to prove. Its occurrence is classified as a technical error, but the literature presents circumstances that may explain some cases.

**22**  I am aware that the opinions expressed in these articles are not admissible for me to consider as proof of their truth since the authors of the articles never testified under oath and exposed themselves to cross-examination. I only mention them as part of the material that the defence professional witnesses relied upon in giving their evidence.

**23**  Like all ***negligence*** cases, the plaintiff must prove three essential elements. First, that the defendant owed a duty of care to the plaintiff. Second, that the defendant breached that duty of care by failing to meet the relevant standard of care. Third, that the plaintiff suffered damages as a direct result of the defendant's ***negligence***. There does not seem to be any dispute over whether Dr. Southerland owed Ms. Carlsen a duty of care. Nor does Dr. Southerland contest the third ingredient that if he is found negligent the damages suffered by Ms. Carlsen were a direct result of his ***negligence***. The only issue I have to decide is whether Dr. Southerland met the relevant standard of surgical care when performing the discectomy.

**24**  Picard and Robertson, Legal Liability of Doctors and Hospitals in Canada, 3rd Edition (Scarborough: Carswell, 1996) at 186, concisely points out the way I should examine these issues:

Thus the medical practitioner is measured objectively against a reasonable medical person who possesses and exercises the skill, knowledge and judgment of the normal, prudent practitioner of his or her special group. The comparison is made with reference to the particular circumstances at the material time. The inquiry into the doctor's milieu will fall into three broad categories:

1. the education, experience and other qualifications of the doctor;

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|  | ii |  | the degree of risk involved in the procedure or treatment; |  |

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|  | iii |  | the equipment, facilities and other resources available to the doctor. |  |

**25**  On the evidence I find that Dr. Southerland had the necessary skill, experience and qualifications to perform the surgery on Ms. Carlsen. When performing the discectomy, Dr. Southerland was aware of the potential danger that he might cut the artery and the vein if he allowed his instruments to protrude past the front of the disk. There is no evidence suggesting he lacked the required equipment, facilities and other resources necessary to perform the surgery.

**26**  The law says that the surgeon's standard of care rises along with the increase in this degree of risk: Picard, supra, at 193:

The standard of care is influenced by the foreseeable risk. As the degree of risk involved in a certain treatment or procedure increases, so rises the standard of care.

**27**  The evidence shows that Dr. Southerland was aware of the risk of cutting the vein or the artery at the time of the surgery. In his admirable zeal to achieve perfection in cleaning out the disc, he unfortunately strayed into forbidden territory.

**28**  Ter Neuzen v. Korn [*(1995), 11 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=) (S.C.C.), helpfully sets out seven principles and a summary that apply to a medical doctor's standard of care:

1. A Specialist's Standard of Care

... A specialist, such as the respondent, who holds himself out as possessing a special degree of skill and knowledge, must exercise the degree of skill of an average specialist in his field: ... Ter Neuzen v. Korn at para. 33.

1. A Physician's Knowledge at the Time

... The conduct of physicians must be judged in the light of the knowledge that ought to have been reasonably possessed at the time of the alleged act of ***negligence***: ... Ter Neuzen v. Korn, at para. 34.

1. Prevailing Standards at the Time

... courts must not, with the benefit of hindsight, judge too harshly doctors who act in accordance with prevailing standards of professional knowledge: ... Ter Neuzen v. Korn, at para. 34.

1. No ***Negligence*** if Complying With

Common Practices at the Time

It is generally accepted that when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent: ... Ter Neuzen v. Korn, at para. 38.

1. Common Practices Not Always Determinative

... The fact that a professional has followed the practice of his or her peers may be strong evidence of reasonable and diligent conduct, but it is not determinative. If the practice is not in accordance with the general standards of liability, i.e., that one must act in a reasonable manner, then the professional who adheres to such practice can be found liable, depending on the facts of each case: Ter Neuzen v. Korn, at para. 42.

1. Common Practices Must Conform With Common Sense

... Where a common and accepted course of conduct is adopted based on the specialized and technical expertise of professionals, it is unsatisfactory for a finder of fact to conclude that such a standard was inherently negligent. ... For example, where there are obvious existing alternatives which any reasonable person would utilize in order to avoid risk, one could conclude that the failure to adopt such measures is negligent notwithstanding that it is the prevailing practice among practitioners in that area: Ter Neuzen v. Korn, at para. 44.

1. Experts Opinion As to Standard of Care Not Conclusive

... General practice of the defendant and some others does not constitute a complete defence. It is some evidence to be taken into consideration on the question of ***negligence*** but it is not conclusive on Court or jury. If it were a defence conclusive on jury or Court, a group of operators by adopting some practice could legislate themselves out of liability for ***negligence*** to the public by adopting or continuing what was an obviously negligent practice, even though by a simple precaution, plainly capable of obviating danger which sometimes might result in death, was well known ... If a practitioner refuses to take an obvious precaution, he cannot exonerate himself by showing that others also neglect to take it: Ter Neuzen v. Korn, at para. 48.

1. Summary - Common Practice - General Rule - Exception

I conclude from the foregoing that, as a general rule, where a procedure involves difficult or uncertain medical treatment or complex, scientific or highly technical matters that are beyond the ordinary experience and understanding of a judge or jury, it will not be open to find a standard of medical practice negligent. On the other hand, as an exception to the general rule, if a standard practice fails to adopt obvious and reasonable precautions which are readily apparent to the ordinary finder of fact, then it is no excuse for a practitioner to claim that he or she was merely conforming to such a negligent common practice: Ter Neuzen v. Korn, at para. 51.

**29**  In Fontaine v. British Columbia, [*[1998] 1 S.C.R. 424*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WJ-00000-00&context=) at 435 the Supreme Court of Canada described how a finder of fact should assess circumstantial and direct evidence designed to establish ***negligence***:

It would appear that the law would be better served if the maxim [res ipsa loquitor] 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.

**30**  Looking at all the direct and circumstantial evidence there is proof that Dr. Southerland cut Ms. Carlsen's vein and the artery while performing the discectomy. From this, I conclude that Ms. Carlsen established on a balance of probabilities a prima facie case of ***negligence*** against Dr. Southerland. There is no evidence that she agreed to surgery that could involve the cutting of her vein and artery. Nor did Dr. Southerland intend to do that when he was cleaning out the disc. He did so inadvertently or carelessly.

**31**  In these circumstances, Dr. Southerland must present evidence "negating that of the plaintiff or necessarily the plaintiff will succeed". The evidence negating ***negligence*** is that of the two defence doctors. Both said that even experienced spinal surgeons cut the artery, the vein or both when performing discectomies. Therefore, the defendant argues, Dr. Southerland's standard of care complied with the recognized and respectable practice of spinal surgeons.

**32**  Evidence that tends to establish a failure of Dr. Southerland to meet the appropriate standard of care seems to be as follows:

1. He knew there was a danger of cutting the artery or the vein if he allowed his instruments to go past the front or annulus fibrosus portion of the disc.
2. He knew he had to be very cautious in preventing this from happening but in his attempt to thoroughly clean out the disc he overshot his intended target.
3. He knew or ought to have known that for the past 10 years spinal surgeons stopped using aggressive techniques in cleaning out the disc. The reasonable inference one can draw from this change of practice is that spinal surgeons adopted it in order to reduce as much as possible any potential injury to the vein or the artery.

**33**  The negating evidence the defendant asks me to apply comes from the testimony of the two defence doctors. Both said that cutting the vein or the artery during a discectomy happens to even the best surgeons. The second defence doctor said it was just a misadventure or an adverse event. Defence counsel argues that while the life-threatening mistake of cutting the artery and the vein rarely happens, it is an unpreventable mistake. Thus, he contends that Dr. Southerland's surgical skills met the standard of care required of him at the time.

**34**  The Shorter Oxford Dictionary defines a "standard" as "a definite level of excellence ...". Hence, the law tries to encourage the pursuit of excellence by all professionals and discourage the acceptance of mediocrity. At one end of the scale, the law says that courts should not hold professionals to a standard of perfection. At the other end, the law does not allow professionals to immunize themselves from liability flowing from careless acts by establishing amongst them a standard of care that is obviously negligent when a simple precaution would have prevented the damage.

**35**  Because this "unpreventable mistake" could cause Ms. Carlsen's death, that eventuality raised the level of Dr. Southerland's standard of care. Standard medical practice would then dictate that Dr. Southerland should have prepared himself for this event by having a vascular surgeon standing by should it occur. He did not. Moreover, there is no evidence indicating the two defence doctors or their other colleagues took this precaution when they performed discectomies on their patients. The defence lack of evidence on this point substantially weakens the defence doctors' opinions that Dr. Southerland's surgery was within the surgical level of excellence for discectomies.

**36**  Assume that very experienced general practitioners occasionally prescribe the wrong medicine causing serious injury or death to their patients. On the defence theory, this would mean that other general practitioners who do the same are acting within their appropriate standard of care. That cannot be the law for general practitioners. Nor can it be the law for other medical professionals.

**37**  The obvious precaution that Dr. Southerland should have taken was to ensure that he not let his instruments penetrate past the annulus fibrosus. The evidence from both sides was that most other spinal surgeons are able to comply with this standard while performing a discectomy. In other words, the level of excellence the law required of Dr. Southerland was much higher than the level of the small number of spinal surgeons who occasionally cut a patient's vein or artery.

**38**  In Kapur v. Marshall et al [*(1978), 19 O.R. (2d) 478*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0YJ-00000-00&context=), the patient died as a result of the defendant spinal surgeon committing a similar mistake to that of Dr. Southerland in this case. The learned trial judge found the defendant acted within the appropriate standard of care. I am unable to agree with that decision for the reasons mentioned above.

**39**  Dr. Southerland struck me as an honest, conscientious surgeon who tries to do his very best for every patient. On this one particular occasion, he made an unfortunate mistake amounting to ***negligence***. Probably, it will never happen again.

JUDGMENT

**40**  There will be judgment for the plaintiff on the issue of liability. Costs follow the event.

BOUCK J.

**End of Document**

[***Casses v. Canadian Broadcasting Corp., [2015] B.C.J. No. 2531***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HHT-8531-JCRC-B110-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E.J. Adair J.

Heard: October 27-31, November 3-7, 17-21,

24-28, December 1-5, 8-10, 2014;

February 2-6, 2015.

Judgment: November 24, 2015.

Dockets: S115272, S098449, S098738, S099002

Registry: Vancouver

**[2015] B.C.J. No. 2531** | 2015 BCSC 2150

Between Fernando Casses and Dr. Fernando Casses Inc., Plaintiffs, and Canadian Broadcasting Corporation, Kathy Tomlinson, Enza Uda, Chris Doe, Wayne Williams, Chris Poe, Brett Hyde, Charlie Cho and Kim Loe, Defendants And between Fernando Casses and Dr. Fernando Casses Inc., Plaintiffs, and Douglas Backer, Caroline Mitchell and Elizabeth Watkins, Defendants, and Kathy Tomlinson and The Canadian Broadcasting Corporation, Third Parties And between Fernando Casses and Dr. Fernando Casses Inc., Plaintiffs, and Krystal Lee Cook, Defendant, and Kathy Tomlinson and The Canadian Broadcasting Corporation, Third Parties And between Fernando Casses and Dr. Fernando Casses Inc., Plaintiffs, and Robin Lee Patricia Odiorne, Defendant, and Kathy Tomlinson and The Canadian Broadcasting Corporation, Third Parties

(567 paras.)

**Case Summary**

**Tort law — Defamation — Defamatory statements — What constitutes defamatory words — Professional misconduct — Defences — Fair comment — Fair comment — Matters of public interest — Actions by Casses against various individual plaintiffs and Canadian Broadcasting Corporation for defamation dismissed — CBC had broadcast television reports and web story that discussed history of professional complaints against Dr. Casses — Individual defendants were former patients of Dr. Casses who had complications resulting from surgeries performed by him, and who were interviewed for reports — Inferential meanings of reports were defamatory of Dr. Casses — However, CBC was entitled to succeed on defence of responsible communication — Dr. Casses made out defamation claim against only one individual defendant, who succeeded on defence of fair comment.**

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| Actions by Casses, and his professional corporation, Dr. Fernando Casses Inc., against various individual plaintiffs and the Canadian Broadcasting Corporation for defamation. The CBC had broadcast television reports and a web story that discussed Dr. Casses. The individual defendants, Cook, Odiorne, Backer and Watkins, were former patients, and their family members, of Dr. Casses who had had complications resulting from surgeries performed by him, and who were interviewed for the TV and web reports. The individual defendant Watkins had made a negative statement on the RateMDs website regarding Dr. Casses and his involvement in the death of a patient; she raised the defence of fair comment. The CBC defendants included a journalist involved with the reports and other employees, including Tomlinson, Uda and Williams. The reports stated Dr. Casses had surrendered his medical license in Arizona, but was now practicing in British Columbia, and that at least five complaints and three lawsuits had been filed against him, but in most cases the BC College of Physicians and Surgeons agreed with Dr. Casses that he acted responsibly and was not to blame. Dr. Casses argued the inferences an ordinary person would draw from the words published and spoken were defamatory, including the inference he was guilty of systematic professional misconduct and habitual professional ***negligence*** and dishonestly and deceitfully concealed information from his patients. The CBC defendants argued there were pleaded meanings alternative to Dr. Casses', which were justified. They pleaded three separate defences: responsible communication, justification and fair comment. Williams also pleaded a limitation defence. The defendants all asserted that nothing was published that referred to Casses Inc.  HELD: Actions dismissed.  A defamation action was required to prove three things to obtain judgment and a remedy: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words referred to the plaintiff; and (3) that the words were published. The plaintiff Casses Inc. failed to prove a defamation claim against any of the defendants. The claims by Casses Inc. could not succeed because neither the TV reports nor the web story nor any statements made by any of the individual defendants would have been understood by a reasonable person to be "of and concerning" Casses Inc. This was not an occasion where personal accusations against an officer or director or employee were defamatory of the corporation. The inferential meanings of the web story and the TV reports were defamatory of Dr. Casses. Dr. Casses' pleaded meanings were not accepted; however, an ordinary, reasonably thoughtful and informed person would have inferred meanings that were defamatory of Dr. Casses. The reports had the tendency to injure Dr. Casses' reputation as a surgeon in the eyes of a reasonable person, impugned his professional skills and his fitness to be licensed in B.C. as a general surgeon. Dr. Casses had proved the necessary elements of a defamation claim against the CBC defendants. However, Dr. Casses failed to make out his claims against the defendants Cook, Odiorne and Backer. But, the inferential meanings of Watkins' RateMDs post were defamatory of Dr. Casses. The CBC Defendants were entitled to succeed on the defence of responsible communication, in relation to the web story and TV reports. The defendants had been diligent in trying to verify the allegations about Dr. Casses, the statements were motivated by concern for the community and many of the statements were substantially true. The CBC defendants acted responsibly in developing and publishing the reports. Watkins' statements about Dr. Casses would have been understood as comment, not fact, particularly given the context and Dr. Casses failed to prove Watkins was actuated by express malice. Watkins succeeded on her fair comment defence. The other individual defendants also would have succeeded on a fair comment defence. Williams' limitation defence would have succeeded in respect of the TV reports, but not the web story. |

**Statutes, Regulations and Rules Cited:**

Health Professions Act, [*R.S.B.C. 1996, c. 183, s. 42*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FP1-JKHB-60MV-00000-00&context=), s. 43, s. 53

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

Supreme Court Civil Rules, Rule 3-5(12)

**Counsel**

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Counsel for the Defendant Robin Lee Patricia Odiorne (in Action No. S099002): J. West.

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**Reasons for Judgment**

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| **E.J. ADAIR J.** |

**1. Introduction**

**1**  The plaintiff Dr. Fernando Casses trained in Colombia as a medical doctor. In the mid-1980s, Dr. Casses came to Canada and completed a five year residency at the University of Toronto to qualify as a general surgeon. Dr. Casses then worked for a number of years in the United States. He moved to B.C. from Arizona in the fall of 2000. Initially, he carried on a surgical practice in Port Alberni. He later moved to Creston, where he practiced briefly in 2001. Then, in 2002, Dr. Casses moved his surgical practice to Quesnel, where he had privileges at G.R. Baker Memorial Hospital. Dr. Casses remained in Quesnel until 2012.

**2**  The defendant Kathy Tomlinson is an investigative journalist and (as of trial) employed by the defendant Canadian Broadcasting Corporation. The CBC hired Ms. Tomlinson in 2007 to launch a television news segment called "Go Public." As described by Ms. Tomlinson, Go Public has always been heavily invested in public-interest stories, and virtually all of the story ideas come from members of the public.

**3**  On September 8, 2009, CBC Vancouver broadcast the first of three Go Public segments in which Dr. Casses was discussed. A segment was also broadcast on "The National," CBC's major, national evening newscast. I will refer to the Go Public segment on each of these broadcasts as a "TV Report." Ms. Tomlinson also wrote a related article (the "Web Story"), which was published on the CBC's website on September 8, 2009. The Web Story remained available as of the trial.

**4**  A number of former patients of Dr. Casses (and their family members) were interviewed for the TV Reports and the Web Story. Those interviewed included the defendants Krystal Lee Cook and Robin Odiorne (both of whom were Dr. Casses' patients), and Douglas Backer and Elizabeth Watkins (whose mother, Edith Backer, was one of Dr. Casses' patients).

**5**  Within a few months of publication of the TV Reports and the Web Story, Dr. Casses filed three separate legal proceedings, against Ms. Cook, against Ms. Odiorne, and against Mr. Backer and Ms. Watkins. I will refer to these proceedings as the "Individual Actions," and the defendants in these actions as the "Individual Defendants." Dr. Casses asserted each Individual Defendant made statements about him (including statements in the TV Reports and the Web Story) that were defamatory. In due course, the Individual Defendants issued third party proceedings against the CBC and Ms. Tomlinson.

**6**  Then, in August 2011, Dr. Casses and the other plaintiff, Dr. Fernando Casses Inc. ("Casses Inc."), Dr. Casses' professional corporation, sued the CBC, Ms. Tomlinson and other CBC employees (the "CBC Defendants"). Dr. Casses and Casses Inc. asserted that the TV Reports and Web Story were defamatory of them. At the same time, the pleadings in the Individual Actions were amended to add Casses Inc. as a plaintiff.

**7**  Dr. Casses says that the "cruel, incendiary and egregious serial libels" contained in the TV Reports and the Web Story caused him "immediate and devastating injury," which can never be adequately redressed by financial compensation -- no matter how significant -- nor by any judgment of the court in his favour. Dr. Casses says that the TV Reports "may represent the most savage attack on the reputation of a professional person by the news media of this province in living memory." He says that the defamatory impact is more severe than that of a well-known case against the CBC, ***Leenen v. Canadian Broadcasting Corp.*** [*(2000), 48 O.R. (3d) 656*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4VK-00000-00&context=) (S.C.J.), aff'd [*(2001), 54 O.R. (3d) 612*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1J6-00000-00&context=) (C.A.), in which the plaintiff was awarded $950,000 in damages, and of the companion case, ***Myers v. Canadian Broadcasting Corp.*** [*(1999), 47 C.C.L.T. (2d) 272*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD91-F1H1-201W-00000-00&context=) (Ont. S.C.J.), aff'd [*(2001), 54 O.R. (3d) 626*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1J7-00000-00&context=) (C.A.), in which $350,000 in damages were awarded. Dr. Casses says that the defamatory imputations of the TV Reports and the Web Story are more serious than the defamatory expressions for which the Church of Scientology was held accountable in the leading case of ***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=). There, $1.6 million in damages (including $800,000 in punitive damages and $500,000 in aggravated damages) were awarded.

**8**  All defendants in all of the actions say the claims should be dismissed.

**9**  All defendants say the plaintiffs have failed to show that any of the TV Reports or the Web Story were "of and concerning" Casses Inc. All defendants say that, on that basic point, the claims of Casses Inc. must fail.

**10**  None of the defendants accepts that the TV Reports and the Web Story bear the defamatory meanings pleaded by the plaintiffs, which the defendants say are extreme and exaggerated. The CBC Defendants (in the CBC Action and in their responses to civil claim filed in the Individual Actions) have specifically pleaded alternative defamatory meanings, and say that these alternative meanings fairly summarize what a reasonable person would understand from the TV Reports and the Web Story.

**11**  The CBC Defendants say that they should succeed on all pleaded defences: justification, fair comment and responsible communication. With respect to justification, they say that the facts regarding the medical cases have been proven to be at least as bad as what was reported by the CBC, and that, on the fullness of the evidence, the truth regarding Dr. Casses' handling of many of the cases is actually worse. On fair comment, the CBC Defendants say that the statements constituting opinions, inferences, deductions and conclusions were plainly views that a person could honestly hold on the facts, and the evidence showed how genuine those opinions were. Finally, with respect to the defence of responsible communication, the CBC Defendants say the evidence demonstrates that the CBC faithfully reported what it had learned from many reliable sources, and gave Dr. Casses every opportunity to tell his side of the story.

**12**  The CBC Defendants say that these cases illustrate the vital role of journalists in shining a light on issues that are important to citizens and that were previously unknown, and of the role citizens can play in informing each other and sharing views. The CBC Defendants say that the subject matter of the TV Reports and the Web Story was not only about Dr. Casses, but also about the oversight by the B.C. College of Physicians and Surgeons (the "College") and the processes by which the quality of patient care in B.C. is or should be safeguarded.

**13**  At the close of submissions, I dismissed the plaintiffs' claims against three of the CBC Defendants: Ms. Enza Uda, Mr. Brett Hyde and Mr. Charlie Cho. (The claims against Caroline Mitchell were discontinued prior to trial.)

**14**  The Individual Defendants say that their statements cannot and do not bear the defamatory meanings alleged by the plaintiffs, and that they can have no liability for any republication by the CBC. In the event I find that any of the Individual Defendants are liable for defaming the plaintiffs, the defences of fair comment, justification and responsible communication have all been pleaded in the Individual Actions. The Individual Defendants (other that Ms. Watkins) also say that if any of them are found liable to the plaintiffs, they should succeed in their third party claims against the CBC and Ms. Tomlinson.

**15**  These actions present two diametrically opposed perspectives. From the plaintiffs' viewpoint, the defendants have engaged in cruel, incendiary and egregious libels, and perhaps the most savage attack on the reputation of a professional person by the B.C. news media in living memory. The defendants' perspective is that a group of citizens in a smaller B.C. community make public their honest concerns and unhappiness with the medical care available to them, their families and community, and their frustration with the College.

**2. Background Facts**

**16**  In this section, I am going to set out background facts and review some of the evidence. I will also make findings that are relevant to the Discussion section that follows.

**17**  I am going to begin with Dr. Casses.

**18**  Dr. Casses' credibility is an important feature of these actions. Several of the "stings" alleged, both by the plaintiffs and by the CBC Defendants (in their alternative defamatory meanings), are to the effect that Dr. Casses concealed relevant information from his patients and family members and failed to acknowledge or treat complications. Thus, how Dr. Casses deals with complications and how he responds to uncomfortable facts are relevant issues in these cases. Patients complained that he was not honest and forthright with them, so his credibility about his interactions with patients is pitted against his patients' credibility.

**19**  I have concluded that I need to be cautious about accepting Dr. Casses' uncorroborated evidence, and where his evidence conflicts with that of his patients, I generally will prefer the patient's evidence. However, I will give considerable weight to admissions or concessions made by Dr. Casses.

**20**  In my opinion, the evidence discloses that Dr. Casses often failed to disclose or acknowledge, or minimized, facts and circumstances that could reflect poorly on him as a surgeon, and he was dismissive of patients' legitimate concerns. The evidence discloses that a number of his patients felt that this was how he treated them, and they were unhappy and concerned about it. This was part of the story they communicated to Ms. Tomlinson, and that she subsequently reported.

1. **Dr. Casses**
2. **Training in Canada and work in Arizona**

**21**  Dr. Casses completed his five-year surgical residency training at the University of Toronto Department of Surgery in the early 1990s. While in Toronto, Dr. Casses lived with Annie Irwin and her husband. Dr. Casses described Mrs. Irwin as like a "second mother," and they had a very close and warm relationship. The Irwins moved to Victoria, B.C., and, according to Dr. Casses, their presence in B.C. was one of the reasons why, some years later, he decided to move here.

**22**  In November 1992, Dr. Casses received a specialist's certificate in general surgery from the Royal College of Physicians and Surgeons of Canada, and in January 1993, he was designated by the Royal College as a "Fellow" in the division of surgery.

**23**  In the mid-1990s, Dr. Casses moved to Arizona, where he was quickly hired to work with the Arizona Heart Institute. As Dr. Casses recalled, he was looking after cardiac and vascular surgery patients in a 25-bed intensive care unit. He left that position after being offered a much better position with another group of surgeons, practicing in Phoenix. As Dr. Casses described it, in this position, he was on standby 24 hours a day, 7 days a week for three cardiac surgeons, and in return, he did all of the general surgery work. According to Dr. Casses, he stayed in that practice until about 1998 or 1999. He then practiced in partnership with another general surgeon until late 1999. According to Dr. Casses, he was on staff at seven hospitals in the Phoenix area (including Walter O. Boswell Memorial Hospital ("Boswell Memorial")) and on call 21 days a month. In addition to changes in his work situation, late 1999 was also a somewhat turbulent time for Dr. Casses personally, as he was involved in divorce proceedings after a brief marriage.

**24**  Dr. Casses described how, over dinner on Valentine's Day 2000, he discussed with his now-wife, Eda ("Sam") Schoenauer, that he was thinking of leaving Arizona and moving to B.C. Around the same time, there had been an issue with one of the surgeries done by Dr. Casses at Boswell Memorial on a patient, Frances Martinez. In February 2002, Dr. Casses was sued for medical ***negligence*** in relation to the case. The litigation was ultimately settled.

**(ii) Dr. Casses' application to the College and problems in Arizona**

**25**  In the summer of 2000, Dr. Casses completed an application form (the "B.C. Application") for registration with the College. The B.C. Application is dated July 15, 2000. Dr. Casses testified that, despite the date written on the B.C. Application, he did not send it to the College until (he thought) late August 2000. He explained that, earlier in the summer, he was attending to some personal matters, including looking after his mother.

**26**  Dr. Casses acknowledged that the questions in the B.C. Application were one way in which the College carried out its due diligence to protect members of the public. He acknowledged "absolutely" that this was not something to be taken lightly, and that it was a very serious mandate for the health, life and death of people in B.C. An applicant was required to certify that the information provided in the application was true.

**27**  The B.C. Application required Dr. Casses to respond to the following questions:

1. Have you ever had your licence to practise medicine in any jurisdiction revoked, suspended, or restricted in any way?
2. Are you presently, or have you ever been, the subject of a complaint which has resulted in a formal investigation or a disciplinary proceeding by a medical licensing authority?
3. Have you ever had your hospital privileges revoked, suspended, or restricted in any way?

. . .

1. Are you aware of any inquiry likely to be made by any authority, licensing or otherwise, with respect to your conduct, personal behaviour, or competence?

Dr. Casses responded "No" to each of these questions.

**28**  However, on August 18, 2000, Dr. Casses performed surgery on a patient, Mrs. Beverly North, at Boswell Memorial. There was a problem with the surgery. Dr. Casses had punctured the patient's right iliac vein. Several hours later, Mrs. North's condition deteriorated severely. She suffered acute respiratory distress syndrome, cardiac failure and renal failure. She died a month later.

**29**  Boswell Memorial then initiated a review. Dr. Casses testified that he did not learn of the review until September 20, 2000. In a somewhat remarkable co-incidence, this was two days after his interview (on September 18, 2000) with Dr. D.H. Blackman, the registrar of the College, in connection with Dr. Casses' application for admission for registration in B.C. The committee conducting the review at Boswell Memorial asked Dr. Casses for a written explanation in relation to 17 cases going back over five years. Beverly North's and Frances Martinez's surgeries were among the 17 cases. Dr. Casses did not inform Dr. Blackman of any of this.

**30**  Dr. Casses then went on a planned vacation to Europe. When he returned in October, Dr. Casses was asked to appear before the Boswell Memorial review committee, which he did on October 18, 2000.

**31**  Dr. Casses wrote to Dr. Blackman at the College on October 11, 2000, advising him that he had accepted a position as a locum in general surgery at the West Coast General Hospital in Port Alberni. He informed Dr. Blackman that the position ran from October 22, 2000 to November 6, 2000. Dr. Casses did not say anything in this letter about the review that was taking place in Arizona. At trial, Dr. Casses testified that he was not obliged to provide that information for Dr. Blackman, and therefore he did not. Dr. Casses was issued a temporary licence by the College for the purposes of the position in Port Alberni.

**32**  Following the review by the committee at Boswell Memorial, a report dated November 8, 2000 was then sent to Dr. Casses, advising him that there was to be an interim suspension of his hospital privileges. Dr. Casses testified that, because he was working in Port Alberni, he did not see the November 8 report until early December. However, based on what Dr. Casses had told Dr. Blackman in his October 11, 2000 letter, the Port Alberni position finished on November 6, and it appears that Dr. Casses had returned to Arizona by November 23. I therefore have significant doubt about the accuracy of Dr. Casses' memory that he did not see the review committee's report until early December.

**33**  The suspension of Dr. Casses' privileges at Boswell Memorial automatically triggered a notice to the Arizona Board of Medical Examiners (the "Arizona Bomex"), which was then required to carry out an investigation.

**34**  On November 23, 2000, Dr. Casses again wrote to Dr. Blackman. The letter is on the letterhead of Dr. Casses' office in Phoenix, and the content of Dr. Casses' letter implies he was writing the letter from Arizona, not Port Alberni. Again, in my view, this casts doubt on Dr. Casses' evidence that he did not see the November 8 report from the Boswell Memorial review committee until early December. Dr. Casses advised Dr. Blackman that he had accepted a permanent position at the West Coast General Hospital in Port Alberni beginning January 1, 2001. He advised further that he would be relocating to B.C. by mid-December and required an unrestricted permanent medical licence to be issued to him by that date. Again, Dr. Casses did not mention anything concerning events in Arizona. At trial, he testified that he was not required to.

**35**  Since, as of November 23, 2000, Dr. Casses had had his hospital privileges at Boswell Memorial suspended, which in turn triggered an investigation by the Arizona Bomex, his responses to questions 7, 8 and 11 in the B.C. Application were no longer true. However, Dr. Casses' position was that he had no obligation to inform the College of that fact, and therefore he did not.

**36**  As he requested, Dr. Casses received a letter from Dr. Blackman dated December 8, 2000, advising him that his name had been entered on the full medical register for B.C., effective December 8, 2000. Again, Dr. Casses did not mention anything about what was taking place in Arizona. I find that, certainly by December 8, 2000 (and probably by November 23, 2000), Dr. Casses had received the November 8, 2000 report of the Boswell Memorial review committee, advising him of an interim suspension of his hospital privileges. However, Dr. Casses did not communicate any of this to Dr. Blackman. At trial, Dr. Casses testified that he was not required to do so. His position was that, if he was not asked to disclose something, he had no obligation to disclose it.

**37**  However, Dr. Casses must have appreciated that his licence to practice medicine in B.C. was based (at least in part) on the answers he had given to the questions in the B.C. Application. I find that, as of December 8, 2000, Dr. Casses knew that his answers to questions 7, 8 and 11 were no longer true, but he concealed the facts from Dr. Blackman and the College.

**(iii) The Arizona Bomex meeting in January 2001 and the Consent Agreement**

**38**  Dr. Tim Hunter, who was the Vice Chairman of the Arizona Bomex in 2000 and 2001, testified concerning the Bomex investigation process. The Arizona Bomex would subpoena records involved in the physician's practice. Those records would then be reviewed by a medical consultant employed by the Bomex, and the consultant would then provide a report to the Arizona Bomex members. According to Dr. Hunter, in Dr. Casses' case, the Arizona Bomex members (including Dr. Hunter) received a lengthy report.

**39**  On January 19, 2001, a meeting of the Arizona Bomex, open to members of the public, was held. At that meeting, a consent agreement, whereby Dr. Casses (who gave his address as Port Alberni, B.C.) would voluntarily surrender his Arizona medical licence, was presented to the Arizona Bomex, for acceptance by the Bomex. The voluntary surrender would then terminate any further investigatory proceedings involving Dr. Casses. However, the agreement had not been signed by Dr. Casses. This was a matter of concern for Dr. Hunter.

**40**  The Arizona Bomex meeting minutes record that Dr. Hunter made the following motion:

Dr. Hunter moved to summarily suspend the doctor's [Dr. Casses'] license if the Board does not receive the signed consent agreement for surrender of license within 30 days and that the case be referred to formal hearing. However, if the signed consent agreement for surrender of license is received within 30 days, it is accepted and the case will be closed.

**41**  The minutes record that the motion was passed, with one abstention.

**42**  The minutes also record that: "Dr. Hunter would like to see a paper trail preventing the doctor from practicing in Canada." This was not part of the motion. Dr. Hunter explained that this was something he said on discussion of the motion at the public meeting. Dr. Hunter also recalled saying at the meeting that there were multiple cases of what he felt were egregious medical practice on the part of Dr. Casses.

**43**  Dr. Casses signed the document titled "Consent Agreement for Surrender of Active License" (the "Consent Agreement") on January 20, 2001. One of the terms was that Dr. Casses agreed not to reapply for a licence for five years from the date of surrender. The Consent Agreement also provided that:

1. All admissions made by Dr. Casses are solely for final disposition of this matter and any subsequent related administrative proceedings or civil litigation involving the Board and Dr. Casses. Therefore, said admissions by Dr. Casses are not intended or made for any other use . . . .

. . .

1. Dr. Casses further understands that this Consent Agreement and Order, once approved and signed, shall constitute a public record document which may be publicly disseminated as a formal action of the Board.

**44**  On cross-examination, Dr. Casses acknowledged that he knew the Consent Agreement was going to be a public document, and he knew that, as of the trial, a copy of the Consent Agreement was available on the Internet.

**45**  Under "Findings of Fact," the Consent Agreement stated:

1. At the time of cancelation of Dr. Casses' license, Dr. Casses' staff privileges at Walter O. Boswell and Del E. Webb Memorial hospitals had been summarily suspended based upon quality assurance concerns.
2. Dr. Casses admits that in connection with a surgery, he believes that he fell below the standard of care which might have been harmful to the health of a patient.

The patient referred to in para. 4 was Mrs. Beverly North.

**46**  On cross-examination, Dr. Casses acknowledged that he admitted the conduct and circumstances described in paras. 3 and 4 of the Findings of Fact in the Consent Agreement constituted unprofessional conduct, in the sense of any conduct or practice which is or might be harmful or dangerous to the health of the patient or the public.

**47**  The Consent Agreement was signed and accepted on behalf of the Arizona Bomex on February 9, 2001.

**48**  As of September 2014, the MD profile page for Dr. Casses on the Arizona Bomex website shows as "Board Actions" on February 9, 2001: "Surrender -- Surrender of License -- Unprofessional conduct (any conduct which is or might be harmful to the health of a patient or the public)." Dr. Casses acknowledged on cross-examination, and I find, that anyone doing a Google search for him could bring up his Arizona Bomex MD profile, and that it was available publically.

**(iv) Dr. Casses' response to the inquiry from the College about Arizona**

**49**  Dr. Blackman wrote a letter to Dr. Casses dated February 23, 2001. Dr. Blackman's letter is not in evidence, although Dr. Casses' response to it, a letter dated March 9, 2001, was marked as Ex. 68. Based on Dr. Casses' letter, I find that Dr. Blackman must have asked Dr. Casses to provide an explanation about events in Arizona. There is no admissible evidence about what prompted Dr. Blackman's letter. However, based on Dr. Casses' evidence, until he was asked directly by Dr. Blackman, he communicated nothing to the College about events in Arizona. His position was that he had no obligation to do so.

**50**  Accordingly, I find that, as of February 2001, Dr. Casses had not communicated anything to Dr. Blackman about either the suspension of his hospital privileges in Arizona or the investigation by the Arizona Bomex that resulted from the suspension, or about the existence and content of (and the background to) the Consent Agreement. It was only when Dr. Casses had no other choice that he provided Dr. Blackman (and the College) with any information.

**51**  Dr. Casses' letter begins:

I am writing in reply to your letter dated February 23, 2001 wherein you request information in response to a number of specific questions. Rather than specifically answering those questions, I thought it would be helpful if I would give you a bit of background concerning my practice history and my decision to move to British Columbia.

At the outset, I would like to acknowledge that there has been a preliminary review of my practice by Boswell Memorial Hospital in Arizona.

**52**  In fact, as Dr. Casses well knew, things had gone far -- very far -- beyond the "preliminary review" stage in Arizona. His hospital privileges had been suspended in November, triggering an investigation by the Arizona Bomex. As of January 20, 2001, he had agreed with the Arizona Bomex to surrender his medical licence and admitted to unprofessional conduct. However, although in his letter Dr. Casses describes a number of events, attempts to explain (and justify) his actions and expresses pain and regret at having to write to Dr. Blackman, his letter does not mention the existence of the Consent Agreement at all. He was not candid with Dr. Blackman about what had happened in Arizona. In my opinion, this reflects a pattern: Dr. Casses, when he could, concealed bad or uncomfortable (for him) facts, unless there was no other alternative. In my opinion, the evidence discloses that this was how Dr. Casses (perhaps despite his best intentions) dealt with a number of his patients.

**53**  I do not know the details of how matters were eventually resolved between Dr. Casses and the College. However, there is no dispute that matters were in fact resolved. In his evidence, Dr. Casses confirmed that sometime in 2001 (he was unable to recall the month), he was again permitted by the College to practice surgery. As far as he was able to recall, Dr. Casses was not placed under the supervision of another doctor when his medical licence was reinstated.

**(v) In 2001, Dr. Casses moved from Port Alberni to Creston and in 2002 moved to Quesnel**

**54**  Sometime in 2001, Dr. Casses left Port Alberni and moved his practice to Creston, B.C. He was subsequently sued by one of his patients there.

**55**  By early 2002, Dr. Casses had moved his practice to Quesnel, where he had privileges (through the Northern Health Authority of B.C.) at G.R. Baker Memorial Hospital ("Baker Hospital").

1. **Dr. Casses' College questionnaires**

**56**  In Dr. Casses' College questionnaire for 2002, dated February 7, 2002, he answered "no" to the following question:

Have you entered into an agreement with, made a promise or given an undertaking to a licensing authority in the face of potential disciplinary action by that authority (other than the College of Physicians and Surgeons of British Columbia).

**57**  Of course, given the Consent Agreement and the circumstances in which Dr. Casses signed it, the true answer to this question was "yes." When it was put to Dr. Casses on cross-examination that he had given a false answer on the questionnaire, Dr. Casses justified answering "no" on the basis that the College already knew about the Consent Agreement. Indeed, in each subsequent year up to and including 2009, Dr. Casses always answered this question "no."

1. **The Arizona jury verdict against Dr. Casses**

**58**  In 2002, while Dr. Casses was practicing in Quesnel, he was named as a defendant in litigation filed in Arizona by Beverly North's children (including Ms. Sandra Hix), arising out of Mrs. North's death. Prior to trial, Dr. Casses' liability insurer paid $1 million to settle the claim against him, and so Dr. Casses did not participate in the 2005 trial. In June 2005, the Arizona jury found in favour of the plaintiffs and awarded damages of $1 million. According to the jury verdict, the jury found the relative degrees of fault to be Boswell Memorial 10% and Dr. Casses 90%.

**59**  Dr. Casses did not dispute that he was partially at fault in relation to Mrs. North's surgery, although he disagreed that he was 90% at fault.

**(viii) There are troubling questions about how Dr. Casses became licensed in B.C. and about the oversight of the College**

**60**  This background raises troubling questions about Dr. Casses' history in Arizona and the circumstances in which he became licensed in B.C. In my opinion, Dr. Casses shows a strong tendency to minimize, excuse and justify his conduct. I find that, until confronted, Dr. Casses concealed information about events in Arizona, including the suspension of his hospital privileges and the existence of the Consent Agreement, from the College. Although Dr. Casses provided an excuse, he continues to give false answers on the College's annual questionnaires, implying that this is acceptable to the College. In my opinion, this also raises troubling questions about the College's oversight.

1. **Dr. Casses' Quesnel patients**

**61**  All of the surgeries performed by Dr. Casses while in Quesnel were carried out at Baker Hospital, where he was one of two general surgeons. As might be expected, Baker Hospital is much smaller and has fewer resources (both in terms of staff and equipment) than the regional hospital in Prince George. Moreover, the resources available at a large metropolitan hospital such as Vancouver General Hospital ("VGH") go far beyond what Baker Hospital can offer.

**62**  Apart from Edith Backer, Mr. Field and Mr. Caskey, Ms. Tomlinson interviewed all of the individuals mentioned below, as part of her research for the Web Story and the TV Reports. She communicated with Ms. Watkins and Caroline Mitchell, Edith Backer's daughters, about their mother's surgeries, and reviewed the correspondence Ms. Watkins exchanged with the Northern Health Authority and the College. Ms. Tomlinson was contacted by Mr. Caskey after the TV Reports were broadcast on September 8.

**63**  The evidence at trial was somewhat different than what Ms. Tomlinson had been told. In some areas, the stories were more complete; in others, they were less so. This is not surprising. However, in essentials, the stories the patients and family members told to Ms. Tomlinson and that were reported in the TV Reports and the Web Story were consistent with the stories that came out during the trial.

**64**  Dr. Casses did not hesitate to acknowledge that it is a profoundly serious matter to perform surgery on an individual. He accepted as fundamental principles of surgical practice that: there should be informed consent; the surgeon takes care to avoid complications but, when they do occur, the surgeon treats them promptly and fully, and investigates for any signs of complications; and, when there are complications that have to be dealt with, it is very important to be completely up front and forthright with the patient about those complications, including in the medical record.

1. **Joe Giesbrecht**

**65**  In September 2003, Dr. Casses performed gall bladder surgery on Mr. Joe Giesbrecht. According to Dr. Casses, when Mr. Giesbrecht was admitted, he was very ill. Originally, Dr. Casses had planned to do a laparoscopic cholecystectomy, in other words, removal of Mr. Giesbrecht's gall bladder (the cholecystectomy) using laparoscopic techniques. He began that procedure. However, the cannula turned out to be too short and, while looking for another larger size, Dr. Casses made a small puncture in Mr. Giesbrecht's small bowel when placing clamps. According to Dr. Casses' operative report, although he recognized the injury, he did not repair it at that stage of the surgery. According to Dr. Casses' operative report, on further investigation, he anticipated performing a laparoscopic cholecystectomy on Mr. Giesbrecht would be extremely difficult and unsafe. He therefore aborted the procedure and proceeded with an open cholecystectomy. According to Dr. Casses' operative report, there were no complications in Mr. Giesbrecht's surgery, apart from the minor puncture of the bowel, which (according to Dr. Casses) was recognized and fixed immediately.

**66**  Mr. Giesbrecht remained in hospital in Quesnel for about two weeks, before being discharged. Unfortunately, while in hospital, Mr. Giesbrecht developed a wound infection, which continued to require treatment and attention after Mr. Giesbrecht was discharged.

**67**  In January 2005, Mr. Giesbrecht sent a complaint letter to the College in relation to his treatment by Dr. Casses. Mr. Giesbrecht wrote that "my complaint is not so much about the fact that Dr. Casses lacerated my bowel but it is mostly about his actions, or lack of action, after the laceration and completion of the surgery." He stated that, after the surgery, neither he nor his wife (who was employed as a nurse at Baker Hospital) was informed about the laceration of his bowel. He wrote that "My wife had to actually confront Dr. Casses the next morning to find out what had taken place during my surgery and that he had lacerated my bowel." Mr. Giesbrecht repeated this version of events in his evidence at trial.

**68**  When this version of events was put to Dr. Casses during cross-examination, he categorically denied it. He acknowledged that he did not inform Mr. Giesbrecht what had taken place during the surgery, but explained that Mr. Giesbrecht was in no condition to have such a communication after his surgery, since he was almost comatose. However, according to Dr. Casses, while he was making rounds, he spoke to Mr. Giesbrecht's wife and gave her a very detailed explanation of what had happened. As far as Dr. Casses could recall, this discussion occurred the same day as Mr. Giesbrecht's surgery.

**69**  Mrs. Giesbrecht was not called as a witness.

**70**  The College responded in writing to Mr. Giesbrecht's complaint. It quoted from a written response from Dr. Casses. There, Dr. Casses described Mrs. Giesbrecht as "an OR nurse [who] understands medical terminology," and "a very experienced OR nurse who works directly with me." Mr. Giesbrecht testified that, at the time of his surgery in September 2003, his wife was not working as an OR nurse at Baker Hospital and was not qualified to do so. When this was put to Dr. Casses on cross-examination, he conceded Mrs. Giesbrecht was probably not working as an OR nurse at the time of Mr. Giesbrecht's surgery.

**71**  The College acknowledged to Mr. Giesbrecht that he had had an accidental perforation of his bowel (something Dr. Casses does not dispute). However, the College wrote that "the management of all of the complications appears to be reasonable and appropriate. The perforation appears to have been accidental, and the College would not be specifically critical of Dr. Casses for having the complication or the subsequent treatment of the wound infection."

**72**  Mr. Giesbrecht was not mentioned by name in the Web Story or any of the TV Reports. His case was one of the cases where the patient complained to the College and the College was not critical of Dr. Casses. However, one of Mr. Giesbrecht's complaints was that he had not been told about what had happened to him during the surgery -- that his bowel had been lacerated. There are no medical records in evidence to confirm whether the "very detailed explanation" described by Dr. Casses took place, and Dr. Casses' statement to the College that Mrs. Giesbrecht was an OR nurse at the time of the surgery was misleading.

1. **Robin Odiorne**

**73**  Ms. Odiorne is in her early 50s. She has lived in Quesnel for over 40 years, and has friends and family there. She has worked for about 30 years as a hairstylist.

**74**  On February 11, 2004, Dr. Casses performed surgery on Ms. Odiorne. Two procedures were scheduled: a laparoscopic cholecystectomy and a hysterectomy. According to Dr. Casses' operative report, the laparoscopic cholecystectomy was to be done first, and the hysterectomy would follow, but only if the laparoscopic cholecystectomy was "flawless."

**75**  On the evidence, the laparoscopic cholecystectomy was "flawless," and Dr. Casses then proceeded with the hysterectomy. During that procedure, Ms. Odiorne's bladder was cut. Dr. Casses' operative report says: "When transecting the vaginal cuff with the Metzenbaum scissors, I made an iatrogenic injury in the posterior fundus of the urinary bladder . . .. That injury was promptly recognized, and then I proceeded in repairing the injury . . . ."

**76**  Dr. Casses' operative report then describes how another surgeon, Dr. Geoff Thomas, became involved. Dr. Casses writes: "Because of the concern with this iatrogenic injury of the urinary bladder, I requested the assistance of Dr. Thomas."

**77**  Dr. Thomas, a urologist, prepared his own operative report. Based on his description, the repair that Dr. Casses had done was not satisfactory. Sutures placed by Dr. Casses were removed and the "bladder defect" was reopened. Dr. Thomas described how, eventually, a deep suture on the right side of the wound was identified. Dr. Casses confirmed in his evidence that he had placed this suture in an attempt to repair the cut in the bladder. Based on Dr. Thomas' report, once this suture was removed, the repair proceeded uneventfully.

**78**  Dr. Casses' evidence concerning what he told Ms. Odiorne after the surgeries was equivocal. At one point, he testified that he could not recall what conversation he had with Ms. Odiorne. It would not be surprising that, 10 years after the fact (and with no contemporaneous notes), Dr. Casses was unable to remember what he talked about with Ms. Odiorne. However, at another point in his evidence, Dr. Casses testified that he had a detailed conversation with Ms. Odiorne, to the effect that the surgery went well, and, although there was a tear in her bladder, this was fixed and she would recover very well.

**79**  On cross-examination, Dr. Casses acknowledged that an operative report is an important part of a patient's medical history, and that it is important to complete it shortly after the operation, since the surgeon is relying on his memory. However, his report was dictated February 22, 11 days after the surgery, in contrast to Dr. Thomas' report, which was dictated the day of the surgery. Dr. Casses described his report on Ms. Odiorne's surgeries as a "very good" report, and testified that, since there had been a surgical complication, he took extra time to make sure that everything was correct.

**80**  Despite that, at trial, Dr. Casses attempted to distance himself from his operative report. Although he wrote in his report, "I made an . . . injury . . in the bladder," Dr. Casses testified that in fact he was not responsible for the injury, which he acknowledged was a complication. Rather, according to Dr. Casses, it was his surgical assistant who had cut Ms. Odiorne's bladder. Dr. Casses explained that he nevertheless accepted responsibility -- and used the word "I" in his operative report -- because he was the "captain of the ship." Dr. Casses testified that his operative report was not wrong, but when it said "I," that was not him but his assistant.

**81**  In her evidence, Ms. Odiorne described meeting with Dr. Casses, prior to the day of her surgeries, to discuss the proposed surgeries with him. (Dr. Casses was unable to recall details of this meeting, which is unremarkable given the passage of time.) Ms. Odiorne recalled that she asked Dr. Casses whether anyone had died when he performed this surgery, and he told her no, that he was good at it. Ms. Odiorne explained that she was scared and nervous, and wanted to know something about Dr. Casses' history.

**82**  Ms. Odiorne could not recall whether she saw Dr. Casses prior to her surgery on February 11. After surgery, she recalled waking up in Baker Hospital's intensive care unit, with people around her. She recalled being in considerable pain (akin to labour pains) in the area of her bladder. Ms. Odiorne recalled that Dr. Casses came to see her, and told her that her bladder had been accidentally "nicked," but it had been repaired and everything looked fine. According to Ms. Odiorne, Dr. Casses used the word "nicked." Ms. Odiorne remembered thinking that a "nick" was small and minor.

**83**  Dr. Casses took great offence at the proposition put to him on cross-examination that he had "nicked" Ms. Odiorne's bladder. He placed a somewhat bizarre interpretation on the word "nick," describing it as "something really grotesque," and claimed he arrived at this understanding by looking up the meaning of the word in several dictionaries. I do not find his evidence believable, and I prefer Ms. Odiorne's evidence of her discussion with Dr. Casses to Dr. Casses' evidence.

**84**  According to Ms. Odiorne, Dr. Thomas came to see her the morning after her surgery. (She explained that, since Quesnel was a small town, she knew who Dr. Thomas was.) As Ms. Odiorne recalled, Dr. Thomas asked her how she was doing, and she told him not good at all, and mentioned her bladder. According to Ms. Odiorne, Dr. Thomas told her that if he had not been in town, she might not have lived, and he described the problems with his repair of the laceration in her bladder. I find that Ms. Odiorne's evidence is consistent with Dr. Thomas' operative report, and that "a bloody mess" would be an apt description of what was facing Dr. Thomas and Dr. Casses until Dr. Thomas completed the repair. According to Ms. Odiorne, after she was discharged from hospital, she found her recovery very difficult. She was in considerable pain and very anxious. As Ms. Odiorne recalled, as she was recovering, she dealt mostly with Dr. Thomas, rather than Dr. Casses.

**85**  According to Ms. Odiorne, because of what she had been told by Dr. Thomas, she became concerned that Dr. Casses may not have told her the truth about what had happened during her surgery. Although Dr. Casses had described her bladder as being "nicked," Dr. Thomas had told her it was a "bloody mess" and took almost an hour to repair.

**86**  I find that Dr. Casses did not fully explain to Ms. Odiorne what had happened to her in surgery, and in particular, did not tell her about why Dr. Thomas had become involved. Rather, in describing what had happened as a nick or small cut, he left Ms. Odiorne with the impression that nothing of consequence had occurred. I find that Ms. Odiorne only learned why Dr. Thomas had become involved, and about the full extent of the complication, when she spoke to Dr. Thomas.

**87**  Eventually, in May 2007, Ms. Odiorne wrote a letter to the College. At trial, she explained that she was motivated to write not only because of her own experience but also because of what she was hearing in the community and her concern for people in her community, especially seniors. Among other things, Ms. Odiorne wrote (concerning Dr. Casses): "This Dr needs to be reviewed! His history needs to be reviewed ASAP!!" She referred to herself as "A very concerned ex-patient." Ms. Odiorne sent a second letter to the College in June 2007, where she wrote (among other things): "I am afraid for myself and all who may go in blind like myself, and be sorry with the results! I do not want anymore innocent people to suffer needlessly."

**88**  As part of the College's normal process in dealing with complaints, Dr. Casses was asked to provide a response and did so in November 2007. In describing what occurred when Ms. Odiorne's bladder was cut, he wrote: "The iatrogenic injury was promptly recognized and immediately Dr. Geoff Thomas, a Urologist was requested in the OR and he very kindly repaired the urinary bladder injury." However, Dr. Casses did not mention anything about his attempt to repair the injury before calling for Dr. Thomas. He did not mention that Dr. Thomas had to dismantle Dr. Casses' attempt at repair, which included searching for and removing the "deep suture" that had been placed by Dr. Casses. Nevertheless, the College clearly was in possession of and reviewed both Dr. Casses' and Dr. Thomas' operative reports.

**89**  The College responded to Ms. Odiorne's complaint by letter dated January 25, 2008. The College wrote in part:

The committee notes that inadvertent trauma to the bladder . . . are well recognized complications of an abdominal hysterectomy. In this case, the complication was promptly recognized and appropriately dealt with. The committee members felt that Dr. Casses had applied appropriate surgical skills and did not feel that Dr. Casses was negligent when accidentally cutting the bladder.

. . .

In the committee's review, some documentation concerns were uncovered regarding your bladder repair. The committee also is cognizant that your letter of concern advised the College that you had general concern that [sic] Dr. Casses' surgical skills. With regards to this the Quality of Medical Performance Committee has asked the Executive Committee to review your concerns.

With regards to the surgical complication that you sustained . . . the committee members sympathize with the fact that this must have been of significant emotional and physical discomfort to you, but could not conclude that this was occasioned by lack of skill or neglect.

**90**  Also on January 25, 2008, the College wrote to Dr. Casses, enclosing a copy of its letter to Ms. Odiorne. The letter to Dr. Casses reads in part:

As you will note from the attached letter to Ms. Odiorne, the committee felt that [the bladder laceration] was an unfortunate surgical complication which was promptly recognized by yourself. For this reason the committee felt that Ms. Odiorne's complaint was not sustainable. However, in the process of reviewing your letter of response, records and your history of previous surgical complaints, the committee found as follows:

1. Your bladder repair resulted in bilateral ureteric occlusion from mal-placed sutures.
2. Your operative report did not disclose that this was the reason for summoning Dr. Thomas.
3. Your response to the College should have addressed this complication.
4. Committee members noted a large number of surgical complications over the last four years, particularly with regards to laparoscopic surgery.

In view of the above the committee felt that while the concern raised by Ms. Odiorne may not be sustainable, the number of previous surgical complications raised a concern that has been brought to the attention of the Executive Committee of the College for their review.

**91**  On cross-examination, Dr. Casses testified that he accepted all of the bulleted criticisms, except for the last one.

**92**  However, almost immediately, he qualified his answer, demonstrating how sensitive he is to criticism, and also a very strong inclination to deflect or minimize it:

Q Okay. Well, we can get to that, but you -- despite what you have said a few minutes ago, you acknowledge that the bladder repair resulted in occlusion from malplaced sutures, that Dr. Thomas -- that your operative report and your letter to the College neglected to mention those important things?

A No, I don't -- I don't acknowledge that. I think that they -- my explanation has been given several times. I do the first repair. If I would have been satisfied with the repair I -- I didn't have a reason to call Dr. Thomas in. Because I was not one hundred percent satisfied with my repair of the urinary bladder, I called Dr. Thomas to check, double check, and confirm whether my repair is satisfactory or not. My repair is not satisfactory. We dismantle the repair. We do it again.

**93**  The College wrote a second letter to Dr. Casses, dated January 29, 2008, informing him that it would be conducting a summary review of his practice.

**94**  According to Ms. Odiorne, when she received the College's response to her complaint, she was so disgusted that she threw out the letter.

**95**  In August 2009, Ms. Odiorne told Ms. Tomlinson her story, essentially as she testified at trial, including her discussion with Dr. Thomas, the College's response to her complaint (that it had been rejected) and what she had done with the College's letter. Ms. Tomlinson asked Ms. Odiorne to see if she could get another copy of the College's letter, but, as far as Ms. Tomlinson could recall, she did not see a copy until after the litigation had started -- long after publication of the Web Story and the TV Reports.

**96**  I find that Dr. Casses was not candid with either Ms. Odiorne or with the College about what happened during Ms. Odiorne's surgery. He minimized the complication of the lacerated bladder and failed to mention his unsuccessful attempt to repair it. These events were not inconsequential for his patient, Ms. Odiorne. He failed to tell Ms. Odiorne the real reason for calling in Dr. Thomas, and left Ms. Odiorne to learn this from Dr. Thomas the next day. Dr. Casses' failure to mention in his operative report that it was his unsuccessful attempt to repair the laceration that resulted in Dr. Thomas being called in, was the subject of critical comment by the College (which Dr. Casses at first accepted, but then quickly rejected). Dr. Casses failed to acknowledge, either to Ms. Odiorne or to the College, what is disclosed by Dr. Thomas' operative report: that the repair (by Dr. Thomas) took significant time and effort, and was complicated by a malplaced suture inserted by Dr. Casses.

1. **Krystal Cook**

**97**  Ms. Cook is now married, and her surname is now Rawls. However, in these reasons, I will continue to use the surname "Cook."

**98**  On February 18, 2004 (a Wednesday), Ms. Cook had surgery performed by Dr. Casses to address an ingrown toenail on the great toe of her left foot. Ms. Cook had just turned 19. In Dr. Casses' operative report, his clinical note stated: "This young female has developed a left ingrown toenail with persistent inflammation and even infection of the medial and lateral aspect of the left toe edges. For that reason, the patient was recommended surgical treatment."

**99**  Based on the operative report, the surgery, done under a local anesthetic, was uneventful. In his oral evidence, Dr. Casses described the outcome as "perfect." Ms. Cook was discharged home that day. I do not know what post-operative instructions Dr. Casses gave to Ms. Cook, although he testified he gave her both oral and written instructions. If there was something in her clinical records about what she was told or given, nothing was entered into evidence at trial. Dr. Casses did not prescribe any antibiotics. He explained that prescribing antibiotics was not in accordance with the guidelines from the Center for Disease Control in Atlanta. There may, in fact, have been an excellent medical explanation for why Dr. Casses did not prescribe antibiotics for Ms. Cook. However, I doubt that he provided any such explanation to Ms. Cook or to her parents.

**100**  By Friday, Ms. Cook was in a great deal of pain. One of her parents took her to see her family doctor, Dr. Strovski. However, Dr. Strovski was unwilling to unwrap the surgical dressing that Dr. Casses had applied, and did not. According to Ms. Cook, he told her to rest and contact Dr. Casses on Monday. Ms. Cook accepted that advice and returned home.

**101**  On February 23, 2004 (Monday), Ms. Cook returned to see Dr. Casses. She came in on crutches. She recalled him saying that she should "quit being a baby," something Dr. Casses denied saying. Ms. Cook found Dr. Casses' remarks hurtful. When Dr. Casses unwrapped the surgical dressing, he saw that Ms. Cook had a horrible infection at the site of the surgery. He made arrangements to have Ms. Cook admitted to hospital immediately. He wrote orders for IV antibiotics and painkillers.

**102**  On February 24, 2004, under a general anesthetic, Dr. Casses examined Ms. Cook's toe and did a surgical cleaning. According to his operative report, on examination, Dr. Casses found severe cellulitis around the skin and subcutaneous tissue of Ms. Cook's left great toe, as well as around the bed of the toenail. Among other things, he removed the remainder of the toenail. I do not know whether Dr. Casses had a plan for treatment of Ms. Cook going forward, because, if there were some relevant medical records, nothing was entered into evidence. There is no evidence any x-rays were taken, for example. On February 26, 2004, Dr. Casses left on a pre-planned holiday, and Dr. Katalinic (the other general surgeon in Quesnel) took over Ms. Cook's surgical care in hospital.

**103**  Ms. Cook remained in hospital about a week, until March 4. Once she was discharged home, she had her dressing changed daily by a home-care nurse and she attended the hospital daily for IV antibiotics. However, her condition worsened and, on the recommendation of the home-care nurse, she returned to hospital on March 14. X-rays showed that she had probably developed osteomyelitis. Ms. Cook saw Dr. Casses on March 15. Her father was with her, and both he and Ms. Cook recall that Mr. Cook was very upset and angry about his daughter's situation. As Mr. Cook recalled, he had an unpleasant exchange with Dr. Casses, and decided to take Ms. Cook to the much larger hospital in Prince George. Dr. Casses disputed Mr. Cook's version of events, and his evidence was to the effect that he was the one who arranged to have Ms. Cook transferred to Prince George. I find that Dr. Casses did arrange the transfer, but it was at Mr. Cook's request, indeed, his insistence. It was at Prince George that the decision was made to amputate Ms. Cook's left great toe in order to save her foot.

**104**  In March 2004, Ms. Cook wrote two posts to the website "healthboards.com." The first, dated March 4, 2004, is quite a long post, in which Ms. Cook describes her experience from February 18 to March 4, 2004. At trial, Ms. Cook testified that what she wrote was true. She did not mention Dr. Casses (or any other physician) by name, although she did mention that on the Monday after the surgery, the surgeon who performed the operation told her "don't be a baby." She later shared this post with Sandra Hix (Beverly North's daughter) and with Enza Uda at CBC, during Ms. Uda's research for a possible story on Dr. Casses. The second posting, dated March 11, 2004, is much shorter. In it, Ms. Cook asked for some advice based on the current state of her wound.

**105**  Ms. Cook described how the other surgeon in Quesnel who had been involved in her care apologized to her for what had gone on. At trial, Dr. Casses became quite agitated when asked if he had ever apologized to Ms. Cook. He said he did not have to apologize because he had done nothing wrong. Dr. Casses said that he did everything "by the book," and that what had happened was not his fault but the fault of the bacteria that caused the infection.

**106**  Ms. Cook never complained to the College about Dr. Casses, although, she said that, after she was contacted by Ms. Hix in 2009, she regretted that she had not done so. She explained that, at the time in 2004, she was just 19 and wanted to put things behind her and forget about them. However, she explained that later, when she realized that others had been affected, she was sorry that she had not spoken up at the time. Ms. Cook explained that she participated in the gathering on August 24, 2009 at Mr. Backer's house (described in more detail below) because she wanted to get the word out to people in her community that Dr. Casses was possibly not the best surgeon and that people had the right to choose and could go elsewhere, and also to tell her story.

**107**  Ms. Cook came to Dr. Casses as a teenager with a real medical problem, requiring surgery. In the absence of some evidence that Dr. Casses' instructions to Ms. Cook included returning to see him immediately if her wound became very painful (and there is no such evidence), I do not think that Ms. Cook or her parents can be criticized for going to the family doctor on February 20, 2004 or following the doctor's advice. When Ms. Cook returned to see Dr. Casses on February 23, she had a very serious medical problem that required immediately hospitalization. Dr. Casses' admonishment -- don't be a baby -- was harsh, uncalled for, hurtful and disrespectful to his patient. The other Quesnel surgeon involved in her care apologized to her, but Dr. Casses clearly feels he has nothing whatsoever to apologize for. That Ms. Cook associates Dr. Casses with the loss of her toe is, in the circumstances, not surprising.

1. **Ronald Caskey**

**108**  On March 29, 2004, Mr. Caskey went into Baker Hospital for what he was expecting would be day surgery by Dr. Casses for a hernia. According to Mr. Caskey, that was the only procedure he had discussed with Dr. Casses. However, when Mr. Caskey was discharged home, he was concerned because he had bandages around his entire abdomen. Then, when the bandages were taken off, he was very surprised to see that he had stitches from his sternum to his navel.

**109**  On the follow-up visit with Dr. Casses, Mr. Caskey asked Dr. Casses what had happened. As Mr. Caskey recalled, Dr. Casses told him that his abdominal muscles were torn and had to be sewn up. However, according to Mr. Caskey, he had never had any issues with his abdominal muscles. Mr. Caskey testified that no one had talked to him about cutting him from sternum to navel, and that he certainly would have remembered such a discussion. According to Mr. Caskey, Dr. Casses never said anything about it to him.

**110**  According to Mr. Caskey, he developed an infection at the top and bottom of the incision, and ended up in Baker Hospital Emergency. As he recalled, he saw Dr. Casses after his visit to the ER, and told him what had happened. According to Mr. Caskey, Dr. Casses told him there was no infection, and the redness was simply a normal part of healing. At that point, according to Mr. Caskey, he lost confidence in Dr. Casses and never went back to him.

**111**  According to Dr. Casses, and contrary to Mr. Caskey's evidence, he discussed performing the additional procedure with Mr. Caskey in the operating room on March 29, 2004, and obtained his consent. However, Dr. Casses acknowledged that his operative report, dictated the same day as Mr. Caskey's surgery, made no mention at all of any such discussion. Dr. Casses described having a discussion with Mr. Caskey in the operating room as a "shortcoming," and not documenting it in writing as a second "shortcoming." Nevertheless, according to Dr. Casses, he had Mr. Caskey's verbal consent to perform the second procedure, although, as of trial, he was unable to recall exactly what Mr. Caskey said.

**112**  There were no medical records in evidence that supported Dr. Casses' version of events.

**113**  Mr. Caskey wrote to the College, complaining about his treatment by Dr. Casses. In accordance with the usual practice, Dr. Casses was asked by the College to respond. Dr. Casses did so by letter dated July 4, 2005, which reads in part:

On the operating room table on March 29, 2004, as is my routine before putting the patient under anesthesia, I asked the patient what procedure we are doing (double-checking) and simultaneously on the operating room table, I asked him to raise his head, . . . At that point, as stated in my OR note, it was quite clear to see a bulging mass from the xyphoid down to the umbilicus. With that finding, . . . I pointed out to the patient that his hernia was larger than just a supra-umbilical hernia. On the OR table it was explained that it would be insufficient just to fix the supra-umbilical hernia without addressing the bulging mass. With no objection from Mr. Caskey we proceeded with midline ventral hernia repair.

**114**  When it was put to Dr. Casses on cross-examination that he never had any conversation with Mr. Caskey in the operating room, but went ahead on his own to do the expanded procedure, Dr. Casses denied it. He also denied that he did not tell Mr. Caskey what had happened until Mr. Caskey came back to see him a few days after the surgery.

**115**  By letter dated October 12, 2005, the College responded to Mr. Caskey's complaint, and said in part:

The issue of having consented to the repair of the diastasis recti is one which the reviewer could not come to a definitive conclusion. . . . Under the circumstances, the College would consider your complaint partially valid owing to the difficulty of trying to determine whether a proper consent was available. The College will share its criticisms of Dr. Casses' care with him.

**116**  Mr. Caskey wrote again to the College on October 25, 2005, and said in part:

At no time did Dr. Casses discuss with me that I had a problem with my abdominal muscles. . . .

Yet Dr. Casses claims that I had a problem and that he discussed this with me and that I gave him oral permission to perform surgery. Not true!

**117**  On January 4, 2006, the College responded by letter to Mr. Caskey's October 25, 2005 letter. In accordance with the general practice, Dr. Casses received a copy of the College's letter. The letter read in part:

In summary, the [Quality of Medical Performance] committee was critical of the care provided by Dr. Casses. The committee was critical of his decision to proceed with more extensive surgery at the time of the planned hernia repair, when the indication for the more extensive surgery was primarily cosmetic and not initiated by you. The committee also did not believe that Dr. Casses had obtained adequate informed consent before proceeding with this more complicated surgery. The committee considered it inappropriate to proceed with more extensive surgery based on a brief preoperative discussion.

**118**  In his testimony at trial, and to his credit, Dr. Casses acknowledged that he read this, "understood and -- and humbly accept the criticism, because it is perfectly valid."

**119**  I find that Dr. Casses did not have any discussion with Mr. Caskey on March 29, 2004 about performing additional surgery and therefore did not have Mr. Caskey's consent to perform such surgery. I prefer Mr. Caskey's evidence, which is consistent with Dr. Casses' operative report, to that of Dr. Casses. Dr. Casses' conduct is a breach of what he agreed is one of the fundamental principles of surgical practice. I find further that Dr. Casses did not inform Mr. Caskey about what had happened in the operating room until Mr. Caskey asked him on the follow-up visit. In that respect, I find that Dr. Casses concealed relevant facts from his patient. In addition, I find that, in responding to the College in relation to Mr. Caskey's complaint, Dr. Casses was not forthcoming about his failure to obtain Mr. Caskey's consent to operate, and attempted to justify his conduct by misstating the facts.

**120**  Ms. Tomlinson did not have any contact with Mr. Caskey prior to broadcast of the first TV Report on September 8, 2009. Mr. Caskey contacted her on September 9 and told her about his story, including about his complaint to the College, and sent her the associated documents. The information that he had made a complaint to the College, and the outcome, was incorporated into the September 9 and September 10 TV Reports and the Web Story.

1. **Tammy Mead**

**121**  On July 26, 2004, Ms. Mead underwent a laparoscopic cholecystectomy performed by Dr. Casses. According to Dr. Casses' operative report dictated the same day, the surgery was uneventful and without complications. Ms. Mead went home later that day. Ms. Mead recalled that she was feeling nauseous and feverish. She was throwing up bile. She was feeling quite unwell when her husband took her back to Baker Hospital on July 28. She was given a "pink lady," some Gravol and pain medication, and then sent home.

**122**  Ms. Mead returned to see Dr. Casses on July 29, 2004. As she recalled, she told him that she was throwing up green bile and in pain. As she recalled, Dr. Casses looked at her and said: "You just had surgery. Go home and have a hot bath."

**123**  According to Ms. Mead, Dr. Casses did not conduct any examination of her, did not order any tests for her and did not prescribe any medications for her. As Ms. Mead recalled, Dr. Casses did not say anything to her about a follow-up visit. There are no medical records that contradict Ms. Mead's evidence on these points.

**124**  As Ms. Mead recalled, she returned home feeling sick and discouraged. She concluded that she was not going to get help locally in Quesnel. Her husband then took her to Prince George. By that time, she was vomiting and the pain was getting worse. Further surgery was required, which was carried out in Prince George.

**125**  In October 2004, Ms. Mead made a complaint to the College concerning Dr. Casses.

**126**  In accordance with the usual process, Dr. Casses was asked to provide the College with his response, and did so by letter dated November 6, 2004. Among other things, he said:

Obviously, if a surgical complication occurs in one of my patients, I am never pleased. Nonetheless, I immediately assess the situation and take corrective measures.

He also wrote that:

Before I begin my response to each one of Mrs. Mead's accusations, I wish to first categorically deny all of them. Most importantly, as I will demonstrate with the clinical evidence contained herein, no surgical complication, no bowel perforation, no duodenal perforation, no "cut liver" occurred during the laparoscopic cholecystectomy which I performed on Mrs. Mead[.]

**127**  Dr. Casses was very definite in his letter to the College that he had not perforated Ms. Mead's bowel. He described his surgery on Ms. Mead as "meticulously performed."

**128**  However, in fact, as Dr. Casses acknowledged on cross-examination, Ms. Mead was suffering from two problems related to the surgery he performed. One was that Ms. Mead's bowel had indeed been perforated during that surgery. The other was that she had a bile leak. Dr. Casses acknowledged that he had not detected either problem during surgery. He conceded that "eventually" he would have discovered them if he had taken Ms. Mead's complaints on July 29 more seriously. His evidence on cross-examination contradicted a number of statements made in his November 6, 2004 letter to the College, including his assertion in the letter that the bowel perforation was the result of an endoscopic retrograde cholangiopancreatography ("ERCP") performed in Prince George, rather than something that had occurred during his surgery in Quesnel.

**129**  The College responded to Ms. Mead's complaint by letter dated March 14, 2005, on which Dr. Casses was copied. The letter read in part:

In summary, the committee was of the opinion that you had a laparoscopic cholecystectomy and were unwell from the time of your surgery until a further operation in Prince George. The committee [w]as of the opinion that the laboratory work, clinical findings, and CT scan, which were carried out before the ERCP, would suggest that you had a significant complication prior to the ERCP.

The committee was of the opinion that the preponderance of evidence would therefore suggest that your problems were related to a complication arising from your original surgery. The committee agreed that this was a valid complaint brought to the committee by yourself. . . .

The committee directed that Dr. Casses be informed that the committee found this care concern to be valid with the suggestion that he consider the possibility of surgical complications in his patients who present with pain postoperatively and the advice to follow these patients closely so that his potential complication can be detected in a timely fashion.

**130**  The College also wrote separately to Dr. Casses on March 14, 2005. That letter read in part:

The committee was of the opinion that the preponderance of evidence would suggest that Mrs. Mead's problems were related to a complication arising from her original surgery. The committee agreed that this was a valid complaint brought to the College by Mrs. Mead. The committee directed that you be informed that the committee found this care concern to be valid, with the suggestion that you consider the possibility of surgical complications in your patients who present with pain postoperatively and the advice to follow these patients closely so that this potential complication can be detected in a timely fashion.

**131**  Dr. Casses confirmed on cross-examination that he understood that was the substance of the College's conclusion, and that what was described was indeed his shortcoming with respect to Ms. Mead, "absolutely."

**132**  In August 2009, Ms. Mead provided Ms. Tomlinson with copies of the correspondence with the College relating to her complaint. Ms. Tomlinson also interviewed her.

**133**  I find that Dr. Casses did not adequately admit to or treat the complications from the surgery he performed on Ms. Mead. In particular, prior to trial, he refused to acknowledge even the possibility that he had perforated Ms. Mead's bowel during surgery, which I find (based on Dr. Casses' evidence on cross-examination) that he in fact did. Rather, in communicating with the College in response to Ms. Mead's complaint, he attempted to build a case that other physicians were responsible.

**134**  I find that, when Ms. Mead came to Dr. Casses for a follow-up appointment after the surgery, he failed to take her complaints seriously (even though she was quite unwell) or even investigate them, compounding the damage to his patient from the original complications from the surgery. I find that his approach to Ms. Mead was consistent with the views he expressed so strongly in his letter to the College -- that his surgery was "meticulously performed" -- and with his rejection of even the possibility that he might have made an error. I find that, unfortunately, Dr. Casses' approach was not at all compatible with the quality of patient care Ms. Mead was entitled to expect from her surgeon.

1. **Leigh Ann Monahan**

**135**  On September 2, 2004, Ms. Monahan had a laparoscopy and a laparoscopic tubal ligation performed by Dr. Casses. According to Dr. Casses' operative report dictated the same day:

The left fallopian tube was properly identified and then clipped with 4 surgical clips. One of the clips on the left, when applied, transected the left fallopian tube, and that appeared to be of no consequence[.]

**136**  Based on the operative report, the surgery was without complications. In his evidence at trial, Dr. Casses was very firm that the transection of the fallopian tube, described in his operative report, was not a complication.

**137**  However, later that day, one of the nurses reported to Dr. Casses that Ms. Monahan's blood pressure was low, and that she appeared sweaty, had a high heart rate and was pale. Dr. Casses suspected that Ms. Monahan may have been experiencing "some post-op intra-abdominal bleeding," and he determined that she needed to be returned immediately to the operating room, which she was. According to his operative report for the second surgery, Dr. Casses found about three units of "free blood" (fully half of the total blood in the human body) in Ms. Monahan's peritoneal cavity. This was completely abnormal. Dr. Casses' wrote in his operative report for the second surgery:

I started evacuating that free blood in the peritoneal cavity and gently removing the laparotomy pads in trying to identify the source of the bleeding.

In doing this maneuver, I just noticed that she was oozing from the broad ligament in close proximity to the laparoscopic clips placed in the left fallopian tube.

. . .

The bleeding point in the broad ligament was easily controlled with a couple of interrupted stitches . . ..

**138**  According to Dr. Casses, the bleeding had not been coming from the area where one of the surgical clips had transected the left fallopian tube, although he acknowledged that the bleeding was "in close proximity."

**139**  After the surgeries performed by Dr. Casses, Ms. Monahan experienced a number of problems, including quite severe abdominal pain. Eventually, in January 2005, she had further surgery performed in Williams Lake by Dr. Glenn Gill (a specialist in obstetrics and gynecology) and Dr. Brosseuk (a general surgeon). Adhesions were discovered in the area where Ms. Monahan was experiencing pain and these were addressed.

**140**  According to Dr. Gill's January operative report, on this surgery, there was no sign of the clips that had been placed by Dr. Casses. As a result, and to be on the safe side, Dr. Gill applied "Filshie clips" to the mid-portion of each fallopian tube. Dr. Gill explained that a Filshie clip is a specially designed clip, specifically for performing tubal ligations. It is wider and longer than the regular surgical clip and also has a Teflon-type cushion on the interior aspect of the clip. The Filshie clip is designed to clamp over the entire width of the fallopian tube and occlude the tube without cutting through or transecting it.

**141**  The January 2005 surgery appears to have resolved the main problems Ms. Monahan experienced after her September 2004 surgery.

**142**  At trial, I had the benefit of three expert reports, two from Dr. Gill (tendered on behalf of the CBC Defendants) and one from Dr. Howard Pendleton (tendered on behalf of Dr. Casses). Like Dr. Gill, Dr. Pendleton is also a medical doctor specializing in obstetrics and gynecology. Both doctors provided opinions about Dr. Casses' surgery on Ms. Monahan, the cause of the post-operative bleeding, his use of surgical clips (as described in the operative report) rather than the Filshie clips ultimately used by Dr. Gill, and other matters.

**143**  In Dr. Pendleton's opinion, the transection of the left fallopian tube was not the cause of the internal bleeding that created the very grave situation for Ms. Monahan and the need for the second surgery in September. However, the question on which Dr. Pendleton was asked to give his opinion was: "did the clip described as transecting the fallopian tube thereby immediately cause significant bleeding of the fallopian tube" [underlining added]. Moreover, Dr. Pendleton's opinion depends to a large degree on the accuracy and reliability of Dr. Casses' operative report.

**144**  In his November 5, 2014 report, Dr. Gill was asked: "What is the most reasonable explanation for bleeding that was discovered after the first surgery?" In Dr. Gill's opinion, from Dr. Casses' second operative report, it was clear that the bleeding that resulted in significant blood loss to Ms. Monahan occurred at the site where the tubal ligation was performed and where the surgical clips were placed on the left side. In his opinion, the most likely explanation was that the transected tube described in the first operative report did in fact subsequently bleed. Dr. Gill went on to explain that the fallopian tubes lie at the top-most aspect of the broad ligament, and are in fact the upper-most part of the broad ligament. In his opinion, the most likely cause of bleeding when the tube is transected in the area described as "close proximity to the broad ligament" would be the surgical clip transecting the tube.

**145**  Dr. Gill explained that there is an aspect of laparoscopic surgery that can suppress or delay bleeding, so that acute bleeding can be missed at the time of the original surgery. I note that, at trial, Dr. Casses rejected this explanation.

**146**  At trial, Ms. Monahan's memory of events at the time of her surgeries in September 2004 was quite poor. This is not surprising given the passage of time, and the fact that she was the patient.

**147**  Ms. Monahan's mother, Wendy Monahan, also testified at trial. She was present at the Baker Hospital when Ms. Monahan had her surgery. I think it fair to say that Ms. Wendy Monahan recalled the circumstances that day as being quite traumatic and that she feared her daughter was going to bleed to death. This is essentially what she communicated to Ms. Tomlinson in August 2009.

**148**  There was some confusion about whether Ms. Monahan had in fact complained to the College, and Ms. Wendy Monahan told Ms. Tomlinson such a complaint had been made. I find that Ms. Monahan did not make a complaint to the College about Dr. Casses. However, Ms. Monahan did file a lawsuit alleging he was negligent. That action was settled.

**149**  I prefer Dr. Gill's more complete discussion of the cause of the bleeding after Ms. Monahan's first surgery to that of Dr. Pendleton. I find that Dr. Casses' comment that the transection of the fallopian tube "appeared to be of no consequence," is consistent with an attempt on his part to minimize that his patient nearly bled to death from an event that occurred during his surgery. In fact, the transection of the fallopian tube was of great consequence to Ms. Monahan. Fortunately, the ultimate outcome for Ms. Monahan was a positive one.

1. **Stephanie Aaslie**

**150**  On April 18, 2005, Ms. Aaslie was admitted to Baker Hospital, suffering from acute gallbladder disease. Ms. Aaslie was then in her mid-20s. On April 20, 2005, she had surgery performed by Dr. Casses. Originally, Ms. Aaslie was to have had a laparoscopic cholecystectomy. However, after that surgery had begun, Dr. Casses noticed a small puncture site dripping bile, and not knowing the source of the bile, he made the medical decision to abandon that procedure. Instead, Ms. Aaslie had open surgery to remove her gall bladder. The surgery included exploration of her common bile duct and the insertion of a T-tube to drain bile. In the operative report, Dr. Casses states that there were no complications. Dr. Casses mentioned Ms. Aaslie's weight and body size as factors that contributed to a lengthy and challenging surgery. Ms. Aaslie was discharged from hospital on April 26, 2005.

**151**  However, after she returned home, Ms. Aaslie continued to feel very unwell. She was unable to eat or drink and was vomiting. She went back to see Dr. Casses. At trial, he testified that he was unable to recall her complaints and could only rely on whatever was in the hospital records. In a consultation report dated May 2, 2005, Dr. Casses described his impression when he saw her that day. He said (among other things) that "she is still massively overweight" and she "doesn't really look sick." Dr. Casses described her main problem as of May 2 as dehydration. He readmitted her to hospital for fluid therapy (among other things), and he anticipated that she would be ready for discharge in 48 hours. However, as Ms. Aaslie recalled, she became more ill. She had "horrible" vomiting and was in extreme pain. She continued to remain in hospital.

**152**  I find that, in fact, in addition to being dehydrated, Ms. Aaslie was leaking bile from a misfit T-tube inserted during Dr. Casses' surgery, and she was indeed quite unwell, as she described.

**153**  On May 10, 2005, at the urging of Ms. Aaslie's family, she was transferred by ambulance from Quesnel to Prince George, where Dr. Casses, at the request of the family, had arranged a referral to another physician.

**154**  At trial, Ms. Aaslie's memory of her time in Prince George was quite sketchy, although she recalled that she continued to feel very ill. In mid-May, she was transferred by air ambulance to VGH. Ms. Aaslie recalled being told that the bile duct had been cut and was leaking inside her. At VGH, she was seen by Dr. Charles Scudamore, a very senior surgeon there.

**155**  Dr. Scudamore's operative report was admitted into evidence as a business record, and he also testified at trial. Although the VGH transfer summary states Ms. Aaslie's diagnosis on admission as "bile duct injury," Dr. Scudamore's pre-operative diagnosis of Ms. Aaslie (which I accept) was a bile duct leak. During Dr. Scudamore's surgery, a bile leak was identified at the border of the T-tube that Dr. Casses had installed. This leak was then repaired using a stent. Dr. Scudamore testified that, contrary to the statements in the transfer summary, he did not see any sign of an injury to the bile duct. Ms. Aaslie returned to VGH in August 2005 for removal of the T-tube and stent.

**156**  At trial, Ms. Aaslie's recollection of her discussions with Ms. Tomlinson in August 2009 was quite poor. She recalled a couple of phone calls, but could not recall much about the content. She recalled that she and her husband met with Ms. Tomlinson in Quesnel. Ms. Aaslie recalled telling Ms. Tomlinson that she had had surgery and was very sick, but could not recall other details of their discussions.

**157**  Ms. Tomlinson had a much more complete recollection of her discussions with Ms. Aaslie. She talked to Ms. Aaslie first by telephone earlier in August, and made notes of the initial discussion in the notebook Ms. Tomlinson kept for notes on the story about Dr. Casses. However, as Ms. Tomlinson recalled, the first discussion was upsetting for Ms. Aaslie and relatively brief. Ms. Tomlinson spoke to Ms. Aaslie again by phone. As Ms. Tomlinson recalled, on that occasion Ms. Aaslie spoke at length about her experience, the complications from her surgery, how ill she was, and how Dr. Casses would not listen to her, brushed her off and kept saying that her problems were part of the healing process. This was generally consistent with Ms. Aaslie's evidence at trial. As Ms. Tomlinson recalled (and according to her notes), Ms. Aaslie told her that it was at VGH that it was discovered her bile duct had been severed and her bowel had been cut. Based on Dr. Scudamore's evidence, this was not, in fact, correct. Rather, Ms. Aaslie's problems came from the misfit T-tube Dr. Casses has installed, and that was ultimately repaired by Dr. Scudamore in Vancouver.

**158**  Ms. Aaslie and her husband met with Ms. Tomlinson on August 25, 2009, in Quesnel, and Mr. Hyde recorded the interview. Parts of the interview are shown in the TV Reports, and both Ms. Aaslie and Mr. Aaslie are quoted in the Web Story.

**159**  Ms. Aaslie came to Dr. Casses with a serious medical problem, and, based on Dr. Casses' evidence, the surgery he performed on April 20, 2005 was challenging and difficult. After she was discharged home from this surgery, Ms. Aaslie in fact remained very unwell. When she was readmitted to Baker Hospital on May 2, 2005, she was suffering from much more than dehydration. I find that Ms. Aaslie's case is similar to Ms. Mead's, and one where Dr. Casses did not adequately admit or treat a complication from the surgery he performed, and, from his patient's perspective, dismissed her legitimate concerns. I find further that the referral to another physician in Prince George came as a result of a request from Ms. Aaslie's family, although it was arranged by Dr. Casses.

1. **William Field**

**160**  On April 25, 2006, Mr. Field had hernia surgery performed by Dr. Casses.

**161**  Dr. Casses' operative report was dictated May 2, 2006, a week after the surgery. The operation performed is described as: "Left inguinal hernia with a polypropylene umbrella plug and mesh . . ." However, in the first paragraph of the "Procedure Description" section, Dr. Casses describes draping an area on the right side of the body, not the left, and in the second paragraph he describes making an incision above "the right inguinal ligament." There is no question that the surgery was performed on the left side of Mr. Field's body, and Dr. Casses' references to the right side are clear errors. Further in the operative report, Dr. Casses writes that "the defect in the internal inguinal ring was obliterated with a polypropylene umbrella plug which was anchored in place using four interrupted stiches . . ." In fact, rather than the single plug described in his operative report, Dr. Casses had found it necessary to use two plugs in Mr. Field's hernia surgery. Dr. Casses concludes his report by stating that, "In this particular operation, there were no complications."

**162**  Unfortunately for Mr. Field, he did have complications as a result of his hernia surgery and required further surgery to address those complications.

**163**  In August 2007, Mr. Field (through his lawyer, Mr. Hewitt) made a complaint to the College about the surgery performed by Dr. Casses. Mr. Field advanced his complaint on several grounds, including that Dr. Casses withheld information about problems during the surgery in the operative report. Mr. Hewitt enclosed three letters from Dr. William Simpson, a surgeon specializing in general and vascular surgery and practicing in Prince George, in support of Mr. Field's complaint. Those letters were admitted at trial as an expert report from Dr. Simpson.

**164**  In his letter dated February 19, 2007, Dr. Simpson noted the discrepancies in Dr. Casses' operative report (mixing up left and right), and also noted that Dr. Casses did not describe the need for two mesh plugs, one of them being extra-large. In Dr. Simpson's view, omission of such details was most unusual. In Dr. Simpson's opinion, it was likely that Dr. Casses had some difficulties in this hernia repair. He noted that the common operative time for an inguinal hernia repair such as described in Dr. Casses' operative report would be 30 minutes. Mr. Field's operation was much longer. Dr. Simpson noted that Dr. Casses "required not only the use of one large mesh plug but also the addition of an extra large secondary plug. This combination is a little unusual and probably reflects the difficulty that was experienced."

**165**  In his letter dated March 5, 2007, Dr. Simpson wrote that:

The use of two plugs, one large and one extra large, indicates significant difference from the usual experience in a hernia repair as does the length of time taken for the surgery.

What initially started off as a planned routine hernia repair obviously became something out of the ordinary. The extensive time taken to do the surgery together with the use of an extra large plug as well as a large plug indicates that this surgery was anything but routine.

**166**  In accordance with the College's usual practice, Dr. Casses was asked to provide a response to Mr. Field's complaint, and he did so by letter dated December 4, 2007. Dr. Casses addressed the use of two plugs and said:

As a note not mentioned in my original OR report was, the fact that I used two plugs instead of one. The reason for this was that the large plug alone was not big enough to 'obliterate' the internal inguinal ring. I placed the second one by its side to completely obliterate the internal inguinal ring.

**167**  In his letter to the College, Dr. Casses repeated that 62 minutes to complete the surgery was an "average" and "standard" time, and there was nothing out of the ordinary for a hernia repair operation to last that long. Dr. Casses hypothesized that the surgeon (Dr. Sullivan) who performed the later surgery on Mr. Field may have inadvertently perforated Mr. Field's bowel, implying that this was the cause of Mr. Field's problems. With respect to the omission of mention of the use of two plugs in his operative report, he said "There is no requirement to note the amount of plugs any more than the need to count stitches during surgery." Of course, Dr. Casses had in fact counted "four interrupted stitches" in his operative report.

**168**  On cross-examination, Dr. Casses said that an operative report is not an inventory.

**169**  The College did not agree with the position taken by Dr. Casses in his response.

**170**  In the College's letter dated April 14, 2008, the College first expressed the opinion that: "The length of the surgery being greater than one hour was probably a reflection of the degree of difficulty of this hernia repair, which could not be sealed with a single plug." On cross-examination, Dr. Casses said that he accepted that conclusion.

**171**  The College then expressed the opinion that:

[t]he operative report, dictated a week after the surgery, was incomplete and inaccurate. The committee members noted that there was a left to right confusion, there was no mention of a second plug, and there was no mention of the difficulty that Dr. Casses experienced with his surgery that led him to have to use two plugs.

On cross-examination, Dr. Casses said that he accepted that those criticisms were "perfectly valid."

**172**  The College's conclusions on these points are also consistent with Dr. Simpson's opinions.

**173**  The College said further:

The subsequent pathology report revealed that the segment of bowel resected contained chronic inflammation and it would not support Dr. Casses' contention that Dr. Sullivan [who performed the later surgery on Mr. Field] perforated the bowel.

Although it was contrary to the hypothesis he advanced in his letter to the College, Dr. Casses said that he accepted that conclusion.

**174**  The College also said:

The committee members opined that most likely the fact that Dr. Casses had used two plugs caused pressure necrosis of the colon and the consequent infection, colo-cultaneous fistula, and ultimate perforation. The committee members were of the opinion that this complaint was sustainable.

Dr. Casses said that he accepted those conclusions.

**175**  However, the College also expressed the opinion that, "It is distinctly unusual to use two plugs and a mesh to seal a hernia." Dr. Simpson had also commented on this. Dr. Casses said he only partly accepted the College's conclusion on this point.

**176**  As part of his case, Dr. Casses tendered expert opinion evidence from Dr. Allen Hayashi, a general surgeon practicing in Victoria. Like Dr. Simpson, Dr. Hayashi is very well-qualified to provide opinion evidence on matters relating to general surgery. Dr. Hayashi prepared an expert's report at least in part to respond to the opinion evidence of Dr. Simpson, and Dr. Hayashi discussed the use of two plugs in a hernia repair. Dr. Hayashi writes (pp. 17-18 of his report):

The plug and patch technique has evolved over time beginning from around the 1970's where surgeons would cut and fashion homemade plug devices by hand. By 1993 the CR Bard Company, a leader in hernia prosthetic reconstruction systems developed, manufactured and standardized these devices. The operative record . . . notes that Dr. Casses used two Bard PerFix Plugs for the procedure. . . .

Seeing that the Bard Company is the leader in the development and manufacturing of hernia plugs, their product information and instructions for use have been widely distributed to surgeons using these devices. Page two of their information document specifies that two plugs can be used for the purposes of repairing hernia defects. There are no specified contraindications for using more than one plug in their brochure.

Dr. Rutkow, a notable and well published expert in hernia care has suggested that two or more Bard PerFix plugs can be used to repair hernia defects. In my experience, many surgeons have used more than one mesh plug when needed to repair an inguinal hernia.

**177**  However, on cross-examination, Dr. Hayashi acknowledged that he had no first-hand experience in the use of two plugs to repair a hernia. He did not know whether Dr. Rutkow had ever used two plugs. The information he had relied on about the use of two plugs came primarily from product representatives, and from the Bard Company, rather than surgeons themselves.

**178**  In Dr. Hayashi's opinion, the most plausible cause of the fistula that Mr. Field developed was pressure necrosis from the mesh plug. This was consistent with the conclusion reached by the College, which Dr. Casses accepted.

**179**  Mr. Field also commenced legal proceedings against Dr. Casses, alleging ***negligence***, and alleging that Dr. Casses had failed to disclose to Mr. Field the complicated nature of the hernia surgery (such that two plugs were required) and had deliberately prepared a false operative report. The action was settled.

**180**  In preparing the Go Public stories, Ms. Tomlinson reviewed the pleadings Mr. Field filed in his legal proceeding, including the allegations that Dr. Casses had filed a false post-operative report and that he had failed to disclose to Mr. Field the complicated nature of the surgery. Ms. Tomlinson did not have a copy of Mr. Field's complaint letter to the College, or the response from the College.

**181**  I find, based on the opinion evidence, that the use of two plugs in hernia surgery was unusual. Based on Dr. Hayashi's evidence, pressure necrosis from the use of even one plug in hernia repair is recognized as a cause of colonic fistulas. However, in responding to the College, Dr. Casses developed a theory in which another surgeon (albeit inadvertently) was responsible for Mr. Field's difficulties, rather than acknowledge the likelihood that Mr. Field experienced a known complication from the surgery Dr. Casses had performed. In his correspondence with the College, Dr. Casses firmly rejected the idea that Mr. Field's surgery was longer than usual because it was more difficult than usual and required two plugs. It is puzzling why Dr. Casses would take this position, although one explanation is that he was attempting to minimize a complication suffered by his patient by insisting that the surgery was routine and uncomplicated. Ultimately, Dr. Casses accepted the conclusion reached by Dr. Simpson and the College on this point.

**182**  I also find that Dr. Casses' operative report was incomplete and inaccurate, a criticism that, at trial, Dr. Casses accepted as valid.

1. **Edith Backer**

**183**  Mrs. Edith Backer had lived in Quesnel since the early 1960s. She and her husband had ten children, six sons and four daughters. One of her sons, the Individual Defendant Mr. Backer, has owned a business in Quesnel for a number of years. He has known Mr. Giesbrecht, and the husbands of Ms. Odiorne and Ms. Mead since they were all children.

**184**  As of July 2008, Mrs. Backer was just short of her 80th birthday. Both her daughter Ms. Watkins and Mr. Backer described her as being in good health. Dr. Casses described her in a consultation report as looking "much younger" than her stated age.

**185**  On July 16, 2008, Mrs. Backer became very unwell while undergoing routine dental surgery. She began to suffer from severe right upper abdominal pain. She was rushed to the Baker Hospital Emergency Department, where she was examined (not by Dr. Casses) and then sent home. However, she remained very unwell. Mrs. Backer returned to the Emergency Department in the early morning on July 17, 2008.

**186**  Dr. Casses was asked to see Mrs. Backer later that morning, in surgical consultation. He examined her thoroughly. An ultrasound and other tests were done. The ultrasound showed a massively dilated gallbladder and a slightly enlarged common bile duct, and also showed a significant amount of what appeared to be free fluid around the liver and other nearby areas. Dr. Casses' impression at the time was that Mrs. Backer was experiencing an acute cholecystitis with the possibility she was also experiencing obstructive jaundice. Dr. Casses then admitted her to hospital. His consultation report indicated that Mrs. Backer was most likely going to require a laparoscopic cholecystectomy, but that such surgery would not be done until she had been treated medically and conservatively for a few days.

**187**  However, later on July 17, Mrs. Backer's condition deteriorated seriously and rapidly. Mrs. Backer had two seizures. Dr. Casses then ordered an emergency CT scan of Mrs. Backer's abdomen. The cause of at least some of Mrs. Backer's symptoms was then identified: there was a hemorrhage in the retroperitoneal area in the right upper quadrant of Mrs. Backer's abdomen, and the acute intra-abdominal bleeding was most likely coming from arterial branches supplying the posterior aspect of the head of the pancreas (which the surgery confirmed it was). In his evidence at trial, Dr. Casses described Mrs. Backer's condition as a ruptured pancreatic artery aneurysm.

**188**  Dr. Casses then proceeded to perform life-saving emergency surgery on Mrs. Backer. Among other things, he found that Mrs. Backer had a "massively distended" gallbladder, although there was no evidence of either acute or chronic inflammation. This was very unusual. Dr. Casses also found a significant amount (Dr. Casses estimated 3 to 4 units) of free blood and clots in the peritoneal cavity. To save Mrs. Backer's life, Dr. Casses had to control the bleeding coming from the head of the pancreas.

**189**  Despite the grave circumstances, Mrs. Backer survived the emergency surgery. She was able to be transferred to Baker Hospital's medical ward later that evening. Ms. Watkins had arrived from Kamloops. Dr. Casses recalled that over the next few days, Mrs. Backer did surprisingly well. Her children confirmed this in their evidence. However, Mrs. Backer was showing signs of obstructive jaundice (something Ms. Watkins recalled noticing before she returned to Kamloops on July 20), and on July 21, 2008, Dr. Casses noted that her bilirubin levels were starting to rise. He concluded that an ERCP needed to be done to clarify whether Mrs. Backer had a common bile duct obstruction (possibly as a result of placement of the stitches in the head of the pancreas during the emergency surgery) and, if so, what would be the best way to release that obstruction. Unfortunately, that procedure could not be done at Baker Hospital. On July 22, 2008, Dr. Casses contacted two surgeons (one in Burnaby and one in Prince George) concerning a transfer for Mrs. Backer. However, he was unable to arrange this. On July 23, 2008, as Mrs. Backer's bilirubin levels continued to rise, Dr. Casses again contacted a surgeon in Prince George and also contacted Dr. Scudamore in Vancouver concerning a transfer for Mrs. Backer. Fortunately, Dr. Scudamore was in a position immediately to accept the transfer.

**190**  In a summary letter that Dr. Casses prepared in anticipation of the transfer, he wrote:

Something that is not very clear to me is at the time of admission, why this patient had a massively dilated gallbladder without a clear underlying cause and why already her common bile duct was slightly enlarged. What is a fact is that this patient is behaving like an obstructive jaundice and I do not know if this obstructive jaundice was starting to happen before [we] operated on an emergency basis on this patient, or if at the time of surgery when placing stitches in the head of the pancreas to control the life threatening intraperitoneal retroperitoneal bleed, we may have caused a narrowing of the distal portion of the common bile duct before reaching the ampulla.

. . .

The family members have been notified of the need for a more advanced treatment, diagnosis and perhaps another operation.

**191**  On July 24, 2008, Mrs. Backer was transferred by air ambulance from Quesnel to VGH. Ms. Watkins was there, waiting for her mother, and remained in Vancouver until her mother's death a few weeks later.

**192**  After investigation at VGH, Dr. Scudamore re-operated on Mrs. Backer on an urgent basis. At the first surgery, Mrs. Backer was found to have a significant amount (about 1.5 litres) of blood mixed with bile in the peritoneal cavity. Dr. Scudamore determined that this was coming from the bile duct, but there was also a perforation of the duodenum. It appeared that there was a suture very close to the proximity of the bile duct. It was determined that this suture could not be safely removed, as it was through into the pancreas. According to Dr. Scudamore, there was no major arterial source of hemorrhage but there was significant bile peritonitis. A cholangiogram confirmed a bile duct stricture. According to Dr. Scudamore, Mrs. Backer did well for several days. However, she then became septic, and the decision was made to operate again. According to Dr. Scudamore, at the second operation, Mrs. Backer was found to have multiple holes in the gastro-intestinal tract, specifically the duodenum. According to Dr. Scudamore, these were then over-sewn, but it was clear that, despite Mrs. Backer being relatively stable, the blood supply to her proximal gastrointestinal tract seemed to be compromised and that she was developing ulcers of the duodenum. According to Dr. Scudamore, although all of the perforations were closed and Mrs. Backer was being treated aggressively, he spoke to her family, suggesting that her situation was actually grave and that, at 80, she would be unlikely to maintain her independence outside of hospital. According to Dr. Scudamore, it was then decided, after a family conference, that care should be withdrawn.

**193**  Mrs. Backer died on August 12, 2008. Her 80th birthday had been three days before.

**194**  Ms. Watkins had lived in Kamloops for many years and, since 1978, she had worked in administration at Royal Inland Hospital. Among other positions, she worked as a medical staff secretary, as an administrative assistant to the chief executive officer and as clerical supervisor for the diagnostic imaging department. Ms. Watkins had completed a 3-month-long medical terminology certificate course. She was therefore familiar with hospitals and with medical terminology.

**195**  On August 27, 2008, Ms. Watkins sent a letter to Ms. Cathy Ulrich, president and CEO of the Northern Health Authority, concerning Mrs. Backer. Ms. Watkins explained that:

I am writing this letter in hopes that some investigation into the events that eventually led to the my mother's death will bring a change in procedure for the Quesnel Hospital Emergency Department.

**196**  In her letter, Ms. Watkins posed a number of questions, beginning with questions about Mrs. Backer's treatment at Baker Hospital on July 16, 2008. Dr. Casses was not the sole focus of Ms. Watkins' letter. For example, Ms. Watkins is obviously critical of the treatment her mother received when she arrived at Baker Hospital Emergency on July 16, and there is at least mild criticism of the surgeons at VGH.

**197**  On September 11, 2008, Ms. Watkins wrote to the College. She enclosed a copy of the letter she had sent to Ms. Ulrich, and said: "I would like to request that you further investigate the actions of Dr. Casses that eventually lead [sic] to the death of my mother."

**198**  Dr. David Butcher, the Vice-president, Medicine, for the Northern Health Authority, responded to Ms. Watkins' letter by letter dated December 16, 2008. He expressed his condolences to Ms. Watkins and the other members of the Backer family. Among other things, in relation to the emergency surgery Dr. Casses performed on Mrs. Backer, he noted that "inadvertent ligation of the common [bile] duct is a recognized complication of this type of surgery."

**199**  With respect to Ms. Watkins' complaint to the College, Dr. Casses provided his comments in a lengthy letter dated October 29, 2008. He said, in part:

Respectfully again, I am very sorry for the loss of Mrs. Watkin's [sic] elderly mother. Unfortunately, her co-morbidities were complicated and beyond the capabilities of any human intervention. . . . The obstruction of the distal common bile duct was an unavoidable complication when putting stiches to control bleeding in an 80 year old pancreas with very poor tissue strength. The necrosis of the head of the pancreas and the perforations of the duodenum were the direct result of impaired blood supply caused by the rupturing of vital arterial blood vessels.

**200**  The College essentially reached the same conclusions. The subsequent surgical complications, including the perforations, were a result of the ruptured pancreatic artery aneurysm, which impaired the blood supply to vital organs and tissues.

**201**  The College responded to Ms. Watkins by letter dated March 5, 2009. The letter began by expressing the College's condolences on the loss of Ms. Watkins' mother. Although Ms. Watkins' letter to the College specifically referred to Dr. Casses, since she had attached the letter to the Northern Health Authority, which criticized and questioned the conduct of other physicians, the College's response addressed those aspects as well.

**202**  After reviewing and quoting from comments from Dr. Casses and Dr. Scudamore, the College wrote:

To put these comments into perspective, if a patient has a compromised blood supply, the tissue that is supplied frequently dies. Also, the functions which the tissue performs do not occur. For example, if the arterial flow in the vessel supplying the small intestine are blocked by an embolus or clot, the tissue is not supplied because of bleeding or infection, and this will lead to damage to the areas being supplied. Under the circumstances, perforations of the small bowel would be expected. This does not mean that the surgeon has created the perforations, but that the lack of blood supply to the area causes a weakening in tissue causing the perforation. Similarly, attempting to perform surgery on damaged tissue is problematic. The tissue tears easily and frequently bleeds, sutures will not hold and attempting to ameliorate the situation is extremely difficult and sometimes impossible.

**203**  Mrs. Backer's children, perhaps Ms. Watkins in particular, found the conclusions reached by the College and the Northern Health Authority very hard to accept. However, I find that the conclusions reached by the College in respect of Dr. Casses' management of Mrs. Backer's case are supportable based on the evidence before me.

**204**  On the evidence, it is difficult to draw any firm conclusions concerning what Dr. Casses told the Backer family members about what had happened in Mrs. Backer's surgery, and whether he explained that, during the emergency surgery, a stitch was made in close proximity to the bile duct and through into the pancreas (a recognized complication from this type of surgery). It is also difficult to draw any firm conclusion about what Dr. Casses told the Backer family members about Mrs. Backer's developing jaundice. Ms. Watkins appeared to have some knowledge about the nature of the Dr. Casses' surgery, since (for example) she mentioned in her letter to Ms. Ulrich that "Dr. Scudamore and Dr. Schumacher performed the roux-en-y procedure to redirect the common bile duct that was accidentally sutured by Dr. Casses." I find that Mrs. Backer's case is one where her children believed that Dr. Casses was dismissive of their concerns. In addition, both Mr. Backer and Ms. Watkins were unhappy about the way the College dealt with Ms. Watkins' complaint.

1. **Ms. Tomlinson's background**

**205**  Ms. Tomlinson is now in her early 50s. After studying journalism at a community college in Edmonton, she began her career in radio in Edmonton in the late 1980s. She moved into television in about 1990. In 1992, she joined the CBC in Edmonton and for several years, until 1997, she worked in a unit that did investigative journalism. In 1997, and while still employed by the CBC, Ms. Tomlinson moved to B.C. and continued to do a significant amount of work as an investigative journalist, although she also worked as news reporter.

**206**  Ms. Tomlinson described the difference between news and investigative journalism. News is responding to the news of the day. Reporting is done very quickly and, while facts are checked and verified, there is not much digging done. On the other hand, according to Ms. Tomlinson, investigative journalism is much more proactive. The reporter aims to expand significantly on a topic or a tip or a piece of information, and spends much more time and uses many more resources than would be the case with a news report.

**207**  In 2001, Ms. Tomlinson left the CBC in Vancouver to become the national reporter for CTV in B.C. Between 2002 and 2005, Ms. Tomlinson was in Washington, D.C., as a reporter in CTV's Washington bureau. In 2005, Ms. Tomlinson returned to Canada, and began work as an investigative reporter for the CTV National News in Toronto in a segment called the "Whistleblower." She remained in that position for about two and a half years. In August 2007, she was hired by the CBC to return to Vancouver and launch and produce Go Public. Although Go Public began as a segment on the CBC in B.C., it was expanded to be broadcast nationally, on radio and on the Internet.

**208**  In 2009, Ms. Tomlinson worked on Go Public with Ms. Uda, who (among other things) provided research support for possible stories. Ms. Uda had a graduate degree in journalism from the University of British Columbia and began working for the CBC in 2001. Between 2001 and about 2008, Ms. Uda worked as a researcher on several CBC programs, which she helped to produce. As she recalled, she first became involved with Go Public in 2007. Ms. Uda worked with Ms. Tomlinson on the story concerning Dr. Casses from the end of May 2009 to the end of July 2009, which was her last involvement with the story. Ms. Uda was away on holidays in August, and when she returned she worked on other things.

**209**  Ms. Tomlinson's boss was Mr. Wayne Williams, CBC Vancouver's News Director. Although Ms. Tomlinson appeared to have a considerable amount of autonomy in investigating and producing stories for broadcast on Go Public, there remained certain areas where Ms. Tomlinson either needed or asked for Mr. Williams' advice, direction and approval. That was the case with respect to the TV Reports and the Web Story.

**210**  Ms. Tomlinson has won a number of journalism awards, including four Jack Webster Awards and two Canadian Association of Journalism awards. She has also won several awards from the Radio Television News Directors Association, including an award for the stories at issue in these actions.

**211**  According to Ms. Tomlinson, virtually all of the stories that appeared in her Go Public segments originated from members of the public who contacted the CBC (usually by writing in) with something that they thought should be made public, but which had not been. Ms. Tomlinson explained that media outlets such as the CBC take on a significant commitment with respect to investigative journalism, because it must be accepted that most of the stories will never make it to air. According to Ms. Tomlinson, that was certainly the case with Go Public. She estimated that about 90% of the stories that are considered -- whether just quickly or even in depth -- never see the light of day because:

we want to make sure that we only bring forward the stories that are very much in the public interest, that of course, first and foremost, are true, fair, and accurate. You know, that -- that represent, you know, the interests of a wide cross-section of people, not necessarily a very narrow one.

And -- and where there's -- it's always very important to us that there's a -- an accountability factor. We say that we hold the powers that be accountable, and that means any organization or entity that holds the public trust or deals with the public in any way whatsoever, we feel that they should be held accountable for whatever they -- they're doing that has any effect on the public. And we don't want to do that -- we don't do that lightly.

**212**  According to Ms. Tomlinson, some Go Public stories have been "killed" very late in the process, after a great deal of resources have gone into them. She explained that stories have been killed the day before they were scheduled to air, which, after the effort that went into the story, is a tough decision to make. Ms. Tomlinson explained that usually the reason why a story is killed at a late stage is because of a significant piece of information that throws the whole story into doubt.

1. **"Go Public" and Dr. Casses**

**213**  According to Ms. Tomlinson, the stories about Dr. Casses originated with an e-mail from Sandra Hix, Beverly North's daughter.

**214**  As Ms. Tomlinson recalled, she was told by Ms. Hix that there was a doctor who had practiced in Arizona and surrendered his licence there, and was now working in B.C., and Ms. Hix thought that people in B.C. should know about him. The doctor was Dr. Casses. As Ms. Tomlinson recalled, she responded to Ms. Hix and (among other things) asked her if she was willing to go public with the story. When Ms. Hix said yes, work then began on a possible story.

**215**  Ms. Tomlinson explained that Ms. Uda typically did the initial research on possible stories for Go Public, and that was true with respect to the story concerning Dr. Casses. Ms. Uda confirmed that one of the first communications she received was an e-mail exchange between Ms. Hix and Ms. Cook dated May 28, 2009, forwarded to her by Ms. Hix. The e-mail included a fairly lengthy message from Ms. Cook copied from her first healthboards posting in March 2004. Ms. Hix and Ms. Cook had become acquainted with one another as a result of a posting Ms. Cook had made about Dr. Casses on his profile on the website "RateMDs.com" ("RateMDs"), where individuals can rate and comment on physicians, and exchange private messages.

**216**  Ms. Tomlinson explained that Go Public stories are not broadcast during the summer months. She was leaving for vacation in about mid-June. Ms. Uda had been gathering some information and, according to Ms. Tomlinson, before she left on vacation, a decision had been made that it would be worth Ms. Uda spending time gathering more information for a possible story on Dr. Casses. According to Ms. Tomlinson, she would talk regularly with Mr. Williams and let him know what was in the works for Go Public. This would have included the story about Dr. Casses, in addition to other stories. The story about Dr. Casses was identified as something possibly for broadcast in the fall.

**217**  Before Ms. Uda left on vacation at the end of July, she continued to gather information for a possible story on Dr. Casses (as well as work on other possible Go Public stories). According to Ms. Uda, she spent a considerable amount of time confirming Dr. Casses' history in Arizona. The documents Ms. Uda collected included a copy of the Arizona jury verdict, a copy of the Consent Agreement, the letter from the College concerning Mrs. Backer and court documents relating to the lawsuits filed by Mr. Field and Ms. Monahan against Dr. Casses. She also spoke to several people, including Ms. Cook, Dr. Hunter and Ms. Watkins. Ms. Uda created a working chronology to keep track of information as it was gathered.

**218**  Ms. Tomlinson then picked up matters when she returned from holidays at the beginning of August. She kept track of her notes (including notes of people she interviewed) in a ring-bound notebook. She reviewed the documents that Ms. Uda had gathered. Some, such as documents related to a police investigation in Maricopa County, Arizona, in connection with the death of Beverly North, she discounted almost immediately even though they were available as part of the public record. Ms. Tomlinson also paid no attention to statements that originated with Mr. Larry North (Ms. Hix's brother), since, from the outset of the communications with Ms. Hix in May, he was identified as an unreliable source of information concerning Dr. Casses.

**219**  In August, Ms. Tomlinson travelled to Arizona and interviewed both Dr. Hunter and Ms. Hix. Audio-visual recordings were made of both interviews. According to Ms. Tomlinson, she and Dr. Hunter discussed what happened at the Arizona Bomex meeting on January 19, 2001. Before meeting with Dr. Hunter, Ms. Tomlinson had read a copy of the typed meeting minutes, and she recalled discussing the "paper-trail" comment in the minutes with Dr. Hunter. However, she could not recall whether she had a copy of the typed minutes with her in Arizona, and, as best she could recall, she did not review the typed document with Dr. Hunter when they met. At trial, Ms. Tomlinson accepted Dr. Hunter's evidence that his statement concerning creating a paper trail was not in fact part of the resolution passed at the Arizona Bomex meeting, and she acknowledged that three of the TV Reports and the Web Story were not accurate in stating these comments were part of a resolution passed by the Arizona Bomex. However, according to Ms. Tomlinson, Dr. Hunter's statement about the paper trail, recorded in the minutes, would still have been part of the stories.

**220**  Ms. Tomlinson spoke to Michael Redhair, a lawyer in Arizona who had acted for Ms. Hix and the other plaintiffs in the litigation in Arizona against Dr. Casses and others arising out of the death of Beverly North. Ms. Tomlinson reviewed a copy of the Arizona jury verdict from the court file. According to Ms. Tomlinson, she had been told by Mr. Redhair that Dr. Casses was not represented at the trial because he had earlier settled with the plaintiffs (which Dr. Casses confirmed).

**221**  On August 11, 2009, after Ms. Tomlinson returned from Arizona, she printed off a copy of Dr. Casses' profile on RateMDs. Ms. Tomlinson explained she knew from Ms. Uda's research that there had been some activity on the website related to Dr. Casses, and she looked up his profile. She explained that, as of mid-August, she was casting a wide net to try and find people in B.C. who had an experience with Dr. Casses. She believed that she probably messaged everyone who had posted on RateMDs -- whether the comments about Dr. Casses were negative or positive -- because she was trying to make connections with anyone who could provide information about Dr. Casses. She asked anyone who wished to contact her to do so privately. One of the people she messaged turned out to be Ms. Schoenauer.

**222**  Ms. Tomlinson communicated directly with a number of people in B.C. These included Ms. Odiorne, Ms. Mead, Ms. Cook, Ms. Watkins, Ms. Aaslie, Mr. Giesbrecht, Ms. Monahan and several other former patients of Dr. Casses. From Tammy Mead, Ms. Tomlinson received and reviewed copies of some medical records (including the operative report) and the letter from the College concerning Ms. Mead's complaint. Ms. Tomlinson reviewed the documents Ms. Uda had obtained from the B.C. court files where Dr. Casses had been sued. She received and reviewed the correspondence Ms. Watkins had sent to and received from the Northern Health Authority and the College, concerning the treatment of her mother.

**223**  Ms. Tomlinson spoke to two physicians (Dr. Hutchinson and Dr. O'Dwyer) who had practiced on Vancouver Island and knew Dr. Casses from his time in Port Alberni. As Ms. Tomlinson recalled, Dr. Hutchinson told her that, around the time Dr. Casses was practicing in Port Alberni, he was contacted by Ms. Hix concerning Dr. Casses' history in Arizona, and he then made his own report to the College. Ms. Tomlinson spoke to Dr. Scudamore, who (according to Ms. Tomlinson) told her that he did not wish to talk about another doctor's cases.

**224**  Ms. Tomlinson made arrangements to go to Quesnel with a camera person, Brett Hyde, to do on-camera interviews. Mr. Backer had agreed to host a gathering at his house of some former patients of Dr. Casses (and family members) with whom Ms. Tomlinson had spoken. The gathering was scheduled for August 24, 2009. The week prior to the Quesnel trip, Ms. Tomlinson left messages at Dr. Casses' office (without identifying herself as a journalist with CBC) asking that he contact her. The messages were not returned.

**225**  Dr. Casses said that, as a result of Ms. Schoenauer posting on RateMDs, he became aware that the CBC was doing some research on him. Ms. Schoenauer testified that two days before what she described as the "ambush" of Dr. Casses on August 25, 2009, she happened to discover RateMDs because her brother was looking for a physician, and she left a post under Dr. Casses' name. As she recalled, in her post, she made favourable comments about Dr. Casses, and she received a communication back from Ms. Tomlinson, asking that she contact her. However, Ms. Schoenauer did not.

**226**  As Dr. Casses recalled, Ms. Schoenauer told him about the postings on RateMDs, and he thought she also told him Ms. Tomlinson had asked Ms. Schoenauer to contact her. However, despite that, Dr. Casses said it did not occur to him that Ms. Tomlinson was interested in talking to people who would defend him.

**227**  On August 24, 2009, Ms. Tomlinson and Mr. Hyde arrived in Quesnel. Ms. Tomlinson recalled that she was trying more urgently to reach Dr. Casses. According to Ms. Tomlinson, she left voice-mail messages at Dr. Casses' office in which she identified who she was, what she was doing and why she wanted to speak to Dr. Casses. As she recalled, eventually, she spoke to Dr. Casses' secretary. However, she did not speak to Dr. Casses that day.

**228**  The gathering at Mr. Backer's took place later that day. Ms. Cook and her father, Ms. Odiorne and her husband, Ms. Mead and her husband, Ms. Monahan, her mother and daughter, Caroline Mitchell and Mr. Backer were present, in addition to Ms. Tomlinson and Mr. Hyde. Mr. Hyde made an audio-visual record of the gathering. At trial, Ms. Odiorne (for example) described her reluctance and concerns about participating. According to Mr. Backer, his wife had suggested to him that he stay quiet (although he did not quite manage to follow this advice). Ms. Tomlinson asked Ms. Cook to bring photographs of her left foot, which she did. Several photos later appeared in the TV Reports. Everyone (except Mr. Hyde) sat around a table at Mr. Backer's. A copy of the College's response to Ms. Watkins' complaint about Dr. Casses was on the table, although no one read it. No one had brought medical records with them.

**229**  Ms. Tomlinson described the gathering as people telling and sharing their stories. They expressed views and opinions about Dr. Casses and the College, based on their experiences. Mr. Backer, for example, described his objective as to make people in the community aware of Dr. Casses' history, so that something could change, and to get Northern Health and the College to look at his record again.

**230**  Ms. Tomlinson and Mr. Hyde stayed overnight in Quesnel.

**231**  Dr. Casses and Ms. Tomlinson tell quite different versions of events the morning of August 25, at Dr. Casses' condominium complex. This is what Ms. Schoenauer described as the "ambush."

**232**  According to Dr. Casses, he went to bed early the evening of August 24. He had no patients the next day and in fact was finished surgery for the week in Quesnel. His plan was to return to Vancouver (via Prince George) later in the afternoon on August 25. He had plans to go to Hawaii later that week.

**233**  According to Dr. Casses, he was awakened about 5 a.m. on August 25 by three extremely loud bangs. He recalled that he looked out the windows of his townhouse, and also looked out the peephole in the front door, but he could not see anyone. He then phoned Ms. Schoenauer, who was at their home in West Vancouver. She had told him earlier to watch out for a reporter who wanted to write a story on him, and, as he recalled, he told her the reporter was there. As Dr. Casses recalled, he did not turn on the lights in his townhouse. However, he turned on his laptop and then made a series of phone calls to Ms. Schoenauer. According to Dr. Casses, while doing this, he was looking out the window on the second floor of his townhouse, scanning the area towards the garage. He kept waiting for activity.

**234**  As Dr. Casses recalled, he and Ms. Schoenauer discussed the need for legal advice. As Dr. Casses recalled, he retained legal counsel, Mr. McConchie, at about 8 a.m. on August 25.

**235**  Ms. Schoenauer's evidence is reasonably consistent with that of Dr. Casses.

**236**  As Dr. Casses recalled, about 9 a.m., he noticed some activity. As he recalled, he saw two individuals -- a blond woman and a cameraman -- "hiding." As Dr. Casses recalled, he continued to monitor them for about 30 to 45 minutes, and he saw them chatting and smoking. According to Dr. Casses, he left his townhouse about 10 or 10:15 a.m., using the back door. As he recalled, he saw the two people again, as soon as he opened the garage door, and the woman was running towards him. He said that he recognized Ms. Tomlinson. He described her as "charging" at him "like a bull," and calling his name. He then backed his SUV out of the garage and drove away. As Dr. Casses recalled, he was suspicious the two people would follow him, so he stopped in a small wooded area where he made some more phone calls. He then drove to Williams Lake, where he took a flight to Vancouver.

**237**  The implication of Dr. Casses' and Ms. Schoenauer's evidence is that Ms. Tomlinson and Mr. Hyde appeared at Dr. Casses' townhouse, unannounced, at an unconscionably early hour of the morning on August 25, 2009. In short, it was an ambush, as Ms. Schoenauer described. This version of events is contained in a letter dated August 25, 2009 sent by Mr. McConchie to Mr. Dan Henry, in-house legal counsel for the CBC. Among other things, the letter describes Dr. Casses as being "the subject of an 'ambush' at his apartment," and that he had actually seen "the same two individuals" standing outside his door when he looked through the peephole.

**238**  At trial, before Dr. Casses testified in chief about events on August 25, he wanted some assistance from a document and, before giving his evidence, he was taken to Mr. McConchie's letter. I found it curious that Dr. Casses felt the need to look at a document to remind himself of events.

**239**  On cross-examination (and contrary to what is stated in the letter), Dr. Casses clarified that he first saw Ms. Tomlinson and Mr. Hyde around 9 a.m. when he looked out towards the garage and saw them in the parking lot. At best, he was unsure whether he saw either of them smoking. However, he would not agree that the statement in Mr. McConchie's letter about seeing individuals when he looked through the peephole around 5 a.m. was false.

**240**  According to Ms. Tomlinson, it was very important that she connected with Dr. Casses directly, which she had been unable to do as of August 24. After the gathering at the Backers, she contacted Mr. Williams. Ms. Tomlinson explained that CBC policy and protocol was that, if someone was going to be approached without advance warning, especially with a camera, the reporter must discuss doing so with the reporter's supervisor first. According to Ms. Tomlinson, she explained the situation to Mr. Williams, and between the two of them, they made the decision that she would go to Dr. Casses' home in the morning and knock on the door before he went to work. They decided that approaching Dr. Casses at the hospital might be too uncomfortable. Mr. Williams essentially confirmed this discussion in his evidence.

**241**  According to Ms. Tomlinson, she and Mr. Hyde went to Dr. Casses' townhouse about 8 a.m. on August 25. As she recalled, she went to the door by herself (something Mr. Hyde confirmed in his evidence), and either knocked or rang a doorbell, but there was no answer. According to Ms. Tomlinson, she and Mr. Hyde decided to wait to see if Dr. Casses would leave the townhouse, and they would try and connect with him. Ms. Tomlinson and Mr. Hyde testified that neither of them was smoking, and neither of them is a smoker.

**242**  As Ms. Tomlinson recalled, they waited quite a while at Dr. Casses' townhouse. While they were waiting, Ms. Tomlinson received a phone call from Mr. McConchie on her cell phone. (She had left her cell number with Dr. Casses' secretary.) According to Ms. Tomlinson, Mr. McConchie introduced himself as Dr. Casses' lawyer, and then said "May I remind you about the Leenen case." Ms. Tomlinson testified:

But he was reminding me about this case and that it involved doctors and it was terrible treatment of these doctors by the CBC, and I needed to be mindful of that, and he wanted to make sure that I understood that, you know, he was quite aware of this case, and I--the message was I'd better watch out. But we hadn't had a conversation, which was what was so odd about it.

**243**  As Ms. Tomlinson recalled, she told Mr. McConchie that she was trying to speak to his client. According to Ms. Tomlinson, Mr. McConchie then mentioned Larry North, and she told him that she had not been talking to Larry North. According to Ms. Tomlinson, she told Mr. McConchie that she had interviewed people in B.C. and wanted to interview Dr. Casses. However, as Ms. Tomlinson recalled, Mr. McConchie told her that Dr. Casses would not be giving an interview and patient confidentiality was a problem. Nevertheless, as Ms. Tomlinson recalled, she asked that her request for an interview be passed along to Dr. Casses, and Mr. McConchie indicated he would do that.

**244**  As Ms. Tomlinson recalled, after the call finished, she and Mr. Hyde continued to wait. She then recalled seeing Dr. Casses come out of the back of the residence. He was running. She called to him, stating who she was. However, he ran to the garage door. Ms. Tomlinson recalled that Dr. Casses shoved the door at her. She went back to where Mr. Hyde was waiting in the parking lot. Then, according to Ms. Tomlinson, Dr. Casses backed his SUV out of the garage very quickly and took off, as she called after him.

**245**  I have concluded that Dr. Casses' version of events, to the extent it conflicts with Ms. Tomlinson's and Mr. Hyde's, is neither credible nor reliable. I find that, if there were three loud bangs at Dr. Casses' townhouse around 5 a.m. on August 25, none of them was made by either Ms. Tomlinson or Mr. Hyde. I find that neither of them was there. They did not arrive until sometime after 8 a.m. Neither of them was smoking. Dr. Casses, who knew that a CBC reporter wished to speak to him, jumped to the wrong conclusion when he was awakened early on August 25. Whatever woke him up, it was not Ms. Tomlinson. His imagination then took over and manufactured the worst, which in turn was reported in Mr. McConchie's August 25 letter.

**246**  After leaving Dr. Casses' townhouse, Ms. Tomlinson and Mr. Hyde then went to an on-camera interview with Ms. Aaslie and her husband, before catching their flight back to Vancouver later that afternoon. Before leaving Quesnel, Mr. Hyde gave Ms. Tomlinson the cassettes of what he had recorded on August 24 and 25. That was his last involvement in the stories involving Dr. Casses. As of that point, Ms. Tomlinson had all of the raw footage shot in both Arizona and B.C. When she returned to Vancouver, the contents of the tapes were "ingested" into the CBC's server and converted to digital files. This is what Ms. Tomlinson then worked with in assembling the TV Reports and Web Story.

**247**  On August 26, 2009, Ms. Tomlinson sent an e-mail message to Susan Prins, the Director of Communications with the College, following up on a voice-mail message. According to Ms. Tomlinson, the College was an important element in the Go Public stories. For example, she felt the College needed to be asked questions about how Dr. Casses came to be licensed in B.C. Ms. Tomlinson asked Ms. Prins whether it was correct that Dr. Casses had been granted a temporary licence in 2000 and then a permanent licence in 2003, and if so, why. She told Ms. Prins that she had been informed by Dr. Hutchinson that he had made a formal report to the College of Dr. Casses' history in Arizona and that he had been led to believe the College was then going to investigate. Ms. Tomlinson asked whether an investigation was done, and if so, what was the result. She asked whether the College ever contacted the Arizona Bomex directly about Dr. Casses, and if so, what was the result of the inquiry. She asked whether Dr. Casses was under investigation by the College or facing disciplinary action for any reason, and also whether there had been any investigations or disciplinary action in the past.

**248**  Ms. Prins responded promptly, on August 27, 2009. She began with a general comment:

Please be advised that irrespective of the information you have obtained on Dr. Casses, the College is not able to provide information about an individual registrant, including details of his/her application for licensure, complaints filed against him/her, or any subsequent investigation. If an investigation leads to formal disciplinary action, this information is published widely and remains on the public record. Full disclosure of disciplinary hearings and actions has been a legislated requirement for this College under our previous Act (the Medical Practitioners Act) and our current Act (the Health Professions Act), and has been a fully transparent, standard practice for many years.

**249**  In response to Ms. Tomlinson's question about Dr. Casses being on the College's temporary and then full register, Ms. Prins said that "I cannot provide you with specific details about why this physician transferred from one register to the other." Ms. Prins did provide some examples of why a physician might be granted a temporary or provisional licence. However, when Ms. Tomlinson asked which of the examples applied to Dr. Casses, Ms. Prins responded that she was unable to answer. With respect to the question (based on Ms. Tomlinson's discussion with Dr. Hutchinson) concerning whether any investigation of Dr. Casses was done, Ms. Prins said: "Again, we cannot disclose information about our investigative processes -- unless the outcome results in formal discipline -- in which case it would have been published."

**250**  Concerning contact with the Arizona Bomex, Ms. Prins explained that the College requires certificates of standing and conduct from all jurisdictions in which a physician has practiced. She said further that:

If we learn of an incident that causes us concern after the license has been granted, we would certainly make contact with the appropriate regulatory authority to gather more information for an investigation.

**251**  With respect to Ms. Tomlinson's questions about whether Dr. Casses was or had been under investigation or facing disciplinary action by the College, Ms. Prins stated: "Per statement above, I cannot provide specific details about this individual's registration history with this College."

**(e) Pre-publication communications between Dr. Casses' legal counsel and the CBC**

**252**  Just after 1 p.m. on August 25, 2009, Mr. McConchie, on behalf of Dr. Casses, sent the letter to Mr. Henry (CBC's legal counsel), referred to above. In addition to the statement about Dr. Casses being the subject of an "ambush," the letter states in part:

Dr. Casses has good reason to believe that CBC Vancouver has already decided to broadcast a news story based on the false information posted to the Internet by one Larry North. . . .

. . .

If the CBC has questions to direct to my client, please send them in writing to my attention.

. . .

My client will take all necessary steps to protect his reputation and to recover indemnification for any defamatory attacks on his good character and professional competence.

**253**  Of course, Ms. Tomlinson had already told Mr. McConchie she had not been talking to Larry North. Ms. Tomlinson never spoke to Larry North at any time, and ignored whatever statements he had published about Dr. Casses. As of August 25, 2009, no final decision had been made whether to broadcast or publish any Go Public story or stories concerning Dr. Casses.

**254**  On August 27, 2009, after discussing the matter with Mr. Williams, Ms. Tomlinson sent an e-mail message to Mr. McConchie, in response to the invitation to send questions the CBC wished to direct to Dr. Casses to Mr. McConchie in writing. The message reads in part:

[H]ere are the topic areas we would like to address:

- the nature of the cases that were submitted to the Arizona Medical Board for review by the hospital . . . , cases showing complications following his surgeries there

- claims from the following Quesnel patients and/or their families that they suffered serious, unexpected, long lasting and/or unnecessary complications, and poor follow up treatment, during and/or after surgeries performed by Dr. Casses: [Ms. Mead, Ms. Aaslie, Edith Backer, Mr. Giesbrecht, Ms. Odiorne, Ms. Cook and Ms. Monahan are named]

- the following similarities between most or all of these claims:

- patients say they were led to believe surgery would be minor or routine and then suffered serious complications

- patients or their families say they were told by Dr. Casses after surgery that they were fine and/or all went well when that was not the case

- 6 of the patients report that Dr. Casses "nicked" other parts of their insides (bowels for example) during surgery -- body parts that were not supposed to be included in the surgery. In some cases, they say the "nicks" were not immediately disclosed by Dr. Casses, and/or only discovered by other doctors

- Dr. Casses did not follow up their complications with treatment to their satisfaction -- and in several of the cases the patients say their conditions worsened or did not improve until other physicians got involved

- the motion put forward by Dr. Tim Hunter during the [Arizona Bomex] hearing on January 19, 2001 to develop a paper trail to prevent Dr. Casses from practicing in Canada

- the extent of Dr. Casses' disclosure to health authorities and/or the [College] when he moved to B.C. in 2000 about losing his privileges at Boswell Hospital in Arizona, and facing summary suspension of his license in Arizona

. . .

Our planned broadcast date is Monday, August 31 . . . .

At this stage, we would prefer to do the on-camera interview today or tomorrow, at [Dr. Casses'] convenience, to permit sufficient time prior to Monday to absorb and appropriately reflect his perspective in our broadcast and online coverage.

If Dr. Casses needs more time to prepare for an interview, please let us know as soon as possible and we will consider whether we can accommodate that.

In fact, to reassure him about any editing concerns he may have, we would be prepared to publish his entire interview online, concurrent with our broadcast of any shorter news items.

**255**  Ms. Tomlinson testified on cross-examination that she had been told by the patients and family members listed that they "suffered serious, unexpected, long lasting and/or unnecessary complications, and poor follow up treatment." However, I cannot accept her evidence at face value. Rather, and based on the evidence I have heard from patients in this trial, I conclude that what Ms. Tomlinson wrote in her e-mail is her interpretation and summary of what she was being told by the people she was interviewing.

**256**  Dr. Casses' response was communicated in a statement sent under cover of a letter dated August 28, 2009 from Mr. McConchie to Mr. Henry. The statement, which is also dated August 28, 2009, is addressed to Ms. Tomlinson and signed by Dr. Casses. It reads in part:

Doctor-patient confidentiality prevents me from speaking to the CBC about any of my patients here in Canada or in the United States. Those legal and ethical constraints are generally well-known . . . .

It is evident that CBC is planning a simplistic, sensationalistic story about the surgical complications of a general surgeon in a small community hospital.

. . .

I have performed over 5,000 (five thousand) surgical procedures in the span of 9 years . . . .

Any suggestion by the CBC in its proposed broadcast that complications following surgery should reflect negatively on my professional competence would be utterly reckless and absurd.

My surgical complication rate is approximately 0.3% (point three percent!) well below the average for a general surgeon.

Your interview request falsely insinuates that I do not disclose the risks and consequences of surgery to my patients.

Without breaching doctor-patient confidentiality, I tell you that it is my invariable practice to explain to each of my patients the fact that every surgical procedure has inherent risks and to describe those risks as they apply to their particular procedures.

Like many other surgeons, I ensure that my explanation to each patient and their consent to the procedure and the associated risks is documented in the patient file.

. . .

Following surgery, my invariable practice is to ensure that each patient is given a truthful and accurate explanation, in plain English, concerning his or her surgery and I appropriately follow them to the best of my ability in recovery. If a complication has occurred, they are given an explanation of the circumstances of that complication. I keep detailed patient records . . . .

I regret to tell you, however, that I am not prepared to submit to an on-camera interview with the CBC.

I am particularly troubled by the abuses suffered by medical doctors Leenen and Myers who consented to on-camera interviews with the CBC for a feature program known as "the fifth estate."

The abuses suffered by Dr. Leenen and Dr. Myers at the hands of the CBC are well-documented in the Ontario Superior Court and Ontario Court of Appeal decisions in favour of Drs. Leenen and Myers . . . .

. . .

If your proposed broadcast impugns my honesty, integrity or professional competence, or compromises the privacy of my practice and my patients, I will not hesitate to instruct my legal counsel to pursue all appropriate legal remedies to the full extent of the law against all persons responsible in law for such libels, including any person (CBC employee or interviewee or so-called 'witnesses') who chooses to make unsubstantiated claims against me on or off-camera.

**257**  I note that Ms. Tomlinson asked a question premised on what is now known to be a misreading of the Arizona Bomex minutes and resolution. In their response to her question, neither Dr. Casses nor his counsel corrected her.

**258**  Ms. Tomlinson shared the August 28 communications with Mr. Williams, and they discussed them. Both of them referred to Dr. Casses' statement as a "chill letter."

**259**  Ms. Tomlinson acknowledged that she did not take any steps to inform any of Dr. Casses' patients who might appear or be quoted in any of the TV Reports or the Web Story about either the existence of Dr. Casses' statement or what it threatened in the final paragraph. Ms. Tomlinson's explanation for not doing so was essentially that it never occurred to her that Dr. Casses might in fact sue his former patients, and she had said as much to everyone at the gathering at the Backers on August 24. She took Dr. Casses' statement as a threat to sue the CBC. Ms. Tomlinson said that she was appalled when Dr. Casses sued his patients.

**260**  After the August 28, 2009 communications, neither Dr. Casses nor legal counsel on his behalf communicated with any of the defendants in any of the actions, prior to the Individual Actions being filed.

1. **Publication of the Web Story and the TV Reports**

**261**  Although the original planned broadcast date of the first TV Report was August 31, 2009, Mr. Williams made the decision to delay the stories for another week. Ms. Tomlinson explained that she wanted some more time to pursue the issue of complication rates, which Dr. Casses had mentioned in his August 28 statement, and to put the stories together. As Ms. Tomlinson recalled, she was not under any time pressure to finish the stories about Dr. Casses.

**262**  Ms. Tomlinson also spoke to Dr. David Butcher and Dr. Becky Temple, both of whom were with the Northern Health Authority. One of the points she was interested in discussing with them was a surgeon's complication rates. In a telephone interview with Dr. Temple, Ms. Tomlinson and Dr. Temple also discussed events in Arizona concerning Dr. Casses. Parts of Ms. Tomlinson's telephone interview are included in the September 10 TV Report.

**263**  Although Mr. Williams reviewed the final product, Ms. Tomlinson alone was responsible for choosing the shots and images that appeared in the TV Reports and the Web Story and assembling them for publication. Apart from the words spoken by the anchors in the TV Reports, Ms. Tomlinson wrote all of the scripts and also wrote the Web Story.

**264**  After the original broadcast, each of the TV Reports was available to be viewed on the CBC website, as part of the regular newscast.

1. **The Web Story**

**265**  The Web Story (including headlines and titles) was written by Ms. Tomlinson. She also chose the pictures. The Web Story was first posted on CBC's website on September 8, 2009. It can be, and has been, updated. A version with text only is attached as Appendix "A". A version with both text and pictures is attached as Appendix "B". The picture of Dr. Casses at the beginning of the Web Story was used several times in the TV Reports. Another picture shows the people around the dining room table at Mr. Backer's.

**266**  The Web Story remained available on the Internet as of the trial. It was updated on December 15, 2014, to take into account Dr. Hunter's evidence at the trial concerning the scope of the Arizona Bomex resolution about Dr. Casses.

1. **The September 8 Local TV Report**

**267**  The first of the TV Reports was broadcast on September 8, 2009, as part of the CBC 6 p.m. local Vancouver news program. It was just over 3 minutes long.

**268**  The TV Report was introduced by the anchors as follows:

Gloria Macarenko: Good evening. We begin with a CBC investigation into a surgeon who surrendered his medical license in Arizona.

Ian Hanomansing: But who is now practicing here in British Columbia to the dismay of at least some of his patients. Our Go Public reporter Kathy Tomlinson has the exclusive story.

**269**  Ms. Tomlinson then begins her report, speaking about Ms. Aaslie, who is shown on the screen. There is a short clip of Dr. Casses, dressed casually and walking in a parking lot, interspersed with a voice-over by Ms. Tomlinson, speaking about Ms. Aaslie and then images of Ms. Aaslie and her husband speaking about Ms. Aaslie's experience, with the occasional voice-over comment from Ms. Tomlinson. For example, Ms. Aaslie says: "When we got out of the, you know, got away from him and under his care, and then I started to get better." Ms. Tomlinson says: "When Dr. Fernando Casses took out her gall bladder she says he cut other parts of her digestive system. She understands surgical mistakes happen but" and then Ms. Aaslie says: "He never admitted to doing anything. The only thing he had said was that there was an infection inside of me that had pooled inside of me but he was just going to let it run its course." There are additional images of Dr. Casses and Baker Hospital.

**270**  At about 1 minute 30 seconds, the scene changes to people seated around a table at Mr. Backer's home. There are images of photographs of Ms. Cook's infected toe, with a statement by Ms. Cook that "this is what my toe looked like." In one of the photographs, her toe appears to be very infected. In a voice-over, Ms. Tomlinson introduces the people at the table by saying: "These patients and their families think there is a pattern of Dr. Casses not admitting to or treating his surgical complications." The general mood at the table appears serious and somber. Individuals are identified as they speak. Ms. Cook says: "He told me that he was sympathetic but I was milking it, quit being a baby." Ms. Mead says: "He said to me, 'Lady you just had surgery, go home and have a hot bath.' After the third day, I knew there was something wrong because I was throwing up green bile." There is then a shot of a photograph of Edith Baker, and a voice-over by Ms. Tomlinson in which she says: "One death and four close calls are represented here. They feel their complaints to BC's College of Physicians and Surgeons weren't taken seriously enough." The scene returns to the group at the table. An image of a letter on the letterhead of the College is shown, after which Ms. Odiorne is identified as a former patient and says: "All of us have complained. What are they doing, what is anybody doing?"

**271**  There is then another image of Dr. Casses walking outside in a parking lot and getting into an SUV. In a voice-over, Ms. Tomlinson says: "At least five complaints and three lawsuits have been filed against him. In most cases though, the College agreed with Dr. Casses that he acted responsibly and wasn't to blame." The scene returns to the table, and Ms. Mead is shown saying: "They need to investigate him fully."

**272**  The scene then changes again, to an image of the exterior of Boswell Memorial. In another voice-over, Ms. Tomlinson says: "His work has been investigated before. This Arizona hospital where he worked before coming to BC suspended his privileges over quality assurance concerns. He also surrendered his licence there." There is another image of Dr. Casses driving away in the SUV. The scene returns to the people around the table, and Ms. Cook says: "I didn't know he wasn't allowed to practice in Arizona." Her father, seated beside her, says: "You trust your doctor, right? He is your doctor."

**273**  Again the scene changes, this time to Dr. Casses driving away in an SUV from Ms. Tomlinson. Ms. Tomlinson calls after him: "How about the complaints that you're getting?" Then, in a voice-over, Ms. Tomlinson says: "Dr. Casses refused to talk to the CBC about any of this, later citing patient confidentiality."

**274**  The scene then shows Ms. Tomlinson on the street outside the CBC Vancouver building. She has a document in her hand, and says:

Dr. Casses sent this letter through his lawyer pointing out that all surgery has risks including accidental perforations. He also claims his surgical complication rate is lower than average, a claim we couldn't verify because the health authority doesn't keep those records. Tomorrow we will tell you about how and why Dr. Casses left Arizona and how the Arizona medical board tried to make sure he would never practice in Canada.

1. **The September 8 National TV Report**

**275**  The second TV Report was broadcast on September 8, 2009 as part of "The National." It was about 2 minutes and 45 seconds long.

**276**  Ms. Tomlinson described assembling the TV Report for the National as a "real distilling process." She explained that she had two minutes and "we've got to hit only the most important or major points that we're trying to make, and it's a condensation of everything."

**277**  The Report was introduced by the anchor as follows:

Peter Mansbridge: Well, if the mere thought of going under the knife gives you the chills, this next story won't help. This surgeon was under investigation in the U.S. He admitted he caused harm to a patient and surrendered his Arizona medical licence. Since then, he has been operating on patients in British Columbia. Now some of them are complaining too and asking how he could be allowed to practice here in the first place. Kathy Tomlinson reports.

While Mr. Mansbridge was introducing the story, a graphic of Dr. Casses, facing the camera and casually dressed, together with a gloved hand holding a scalpel, appear over Mr. Mansbridge's left shoulder.

**278**  The story then begins with the voice-over of Ms. Tomlinson speaking about Ms. Aaslie and a shot of Ms. Aaslie, as in the local TV Report. There is a short clip of Dr. Casses, casually dressed and walking in a parking lot, interspersed with a voice-over by Ms. Tomlinson, speaking about Ms. Aaslie, then images of Ms. Aaslie and her husband speaking about Ms. Aaslie's experience, with the occasional voice-over comment from Ms. Tomlinson. Ms. Aaslie says: "I said I was sick so many times and there was something wrong and he just kept telling me it was part of the healing process." Ms. Tomlinson says: "She became gravely ill. Her husband said the nurses urged him get a second opinion, get her to a hospital, get her to another doctor." Mr. Aaslie says: "Yeah, because she is not getting any better, she is getting worse." There are views of the exterior of Baker Hospital.

**279**  Again, the scene changes to the people seated at the dining room table. Ms. Odiorne (unidentified) says: How many people are really out there like us." Ms. Cook, who has photographs of her toe, holds up a photograph and says: "That was what my toe looked like." In a voice-over, Ms. Tomlinson says: "Several former patients and their families say Dr. Casses didn't admit to or fully treat serious complications." People are shown sitting around the table. As in the local TV Report, the mood appears somber and serious. Tammy Mead is identified and says: "He said to me, 'Lady you just had surgery. Go home and have a hot bath'." Ms. Tomlinson says in a voice-over: "At least five complaints and three lawsuits have been filed. In most cases though, BC's College of Physicians and Surgeons agreed with Dr. Casses that he wasn't at fault, except in Tammy Mead's case." During this voice-over, three documents are displayed, one showing the letterhead of the College, and Dr. Casses is shown walking near a car. Tammy Mead is then shown, saying: "They need to investigate him fully."

**280**  The scene changes to the exterior of Boswell Memorial and Ms. Tomlinson says in a voice-over: "He's been investigated before. This Arizona hospital, where he was before BC, suspended his privileges nine years ago." A man (in fact Dr. Hunter) -- dressed as one would expect to see a physician dressed -- is shown and says: "I was just horrified." Ms. Tomlinson is then shown speaking to the man and says in a voice-over: "The medical board there told him, hand over his licence or it would be suspended. He did." Interspersed is an image of Dr. Casses getting into an SUV. The man speaking to Ms. Tomlinson is identified as Dr. Tim Hunter, and he says: "There were a large number of very poor surgeries and a number of people harmed." Dr. Casses is then shown in the SUV, apparently driving away. An image is shown labelled "Arizona Medical Board Resolution," with the Arizona State seal and a quote is shown that says "a paper trail preventing Dr. Casses from ever practicing in Canada." This has a voice-over from Ms. Tomlinson in which she says: "Because he had done his residency in Ontario, the board resolved to create a paper trail preventing Dr. Casses from ever practicing in Canada."

**281**  The scene changes back to a parking lot and Ms. Tomlinson calling after an SUV as it drives away: "How about the complaints that you're getting." In a voice-over, Ms. Tomlinson says: "Dr. Casses refused to talk to the CBC about any of this, later citing patient confidentiality."

**282**  The segment again ends with Ms. Tomlinson on the street in Vancouver. She says:

BC's College of Physicians and Surgeons also refused to be interviewed or explain how Dr. Casses got a permanent licence here given what happened in Arizona. Dr. Casses later sent a statement [Ms. Tomlinson holds up a document] through his lawyer saying his complication rate is much lower than average, a claim the health authority couldn't verify though, because it doesn't track that.

1. **The September 9 TV Report**

**283**  The third TV report was broadcast on the 6 p.m. local Vancouver news on September 9. It was just under 3 minutes long.

**284**  Mr. Hanomansing introduced the segment as follows:

More now on our CBC investigation into a surgeon in Quesnel. Last night we heard patients complaining the doctor denied or failed to treat serious complications following his surgeries. More patients have come forward today. And tonight, Go Public reporter Kathy Tomlinson takes us to Arizona, where the doctor surrendered his licence.

**285**  The segment begins in Sun City, Arizona, with an image of Ms. Hix, who says: "My mom was extremely healthy." A photograph of Beverly North is shown. In a voice-over, Ms. Tomlinson says: "Beverly North was one of the last American patients operated on by Dr. Fernando Casses before he came to BC, right before his hospital privileges were pulled in Arizona." There is then an image of Dr. Casses, dressed casually, walking in a parking lot. The scene returns to Ms. Hix and Ms. Tomlinson. Ms. Hix appears to be weeping and quite emotional. They are looking at photographs of Beverly North. Ms. Tomlinson says in a voice-over: "He cut a major vein while trying to remove a blockage in her leg." There is a further exchange between Ms. Hix and Ms. Tomlinson. Ms. Hix recounts what she says Dr. Casses told the family that night, that her mother had had a heart attack. Ms. Tomlinson says in a voice-over accompanied by an image of Mrs. North's grave and then Dr. Casses walking in a parking lot and getting into an SUV. Ms. Tomlinson is shown outside Boswell Memorial and says:

Her mother died weeks later. An autopsy showed no heart damage. A jury found Dr. Casses 90% responsible. The Arizona medical board moved to revoke his licence and he surrendered it, admitting to unprofessional conduct. That same month, he started his new job performing surgeries in B.C.

**286**  The scene then goes to the people seated around the dining room table. As in the September 8 TV Reports, the mood is serious and somber. Ms. Cook says: "Why didn't I know that he wasn't allowed to practice in Arizona?" Ms. Tomlinson says in a voice-over: "Some of his B.C. patients in Quesnel are now complaining Dr. Casses also denied or failed to treat their complications." The photographs of Ms. Cook's left foot are again shown. Ms. Odiorne says: "How many people are really out there like us."

**287**  The scene shifts back to Arizona, to Dr. Hunter, who is identified as the former vice-chairman of the Arizona Medical Board. Dr. Hunter says: "I was just horrified reading the cases." In a voice-over, Ms. Tomlinson says: "This Arizona doctor reviewed some of his complications during the investigation there." Dr. Hunter is then shown being interviewed by Ms. Tomlinson and says: "As I recollect, there were a large number of very poor surgeries and a number of people harmed." Next is shown the image labelled "Arizona Medical Board Resolution" with the Arizona State seal and the quote that says "a paper trail preventing Dr. Casses from ever practicing in Canada." In a voice-over, Ms. Tomlinson says: "The board resolved to create a paper trail preventing Dr. Casses from ever practicing in Canada."

**288**  The scene shifts to Dr. Casses driving away in his SUV while Ms. Tomlinson calls after him: "How about the complaints that you're getting?" In a voice-over, Ms. Tomlinson says: "Dr. Casses refused to talk to CBC, then it appears left town. His secretary says that the office is closed for holidays and she doesn't know where Dr. Casses is." A couple of images, taken from a distance, of Dr. Casses' and Ms. Schoenauer's West Vancouver home are shown, accompanied by Ms. Tomlinson's voice-over that: "he also has this home in West Vancouver."

**289**  The segment again ends with Ms. Tomlinson on the street in Vancouver. She says:

B.C.'s College of Physicians and Surgeons gave Dr. Casses a temporary licence when he came to B.C., then, despite knowing his history, made that licence permanent. It won't say why. There have been at least seven complaints filed against him since. The latest we know of, the patient insisted that Dr. Casses' version of what happened wasn't true. The College then decided it didn't believe him either, and it took what it calls remedial action. Tomorrow we will tell you what the health authorities knew and didn't know about Dr. Casses' history in Arizona.

1. **The September 10 TV Report**

**290**  The final TV Report was broadcast on the 6 p.m. local Vancouver news. Again, it was just under 3 minutes long.

**291**  It was introduced by Ms. Macarenko as follows:

For the past two nights we have brought you the stories of patients who are upset about a B.C. surgeon who had surrendered his licence in Arizona. Tonight we continue with our exclusive Go Public investigation. Kathy Tomlinson now on how the doctor got his licence and job in B.C. despite his history in Arizona.

**292**  The segment begins with people seated at a dining room table. The mood is somber and serious. Ms. Odiorne (not identified) says: "All of us have complained. What are they doing? What is anybody doing?" Ms. Tomlinson says in a voice-over over of shots of people seated at the table: "Former patients and their families upset over how they were treated by Quesnel surgeon Dr. Fernando Casses." There is an image of Dr. Casses, casually dressed, walking in a parking lot. Ms. Mead says: "I had six follow-up surgeries. I'm now cut [gesturing]." Ms. Cook picks up photographs of her foot, including one showing that her great toe has been amputated. Ms. Tomlinson says in a voice-over: "They say he denied or failed to treat serious complications." Ms. Mead is then shown, and says: "They need to investigate him fully." Over images of the people at the table, Ms. Tomlinson says: "This group doesn't understand why the College allowed Dr. Casses to practice here in the first place." Ms. Odiorne (again unidentified) says: "They are doing a really poor job."

**293**  The scene shifts to Boswell Memorial, and then the image of the "Arizona Medical Board Resolution" seen in earlier broadcasts. In a voice-over, Ms. Tomlinson says: "Before coming to Quesnel in 2001, Dr. Casses had been told, surrender his licence in Arizona or it would be suspended. He did. The Arizona Medical Board resolved to create a paper trail preventing Dr. Casses from ever practicing in Canada." The image labelled "Arizona Medical Board Resolution" with the Arizona State seal and the quote that says "a paper trail preventing Dr. Casses from ever practicing in Canada" is again shown. Ms. Cook is shown, saying: "Why didn't I know that he wasn't allowed to practice in Arizona?"

**294**  There is then an image of the exterior of Boswell Memorial and then Dr. Casses, dressed casually, walking in a parking lot. Ms. Tomlinson says in a voice-over: "It turns out Dr. Casses left for B.C. when the investigation in Arizona was just getting started, before his record was tarnished. He got a temporary B.C. licence first, then, even after a B.C. doctor reported his Arizona history to the College, it still made his licence permanent." There are then some images of the exterior of the offices of the College.

**295**  The scene returns to the people around the dining room table. Caroline Mitchell, identified as "Deceased patient's daughter," says: "The College of Physicians should give a reason why they did that." In a voice-over of the image of the building directory for the College's offices, Ms. Tomlinson says: "The College refused to explain any of it, citing doctor privacy."

**296**  Over images from the exterior of Baker Memorial, Ms. Tomlinson says: "The Northern Health Authority gave Dr. Casses hospital credentials after he told them he had given up his Arizona licence over one case. The Health Authority says it didn't check that, and he's done 1,500 surgeries here since." There is audio (accompanied by text on the screen) of an exchange between Ms. Tomlinson and Dr. Becky Temple. Ms. Tomlinson asks Dr. Temple: "Did anyone talk to anyone on the Arizona Medical Board?" Dr. Temple responds: "That would not be a normal procedure for the hospital. I don't feel that the Arizona Medical Board has any authority or mandate to decide who practices in Canada or British Columbia." There are a few more images of Dr. Casses in his SUV. Ms. Tomlinson says: "CBC News has learned there were several problem surgeries in Arizona, which the Board there reviewed. Dr. Casses admitted to harming a patient in one."

**297**  Finally, Ms. Tomlinson is back on the street in Vancouver and says:

We now know of nine complaints to the B.C. College, three of them upheld, three not upheld and others still outstanding. We've also heard from a few more upset patients in Quesnel who now want the authorities to take a closer look at Dr. Casses' record.

1. **Aftermath**

**298**  Ms. Tomlinson explained that shortly (about a week or so) after the last TV Report was broadcast, the digital records, containing the raw footage shot in Arizona and Quesnel, were deleted from the CBC servers. This happened as part of a regular, strictly enforced practice to delete material from the CBC servers once programs have been aired, to free up space. Ms. Tomlinson described the records as being "blown away." According to Ms. Tomlinson, editors at the CBC were constantly clearing out the servers, and she has had personal experience with material being "blown away" or deleted prematurely, before she had completed work on a story and before the story had aired.

**299**  Dr. Casses did not watch any of the TV Reports when they were first broadcast. Rather, he asked Ms. Schoenauer to watch them, and report in detail what she saw to him, including a summary of "the facts" and the names of the participants. Ms. Schoenauer did as she was asked, watching carefully and taking notes. The TV Reports were also available on-line, so Ms. Schoenauer could replay them multiple times and take better notes.

**300**  After the broadcast of the first TV Report, Ms. Schoenauer and Dr. Casses discussed what she had seen. Both of them were very upset. Dr. Casses recalled saying that these were lies, a distortion of the facts and a manipulation of information. He recalled that he felt very angry, frustrated and helpless, because he did not feel he had the power to go onto the Internet and clarify the facts. He was perhaps even more upset by the second TV Report (on "The National") and what Dr. Hunter said. Ms. Schoenauer recalled that Dr. Casses described Dr. Hunter's statements as completely illegal.

**301**  Despite feeling quite devastated and upset, Dr. Casses also recalls receiving phone calls and other communications from doctors and acquaintances expressing sympathy for his situation, and support.

**302**  On September 11, 2009, Ms. Watkins posted the following to Dr. Casses' profile on RateMDs:

Check out CBC.ca weeklong investigation regarding post-op surgical complications. The College of P&S of BC should be held accountable for granting him privileges to practise in BC. He waited too long post-surgery on our mother before sending her to VGH -- she suffered 3 weeks and 5 surgeries later trying to clean up the surgical mess left by this doctor, only to succumb to her death from infection of leaking bile, sutured pancreas and nicked bowel. Had he sent her on sooner she may still be with us today. Northern Health Authority needs to investiage [sic] every patient of his to show the real statistics on post-op complications -- we might all be surprised!

She gave Dr. Casses the lowest rating, one out of five stars.

**303**  Ms. Watkins explained that, after viewing the TV Reports, she realized there were a lot of other people affected and she wanted to share what her family had gone through. She said that her sister Caroline Mitchell (who attended the gathering on August 24, appeared in the TV Reports and was quoted in the Web Story) told her about RateMDs.

**304**  Dr. Casses waited about three months or so before he watched any of the TV Reports. He explained that he waited because he wanted to be objective, and did not want to "contaminate" himself with voices, ads and chit-chat. However, he looked at the Web Story more or less as soon as it was published.

**305**  In the meantime, Dr. Casses took out a paid advertisement in the September 16, 2009 edition of Quesnel Observer newspaper. It is dated September 2009 and signed by Dr. Casses. I will refer to this as the "September Statement." Dr. Casses testified that everything stated in the September Statement is true. He agreed on cross-examination that this was his statement to the public at large and it was very important to be forthcoming.

**306**  The September Statement reads in part:

As everybody now knows, the Canadian Broadcasting Corporation has embarked on an elaborate television and radio campaign which appears to be calculated to destroy my professional reputation, to expose me to mistrust and vicious blog commentary, and to compromise my ability to practice my chosen profession. I have worked too hard to allow libels to destroy my good name and taken the appropriate steps to retain legal counsel in that regard.

The CBC programmes build innuendo upon false innuendo, all of it anchored by stories about events in Arizona. Although certain Arizona facts are true, other are not. Some CBC allegations are distortions of fact or half-truths which leave a false impression on the viewer or readers. . . .

Your readers may well ask, what truth is there to claims about your surgical history in Arizona?

What is true is that I voluntarily surrendered my medical license 10 years ago in Arizona and voluntarily admitted that in one instance, I did not perform a surgical procedure to an appropriate standard. . . .

I fully disclosed the Arizona facts and all the associated circumstances (including allegations I disputed) to the BC College of Physicians and Surgeons and to the Northern Health Authority when I surrendered my Arizona licence. . . .

As might be expected, the British Columbia College of Physicians and Surgeons conducted a thorough investigation with the assistance of two independent, outside Canadian surgeons and came to the conclusion that I was qualified and fit to practice general surgery in British Columbia. In other words, before I was permitted to practice surgery after my history had been put under the microscope.

. . .

Without breaching doctor-patient confidentiality, I tell you that it is my invariable practice to explain to each of my patients the fact that every surgical procedure has inherent risks and to describe those risks as they may apply to their particular procedures.

. . .

Following surgery, my rigid practice is to ensure that each patient is given a truthful and accurate explanation, in plain English, concerning his or her surgery and I appropriately follow them to the best of my ability in recovery. If a complication has occurred, they are given an explanation of the circumstances of that complication. . . .

. . .

You may be surprised to learn this, but . . . legal and ethical requirements continue to prevent me from speaking to the news media about any of my patients. Furthermore, any patient complaints against me have been considered by the proper authorities and addressed by independent medical reviewers.

Dr. Casses goes on to explain why he was not prepared to submit to an on-camera interview, and repeated paragraphs from his August 28, 2009 statement that referred to the ***Leenen*** and ***Myers*** cases.

**307**  According to Dr. Casses, the atmosphere when he returned to work after the TV Reports was "horrible." He felt like everyone was looking at him, but no one talked to him about the TV Reports or the Web Story. He explained that (like any surgeon) he received patients as a result of referrals from other doctors, and after the TV Reports and Web Story, his referrals dropped dramatically, about 50% by his estimate. According to Dr. Casses, before the TV Reports and the Web Story, 70% of the patients in the waiting room were for him, while 30% were for the other surgeon, Dr. Katalinic. Afterwards, he estimated 99% of the patients were for Dr. Katalinic, and only 1% for him. Before the TV Reports and the Web Story, Dr. Casses estimated that he spent two full days per week in the operating room doing surgery, and one to two days per week doing endoscopy, and, as he recalled, he had a waiting list of four months. Afterwards, he was unable to fill his allocated operating room time. As Dr. Casses explained, since operating room time is valuable, if he did not have patients, the time had to be given to someone else. He went down to a half day for surgery and a half day for endoscopy. According to Dr. Casses, all of this happened very quickly after the TV Reports and Web Story, and never recovered up until he decided to leave Quesnel.

**308**  Within a few months, Dr. Casses commenced three separate lawsuits, seeking damages for defamation. His lawsuits against Mr. Backer, Ms. Watkins and Ms. Cook were filed in November 2009, and his lawsuit against Ms. Odiorne was filed in December 2009. In June and July 2010, the Individual Defendants issued third party notices against the CBC and Ms. Tomlinson, claiming contribution and indemnity with respect to any liability for damages found against them in the Individual Actions.

**309**  Dr. Casses and Casses Inc. did not sue the CBC and Ms. Tomlinson until August 9, 2011. Mr. Williams was added as a defendant in October 2013 (without prejudice to a limitation defence).

**310**  Dr. Casses also commenced legal proceedings in Arizona against Ms. Hix and her brother Larry North, alleging defamation. Dr. Casses confirmed that the claims against Ms. Hix were settled by a judgment pronounced September 1, 2010, and the terms of a settlement agreement dated August 11, 2010. By the terms of the settlement agreement, Ms. Hix was required to pay Dr. Casses damages in the sum of ten dollars, and (among other matters) the parties agreed on the contents of a press release, which either party was permitted to publish once the judgment order was signed by the court. Other than the court's judgment and the press release, nothing else was to be published or communicated by Ms. Hix to anyone. The press release states in relevant part:

Dr. Fernando Casses brought a lawsuit against Sandra J. Hix in the Superior Court of the State of Arizona alleging damages for Defamation of Character. Fernando Casses and Sandra J. Hix have resolved the claims among them. Pursuant to the agreement of the parties, plaintiff, Dr. Fernando Casses was awarded judgment against Sandra J. Hix.

Sandra J. Hix now recognizes and accepts: (i) that Dr. Casses' surgery on her mother did not involve any criminal misconduct on the part of Dr. Casses; and (ii) the Arizona civil jury verdict that Dr. Casses was negligent did not involve a finding of criminal or deliberate or systemic misconduct on his part. In order to clear the air, Ms. Hix has decided to apologize to Dr. Casses for any embarrassment caused by her past allegations which may have lead [sic] some people to believe otherwise.

**311**  Dr. Casses was unable to say exactly when he left Quesnel. However, based on his and other evidence, I conclude that he probably left sometime in the summer in 2012. Dr. Casses says that, for the two years or so prior to trial, he has been working as a board-certified surgical assistant at Surrey Memorial Hospital, assisting in complicated thoracic surgeries. According to Dr. Casses, he enjoys his current work, which does not require him to deal directly with patients and their families.

**3. Discussion and Analysis**

**312**  In this section, I will first address the plaintiffs' defamation claims, in all four of the actions.

**313**  In summary, I conclude that Casses Inc. has failed to prove a defamation claim against any of the defendants. I conclude that what I find are the inferential meanings of the Web Story and the TV Reports are defamatory of Dr. Casses. However, I conclude that Dr. Casses has failed to make out his claims against Ms. Cook, Ms. Odiorne and Mr. Backer. Finally, I conclude that what I find are the inferential meanings of Ms. Watkins' RateMDs post are defamatory of Dr. Casses.

**314**  I will then turn to the defences raised by the CBC Defendants and Ms. Watkins.

1. **The Plaintiffs' Defamation Claims**
2. **Basic Principles**

**315**  A plaintiff in a defamation action is required to prove three things to obtain judgment and a remedy: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed. See ***Grant v. Torstar Corp.***, [*2009 SCC 61*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1GX-00000-00&context=), at para. 28.

**316**  The onus of proving a statement was defamatory is on the plaintiff.

**317**  Any imputation that may tend to lower the plaintiff in the estimation of right-thinking members of society generally or to expose him or her to hatred, contempt or ridicule is defamatory. In determining the meaning of a publication and whether it is defamatory, the court may take into consideration all of the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented. See ***Botiuk v. Toronto Free Press Publications Ltd.***, [*[1995] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3K6-00000-00&context=), at para. 62.

**318**  Professionals may be defamed by comments that question or impugn their qualifications, knowledge, skill, capacity, judgment or efficiency. Comments suggesting that a medical practitioner is incompetent, unqualified or guilty of discreditable conduct in his or her profession are defamatory. See, for example, ***Cimolai v. Hall***, [*2005 BCSC 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0XF-00000-00&context=), at para. 72, aff'd [*2009 BCCA 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2BK-00000-00&context=), and R.E. Brown, *The Law of Defamation in Canada*, 2nd ed. (Toronto: Carswell, 1994) ("*Brown on Defamation*"), at p. 4-247. Dr. Casses says that he has been defamed by publications that question and impugn his professional qualifications and skill, and impute incompetence and unfitness for his position as a general surgeon.

**319**  The court applies an objective test in determining whether the meaning of a publication or statement is defamatory. In the often-cited case of ***Lewis v. Daily Telegraph Ltd.***, [1963] 2 All E.R. 151 (H.L.), Lord Reid for the court said, at pp. 154-155:

What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning. . . .

. . .

In this case it is, I think, sufficient to put the test this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. One must try to envisage people between these two extremes and see what is the most damaging meaning that they would put on the words in question. . . .

What the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression.

**320**  Lord Reid also provided helpful guidance in ***Rubber Improvement Ltd. v. Daily Telegraph Ltd.***, [1964] A.C. 234 (H.L.), at p. 258:

There is no doubt that in actions for libel the question is what the words would convey to an ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs.

**321**  With respect to the standard of what constitutes an ordinary member of the public, Abella J.A. (as she then was) wrote, in ***Color Your World Corp. v. Canadian Broadcasting Corp.*** [*(1998), 156 D.L.R. (4th) 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1BV-00000-00&context=) (Ont. C.A.), at para. 15:

The standard . . . is difficult to articulate. It should not be so low as to stifle free expression unduly, nor so high as to imperil the ability to protect the integrity of a person's reputation. The impressions about the content of any broadcast -- or written statement -- should be assessed from the perspective of someone reasonable, that is, a person who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility. A degree of common sense must be attributed to viewers.

**322**  The intention of the author and publisher is not relevant on the issue of meaning. The subjective opinion of a plaintiff concerning the meaning of the expression is also not relevant. See ***Lawson v. Baines***, [*2011 BCSC 326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1GT-00000-00&context=), at para. 39, aff'd [*2012 BCCA 117*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6274-00000-00&context=). (I will refer to the trial decision as "***Lawson v. Baines***".)

**323**  The plaintiffs do not complain about the literal meanings of the words, either in any of the TV Reports or the Web Story, or in any of the statements alleged to be made by the Individual Defendants. Rather, the plaintiffs say that what is defamatory are the inferential meanings left by those publications and statements. An inferential meaning is the impression an ordinary, reasonable person would infer from the allegedly defamatory material, looking at everything in context.

**324**  The TV Reports, of course, are not simply words. As Cunningham J. commented in ***Leenen***, at para. 89: "Television, a very powerful medium, provides widespread and instantaneous dissemination of information." The same can be said of the Internet, where all of the TV Reports and the Web Story were available on the CBC website. In ***Crookes v. Newton***, [*2011 SCC 47*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1XS-00000-00&context=), Abella J. wrote (at para. 37): "Because the Internet is a powerful medium for all kinds of expression, it is also a potentially powerful vehicle for expression that is defamatory."

**325**  The plaintiffs bear onus to prove, on a balance of probabilities, that the TV Reports, the Web Story and the statements alleged to have been made by the Individual Defendants bore the inferential meanings alleged, or something substantially similar. See ***Lawson v. Baines***, at paras. 35 and following.

**326**  It is for the trier of fact (in a non-jury trial such as this one, the trial judge) to decide what natural and ordinary meaning the words bear, including what innuendos can be reasonably inferred. Thus, I am not bound by either the plaintiffs' interpretations, or those of the defendants. See ***Miller v. Canadian Broadcasting Corp.***, [*2003 BCSC 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7ND-G04R-00000-00&context=), at para. 17 (citing ***Lucas-Box v. News Group Newspapers Ltd.***, [1986] 1 All E.R. 177 (C.A.)).

**327**  To prove the publication element of defamation, a plaintiff must establish that the defendant has, by any act, conveyed defamatory meaning to a single third party who has received it. Traditionally, the form the defendant's act takes and the manner in which it assists in causing the defamatory content to reach the third party are irrelevant. See ***Crookes v. Newton***, at para. 16.

**328**  The general rule is that a person is responsible only for his or her own defamatory publications, and not for their repetition by others: *Brown on Defamation*, at p. 7-40. The exceptions to this rule are where: (a) the original publisher authorized or intended the republication; (b) the person to whom the original publication is made was under a duty to repeat the expression; and (c) the republication was the natural and probable result of the original publication. See ***Speight v. Gosnay*** (1891), 60 L.J.Q.B. 231 (C.A.), at p. 232. These exceptions are discussed in *Brown on Defamation*, at pp. 7-44 to 7-46 (footnotes omitted):

These exceptions apply only where the information repeated is the same or substantially the same so that the sum and substance of the original charge remains, or at least part of the sting of the original publication is conveyed. The fact that there are some slight alterations in the republication will not affect the exceptions if the sense of the original publication is still the same. On the other hand, where the original publisher merely provides "some of the material used by another in the preparation of a defamatory piece, he will not be liable as a publisher of the later publication, if, as a whole, it is different in sense and substance from the material he provided."

**329**  A practical application of the rule and the exceptions is found in ***Pressler v. Lethbridge and Westcom TV Group Ltd.***, [*2000 BCCA 639*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2C9-00000-00&context=), where Southin J.A. discussed the liability of an interviewee for defamatory statements in a broadcast. She wrote, at paras. 52-53:

[52] . . . [A] common technique of television producers is to interview a number of persons and take bits and pieces from each interview and put them together in a way thought to be interesting. This technique is capable of giving a false impression of the meaning the interviewee intends by his words to convey, by virtue either of editing out other words of the interviewee or juxtaposing the words used with the words of others.

[53] Publication is the essence of defamation. In principle, I consider an interviewee is liable for a publication on television if by his antecedent dealings with the broadcaster he has authorized the publication of its substance and its sting and what is published by the broadcaster is that substance and that sting. This is an application to the modern media of ***R. v. Cooper*** (1846), 8 Q.B. 533, 115 E.R. 976.

**330**  Here, I find that the Web Story and each of the TV Reports were in fact published by the remaining CBC defendants (the CBC, Ms. Tomlinson and Mr. Williams). The main contest in the CBC Action is over the other two elements that the plaintiffs must prove: (1) that the statements were defamatory and (2) that the statements in fact referred to each of the plaintiffs. All elements are in issue in the Individual Actions.

**(ii) Do any of the publications in any of the Actions refer to Casses Inc.?**

**331**  I will first address the question whether any of the publications or statements in issue in fact refer to, or are "of and concerning," Casses Inc. Casses Inc. has the burden to prove this, on a balance of probabilities. If it does not, its claims must be dismissed.

**332**  The CBC defendants admit that the CBC published the Web Story and the TV Reports and that they are about Dr. Casses. However, none of the defendants in any of the actions admits that anything published referred to Casses Inc.

**333**  Whether the statement or publication in fact refers to, or is "of and concerning," the plaintiff, like questions concerning meaning generally, is determined from the perspective of an ordinary or reasonable reader or viewer. The test is stated in one of the leading cases, ***Knuppfer v. London Express Newspaper, Ltd.***, [1944] A.C. 116, at p. 121 (per Viscount Simon, L.C.):

There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law - can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact - Does the article in fact lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise, and where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily, as a matter of law, to be answered in the negative.

**334**  Statements or publications can be defamatory of a person without the person being identified by name. As is stated in *Brown on Defamation*, at pp. 6-7 to 6-10 (footnotes omitted):

It is essential to the cause of action that the words be defamatory of the plaintiff. It is not necessary that the plaintiff be named specifically, or identified by his or her proper name, or even mentioned at all, if it is otherwise shown that the words would be reasonably understood to refer to the plaintiff. Nor is it necessary for the person to whom the publication is made to know the plaintiff by name.

Direct evidence that the plaintiff is pointed to is not essential. He or she may be indicated "by designation or description", or pointed to by the circumstances ... It may be clear from other evidence that he was the one alluded to, but he must satisfy the court in that regard. This may be done by introducing evidence, apart from the publication, connecting the plaintiff with the defamatory publication. The extrinsic facts do not have to coincide exactly with the facts detailed in the publication so long as they enable a reasonable person to identify the plaintiff.

**335**  Statements which do not refer to the plaintiff by name will nonetheless meet the "of and concerning" requirement if they may reasonably be found to refer to the plaintiff in light of the surrounding circumstances. Moreover, in cases involving more than one allegedly defamatory publication, the court may be entitled to look at all of the articles in considering the question of whether a particular one refers to the plaintiff. See ***Butler v. Southam Inc.***, [*2001 NSCA 121*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPW1-JNY7-X1K3-00000-00&context=), at paras. 39-42.

**336**  Mr. McConchie argues that the TV Reports, the Web Story and the statements made by the individual defendants were defamatory of both Dr. Casses and Casses Inc. Mr. McConchie submits that the circumstances described in the following passage from *Brown on Defamation*, at pp. 18-124 to 18-127, applies here (footnotes omitted):

However, there are occasions where personal accusations against an officer, director or employee may be defamatory of the corporation as well. Whether that is the case depends "upon the part that the director or officer is alleged to have played in the operations of the company and upon the extent to which the one is identified with or considered to be the alter ego of the other". The question is whether the persons to whom an article refers and the corporation are so closely identified in the public mind that the accusation would be understood to be defamatory of the corporation. ...The same is true if the accusations are made against the sole owner, and it is shown that "the corporation's trading reputation is integrally related to the personal plaintiff's business or trading reputation". ...

It has also been held that since a corporation can only act through its officer, directors and employees, attacks on them must necessarily affect the business reputation of the corporation and those attacks may be considered in computing the damages suffered by the corporation which has also been defamed.

**337**  Mr. McConchie also cites ***Barrick Gold Corp. v. Lopehandia*** [*(2004), 71 O.R. (3d) 416*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B2PV-00000-00&context=) (C.A.), where the court said (at para. 47):

[47] However, a significant element in Mr. Lopehandia's defamatory campaign against Barrick consisted of lengthy attacks on the integrity and bona fides of its various officers, directors and employees. A corporation can only act through such individuals. False and defamatory statements concerning the people who are responsible for supervising and conducting the affairs of the corporation -- particularly a public corporation such as Barrick -- must inevitably affect the business reputation of the corporation, as well as that of the individuals. The authors of P.F. Carter-Ruck and H.N.A. Starte, Carter-Ruck on Libel and Slander, 5th ed. (London: Butterworths, 1997), at pp. 197-98, state:

It is probable that a statement which reflects upon the honesty of the directors of a company, which is calculated by the imputations to which it gives rise to lead third parties no longer to deal with the company, would also entitle the company to seek substantial damages.

**338**  The defendants say that, whatever the outcome of Dr. Casses' claims, the claims by Casses Inc. must be dismissed. They say that Casses Inc. was never identified or referred to in any way (including inferentially) in any of the publications or statements. The defendants submit that a corporation cannot maintain a defamation action for words that reflect not upon itself but solely upon its individual officers or members, who must bring the action themselves. In support, they cite *Gatley on Libel and Slander*, 7th ed. (London: Sweet & Maxwell, 1974), at p. 378 (para 890), and ***Church of Scientology of Toronto v. Globe and Mail Ltd. et al.***, [*(1978), 84 D.L.R. (3d) 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0WC-00000-00&context=) (Ont. H.C.J.). They point out that the alleged defamatory publications and statements concern Dr. Casses' activities as a surgeon carrying out surgery and other medical procedures on patients. These activities are, necessarily, carried out by Dr. Casses personally. A corporation cannot hold a scalpel.

**339**  In my opinion, the claims by Casses Inc. cannot succeed because neither the TV Reports nor the Web Story nor any statements made by any of the Individual Defendants would be understood by a reasonable person to be "of and concerning" Casses Inc. While there may be occasions where personal accusations against an officer or director or employee may be defamatory of the corporation as well, this is not one of them. Casses Inc. hardly had the profile of a public company such as Barrick Gold Corp. Perhaps Dr. Casses (and maybe Ms. Schoenauer) identified Casses Inc. as Dr. Casses' alter ego, although the evidence to support even that conclusion is slim at best. In my view, the plaintiffs have failed to prove that an ordinary, reasonable person would identify Dr. Casses with Casses Inc., and understand or infer that a reference to Dr. Casses would also be a reference to Casses Inc.

**340**  The words complained of clearly referred to Dr. Casses. But there is nothing in any of the publications or statements in issue that even hint at the existence of Casses Inc., much less refer to it, even inferentially. Dr. Casses' own letterhead was devoid of any mention of Casses Inc., so it is very difficult to say that it had any kind of public profile, or that mention of Dr. Casses to anyone would also bring to mind Casses Inc. There was no evidence that the residents of Quesnel knew that Dr. Casses carried on his surgical practice through Casses Inc. There is nothing in the surrounding circumstances to suggest that any of the TV Reports, or the Web Story, or any statements made by Individual Defendants alluded to Casses Inc. in any way. Rather, they were all personal to Dr. Casses. In my opinion, looking at all of the publications and statements together, there is nothing that would suggest to a reasonable person that any of them were about both Dr. Casses and Casses Inc., or that any such inference would be drawn.

**341**  In the Individual Actions, Casses Inc. pleads that statements were made by Ms. Cook, Ms. Odiorne and Mr. Backer to Ms. Tomlinson and that Ms. Tomlinson knew that Dr. Casses carried on his medical practice through Casses Inc. Based on this, the conclusion I am being asked to draw is that when Individual Defendants were speaking to Ms. Tomlinson, their statements were "of and concerning" both Dr. Casses and Casses Inc., based on Ms. Tomlinson's knowledge. However, in my opinion, this train of reasoning is too artificial to be either convincing or acceptable. The fact is each of the Individual Defendants, when speaking about Dr. Casses, was speaking about him in his capacity as an individual qualified to perform surgery. That is how what they said would be understood by the ordinary, reasonable person, even by someone who knew that Dr. Casses had a personal corporation.

**342**  Moreover, a corporation cannot perform surgery. Sections 42 and 43 of the ***Health Professions Act***, *R.S.B.C. 1996, c. 183*, which discuss "health profession corporations" and which Mr. McConchie relied on in closing submissions, do not assist Casses Inc. to make out its claims that it was defamed. That, legally, Dr. Casses may be able to carry on a surgical practice through a professional corporation does not mean that, when Dr. Casses' name is mentioned, a reasonable person would conclude that Casses Inc. is also being mentioned. It remains the fact that it is the surgeon -- Dr. Casses personally -- who performs the surgery and renders the patient care. That is what Dr. Casses' patients were unhappy about.

**343**  I do not think it was an accident that, when the Individual Actions were filed in 2009, Casses Inc. was not named as a plaintiff. Rather, the naming of Dr. Casses as the sole plaintiff reflected the reality that none of the statements alleged to be defamatory would be regarded by a reasonable person as capable of referring to Casses Inc.

**344**  Accordingly, I conclude that Casses Inc. has failed to prove that any of the publications or statements in issue in fact referred to it.

**345**  Because Casses Inc. has failed to prove an essential element of its claims for defamation, it follows that the claims by Casses Inc. in all of the actions must be dismissed.

**346**  In that light, in the discussion that follows (including references to the notices of civil claim), I will treat Dr. Casses as if he is the only plaintiff.

**(iii) General comments about Dr. Casses' pleaded meanings in the CBC Action**

**347**  As I noted above, in the CBC Action, Dr. Casses does not complain about the literal meanings of any of the words published or spoken in any of the TV Reports or the Web Story, or assert that the words themselves are defamatory. Rather, Dr. Casses says that the inferences an ordinary person would draw from the words published and spoken, as set out in his pleaded meanings, are defamatory.

**348**  The context of the TV Reports is important. While the Web Story was mainly (although not exclusively) text, all of the TV Reports have important audio and visual elements as part of the reporting. A tone of voice and inflections can create their own impressions. Visuals create their own impression. An individual can appear to be friendly and open, with nothing to hide. Another individual -- seen only from a distance or driving away from a reporter -- can appear secretive and evasive. In my opinion, this is how Dr. Casses is made to appear in the TV Reports, while the Aaslies and the group gathered at the Backers' are portrayed sympathetically.

1. **Meanings of the Web Story**

**349**  Dr. Casses says that the Web Story conveyed the following "natural and ordinary inferential meanings":

1. The individual plaintiff had a disgraceful history of systematic professional misconduct and habitual professional ***negligence*** in Arizona before coming to British Columbia and being licensed by the College of Physicians and Surgeons of British Columbia to practise medicine in British Columbia;
2. The individual plaintiff has been guilty of systematic professional misconduct and habitual professional ***negligence*** in British Columbia since being licensed by the College of Physicians and Surgeons of British Columbia, in relation to his surgical care and post-surgical treatment of patients Edith Backer, Krystal Cook, Robin Odiorne, and Stephanie Aaslie together with numerous other cases in British Columbia;
3. The plaintiffs negligently performed surgery on patients Edith Backer, Krystal Cook, Robin Odiorne, and Stephanie Aaslie, together with numerous other cases in British Columbia, thereby causing each of them to suffer needless pain;
4. The plaintiffs negligently performed surgery on patient Edith Backer thereby causing her death;
5. The plaintiffs dishonestly and deceitfully concealed from patient Edith Backer, from her son Douglas Backer and from her daughter Caroline Mitchell, and from others, serious complications arising from the surgery they had performed on Edith Backer;
6. The plaintiffs deliberately refused to acknowledge and failed to treat serious complications arising from the surgery they had performed on patients Edith Backer, Krystal Cook, Robin Odiorne, and Stephanie Aaslie, together with numerous other cases in British Columbia, or alternatively, the plaintiffs negligently failed to treat such complications;
7. The plaintiffs deliberately and deceitfully did not reveal or treat serious perforations and post-surgical infections arising from the surgery they had performed on Edith Backer;
8. The plaintiffs negligently performed surgery on patients Krystal Cook, Robin Odiorne, and Stephanie Aaslie, together with numerous other cases in British Columbia, thereby causing them permanent damage;
9. The plaintiffs negligently performed surgery on patient Krystal Cook thereby requiring the amputation of her big toe;
10. The plaintiffs dishonestly and deceitfully concealed from patients Krystal Cook, Robin Odiorne, and Stephanie Aaslie, together with numerous other cases in British Columbia, serious complications arising from the surgery they had performed on them;
11. The plaintiffs deliberately and deceitfully did not reveal or treat serious post-surgical infections caused by the surgery they had performed on Krystal Cook, together with numerous other cases in British Columbia;
12. The plaintiffs negligently performed surgery on patients Robin Odiorne and Stephanie Aaslie, thereby nearly causing their death;
13. The plaintiffs dishonestly and deceitfully concealed from patient Robin Odiorne serious complications arising from the surgery they had performed on her;
14. The plaintiffs deliberately and deceitfully did not reveal or treat serious perforations caused by the surgery they had performed on Robin Odiorne;
15. The plaintiffs negligently performed surgery on patient Stephanie Aaslie thereby severing her bile duct, liver and bowel and causing a life threatening infection;
16. The plaintiffs deliberately and deceitfully failed to reveal and treat the severed bile duct, liver and bowel and life-threatening infection caused by the surgery they had performed on patient Stephanie Aaslie;
17. The plaintiffs' aforesaid conduct concerning patients Edith Backer, Krystal Cook, Robin Odiorne, and Stephanie Aaslie, together with numerous other cases in British Columbia, warranted termination of their medical licence or other severe disciplinary sanctions by the College of Physicians and Surgeons of British Columbia; and/or
18. One or more of the above.

**350**  According to Dr. Casses, these (or one or more of them) are the "stings" of the Web Story.

**351**  In my opinion, the meanings pleaded by Dr. Casses are at the most extreme end of what might be inferred from the Web Story. They reflect the worst and harshest interpretation of the Web Story. They are likely how Dr. Casses and Ms. Schoenauer perceived the Web Story. However, their personal reactions and subjective opinions are not the test of whether the Web Story was defamatory. Moreover, I do not think that an ordinary person -- not trained as a lawyer -- thinks in terms of "systematic professional misconduct" or "habitual professional ***negligence***." An ordinary person, not trained as a lawyer, does not use the words "negligently" or "negligent" in any technical legal sense, contrary to what Mr. McConchie suggested in argument.

**352**  I do not accept Dr. Casses' pleaded meanings as the meanings that an ordinary, reasonable person would infer from the Web Story.

**353**  In my opinion, the Web Story as a whole would probably lead an ordinary, reasonably thoughtful and informed person to infer that:

1. before being licensed by the College, Dr. Casses had a history in Arizona of poor surgical practice in numerous cases, leading to a loss of his licence to practice there. This occurred around the same time Dr. Casses moved to B.C. and became licensed by the College;
2. because of Dr. Casses' history in Arizona, it is reasonable to ask questions about how Dr. Casses came to be licensed by the College and to receive hospital privileges here;
3. since being licensed to practice in B.C., Dr. Casses has had a number of cases where patients or family members of patients have raised serious issues concerning the quality of his surgical and post-surgical care;
4. there were incidents in which Dr. Casses did not adequately admit or treat complications after surgery;
5. some former patients or family members of former patients believe that Dr. Casses was careless, dismissive of their concerns and unprofessional;
6. claims by Dr. Casses about his low complication rate could not be verified;
7. former patients and family members of former patients question how Dr. Casses was able to become licensed by the College, given his history (including the loss of his licence) in Arizona;
8. former patients and family members of former patients are concerned about the oversight provided by the College, who they believe should have investigated Dr. Casses more fully before licensing him to practice medicine in B.C.;
9. the College has received complaints about Dr. Casses, but a number of patients or family members of patients are unhappy with the way the College has dealt with the complaints and feel that the College needs to take patient complaints about Dr. Casses more seriously.

**354**  In my opinion, these are the inferential meanings that an ordinary person, not avid for scandal, would draw from the Web Story.

**355**  Based on these meanings, I find further that the Web Story was in fact defamatory of Dr. Casses since it had the tendency to injure Dr. Casses' reputation as a surgeon in the eyes of a reasonable person. Based on these meanings, the Web Story questions and impugns Dr. Casses' professional skills and his fitness to be licensed in B.C. as a general surgeon. Such imputations are clearly defamatory.

**(v) Meanings of the September 8, 2009 Local TV Report**

**356**  Dr. Casses says that the September 8 Local TV Report conveyed the following inferential meanings:

1. The individual plaintiff had a disgraceful history of systematic professional misconduct and habitual professional ***negligence*** in Arizona before coming to British Columbia and being licensed by the College of Physicians and Surgeons of British Columbia to practise medicine in British Columbia;
2. The individual plaintiff has been guilty of systematic professional misconduct and habitual professional ***negligence*** in British Columbia since being licensed by the College of Physicians and Surgeons of British Columbia, in relation to his surgical care and post-surgical treatment of patients Edith Backer, Krystal Cook, Robin Odiorne, and Stephanie Aaslie together with numerous other cases in British Columbia;
3. The plaintiffs provided negligent surgical care to patients Stephanie Aaslie, Edith Backer, Krystal Cook, and Robin Odiorne, together with numerous other cases in British Columbia;
4. The plaintiffs negligently performed surgery on patients Stephanie Aaslie and Robin Odiorne thereby nearly causing their deaths;
5. The plaintiffs dishonestly and deceitfully, or alternatively negligently, concealed from patients Stephanie Aaslie, Krystal Cook, and Robin Odiorne, together with numerous other cases in British Columbia, serious complications arising from the surgery they had performed on them;
6. The plaintiffs deliberately failed to treat serious complications arising from the surgery they had performed on patients Stephanie Aaslie, Krystal Cook, and Robin Odiorne, or alternatively, the plaintiffs negligently failed to do so;
7. The plaintiffs negligently performed gall bladder surgery on patient Stephanie Aaslie thereby cutting other parts of her digestive system and causing a life threatening infection to pool inside of her;
8. The plaintiffs negligently performed surgery on patient Edith Backer thereby causing her death;
9. The plaintiffs dishonestly and deceitfully concealed from patient Edith Backer, from her daughter Caroline Mitchell and from her son Douglas Backer, and from others, serious complications arising from the surgery they had performed on Edith Backer;
10. The plaintiffs negligently performed surgery on patient Krystal Cook thereby causing the big toe on her left foot to become severely infected;
11. The plaintiffs callously and deliberately refused to investigate or treat complications arising from the surgery they had performed on Krystal Cook;
12. The plaintiffs' aforesaid conduct concerning patients Stephanie Aaslie, Edith Backer, Krystal Cook, and Robin Odiorne warranted termination of their medical licence or other severe disciplinary sanctions by the College of Physicians and Surgeons of British Columbia; and/or
13. One or more of the above.

**357**  Dr. Casses pleads in the alternative that these meanings were conveyed by the combined effect of the Web Story and the September 8 Local TV Report.

**358**  According to Dr. Casses, these (or one or more of them) are the "stings" of the September 8 Local TV Report.

**359**  Again, in my opinion, the pleaded meanings are at the most extreme end of what might be inferred from the September 8 Local TV Report (either alone or by the combined effect of the TV Report and the Web Story), and they reflect the worst and harshest interpretation. As I observed above, an ordinary person, not trained as a lawyer, does not think in terms of "systemic professional ***negligence***" or "habitual professional ***negligence***," and does not use the words "negligently" or "negligent" in any technical legal sense.

**360**  I do not accept Dr. Casses' pleaded meanings as the meanings that an ordinary, reasonable person would infer from the September 8 Local TV Report.

**361**  In my opinion, the September 8 Local TV Report, in the context of the words and visuals, would probably lead an ordinary, reasonably thoughtful and informed person to infer that:

1. since being licensed to practice in B.C., Dr. Casses has had a number of cases where patients or family members of patients have raised serious issues concerning the quality of his surgical and post-surgical care;
2. there were incidents in which Dr. Casses did not adequately admit or treat complications after surgery;
3. some former patients or family members of former patients believe that Dr. Casses was careless and unprofessional;
4. Dr. Casses dismissed the legitimate concerns of his patients Ms. Aaslie, Ms. Cook, Ms. Mead and Ms. Odiorne in relation to the care he had provided;
5. the College needed to take patient complaints about Dr. Casses more seriously;
6. before being licensed by the College, Dr. Casses had a history in Arizona of poor surgical practice in numerous cases, leading to a loss of his licence to practice there;
7. because of Dr. Casses' history in Arizona, it is reasonable to ask questions about how Dr. Casses came to be licenced by the College and to receive hospital privileges here.

**362**  In my opinion, in the context of the whole broadcast, these are the inferential meanings that an ordinary person, not avid for scandal, would draw from the September 8 Local TV Report.

**363**  Based on these meanings, I find that the September 8 Local TV Report was in fact defamatory of Dr. Casses, since it had the tendency to injure Dr. Casses' reputation as a surgeon in the eyes of a reasonable person. This TV Report questions and impugns Dr. Casses' professional skills and his fitness to be licensed in B.C. as a general surgeon. Such imputations are clearly defamatory.

**(vi) Meanings of the September 8, 2009 National TV Report**

**364**  Dr. Casses says that the September 8 National TV Report conveyed the following inferential meanings:

1. The individual plaintiff had a disgraceful history of systematic professional misconduct and habitual professional ***negligence*** in Arizona before coming to British Columbia and being licensed by the College of Physicians and Surgeons of British Columbia to practise medicine in British Columbia;
2. The individual plaintiff has been guilty of systematic professional misconduct and habitual professional ***negligence*** in British Columbia since being licensed by the College of Physicians and Surgeons of British Columbia, in relation to his surgical care and post-surgical treatment of patients Edith Backer, Krystal Cook, Robin Odiorne, and Stephanie Aaslie, together with numerous other cases in British Columbia;
3. The plaintiffs provided negligent surgical care to patients Stephanie Aaslie, Edith Backer, Krystal Cook, and Robin Odiorne, together with numerous other cases in British Columbia;
4. The plaintiffs negligently performed surgery on patient Stephanie Aaslie thereby nearly causing her death;
5. The plaintiffs negligently performed gall bladder surgery on patient Stephanie Aaslie thereby cutting other parts of her digestive system and causing a life threatening infection to pool inside of her;
6. The plaintiffs negligently performed surgery on patient Edith Backer thereby causing her death;
7. The plaintiffs dishonestly and deceitfully, or alternatively negligently, concealed serious surgical complications arising from surgery they had performed on patients Stephanie Aaslie, Edith Backer, Krystal Cook, and Robin Odiorne, together with numerous other cases in British Columbia;
8. The plaintiffs negligently performed surgery on patient Krystal Cook thereby causing the big toe on her left foot to become severely infected;
9. The plaintiffs deliberately failed to treat serious complications arising from the surgery they had performed on patients Stephanie Aaslie, Edith Backer, Krystal Cook, and Robin Odiorne, together with numerous other cases in British Columbia, or alternatively, the plaintiffs negligently failed to do so;
10. The plaintiffs' aforesaid conduct concerning patients Stephanie Aaslie, Edith Backer, Krystal Cook, and Robin Odiorne, together with numerous other cases in British Columbia, warranted termination of their medical licence or other severe disciplinary sanctions by the College of Physicians and Surgeons of British Columbia; and/or
11. One or more of the above.

**365**  Dr. Casses pleads in the alternative, and by way of legal innuendo, that these defamatory meanings were conveyed by the combined effect of the Web Story and the two September 8 TV Reports.

**366**  According to Dr. Casses, these (or one or more of them) are the "stings" of the September 8 National TV Report.

**367**  Once again, in my opinion, the pleaded meanings are at the most extreme end of what might be inferred from the September 8 National TV Report (either alone or combined with the Web Story and the September 8 Local TV Report), and reflect the worst and harshest interpretation. Again, as I observed above, an ordinary person, not trained as a lawyer, does not think in terms of "systemic professional ***negligence***" or "habitual professional ***negligence***," and does not use the words "negligently" or "negligent" in any technical legal sense.

**368**  I do not accept Dr. Casses' pleaded meanings as the meanings that an ordinary, reasonable person would infer from the September 8 National TV Report.

**369**  In my opinion, the September 8 National TV Report, in the context of the words and the visuals, would probably lead an ordinary, reasonably thoughtful and informed person to infer that:

1. before being licensed by the College, Dr. Casses had a history in Arizona of very poor surgical practice in numerous cases, leading to a loss of his licence to practice there;
2. because of Dr. Casses' history in Arizona, it is reasonable to ask questions about how Dr. Casses came to be licensed by the College and to receive hospital privileges here;
3. since being licensed to practice in B.C., Dr. Casses has had a number of cases where patients or family members of patients have raised serious issues concerning the quality of his surgical and post-surgical care;
4. there were incidents in which Dr. Casses did not adequately admit or treat complications after surgery;
5. some former patients and family members of former patients believe that Dr. Casses was careless, dismissive of their concerns and unprofessional;
6. patients are concerned about the degree of oversight Dr. Casses received from the College;
7. claims by Dr. Casses about his low complication rate could not be verified.

**370**  In my opinion, in the context of the whole broadcast, these are the inferential meanings that an ordinary person, not avid for scandal, would draw from the September 8 National TV Report.

**371**  Based on these meanings, I find further that the September 8 National TV Report was in fact defamatory of Dr. Casses. It had the tendency to injure Dr. Casses' reputation as a surgeon in the eyes of a reasonable person. This TV Report questions and impugns Dr. Casses' professional skills and his fitness to be licenced in B.C. as a general surgeon. Such imputations are clearly defamatory.

1. **Meanings of the September 9, 2009 TV Report**

**372**  Dr. Casses says that the September 9 TV Report conveyed the following inferential meanings:

1. The individual plaintiff had a disgraceful history of systematic professional misconduct and habitual professional ***negligence*** in Arizona before coming to British Columbia and being licensed by the College of Physicians and Surgeons of British Columbia to practise medicine in British Columbia;
2. The individual plaintiff has been guilty of systematic professional misconduct and habitual professional ***negligence*** in British Columbia since being licensed by the College of Physicians and Surgeons of British Columbia, in relation to his surgical care and post-surgical treatment of patients Edith Backer, Krystal Cook, Robin Odiorne, and Stephanie Aaslie, together with numerous other cases in British Columbia;
3. The plaintiffs provided negligent surgical care to patients Edith Backer, Krystal Cook, Robin Odiorne, together with numerous other cases in British Columbia;
4. The plaintiffs dishonestly and deceitfully concealed from patient Edith Backer, from her daughter Caroline Mitchell and her son Douglas Backer, and from other persons, serious complications arising from the surgery they had performed on Edith Backer;
5. The plaintiffs deliberately, or alternatively negligently, failed to admit or treat serious complications arising from the surgery they had performed on patients Edith Backer, Krystal Cook, and Robin Odiorne, together with numerous other cases in British Columbia;
6. The plaintiffs negligently performed surgery on patient Krystal Cook thereby causing the big toe on her left foot to become severely infected;
7. The plaintiffs dishonestly and deceitfully denied serious complications arising from the surgery they had performed on patients Edith Backer, Krystal Cook, and Robin Odiorne, together with numerous other cases in British Columbia;
8. The plaintiffs' conduct concerning patients Edith Backer, Krystal Cook, and Robin Odiorne, together with numerous other cases in British Columbia, warranted termination of their medical licence or other severe disciplinary sanctions by the College of Physicians and Surgeons of British Columbia; and/or
9. One or more of the above.

**373**  Dr. Casses alleges in the alternative, and by way of legal innuendo, that these meanings were conveyed by the combined effect of the Web Story and the September 8 and September 9 TV Reports.

**374**  According to Dr. Casses, these (or one or more of them) are the "stings" of the September 9 TV Report.

**375**  Once again, in my opinion, the pleaded meanings are at the very extreme end of what might be inferred from the September 9 TV Report (either alone or together with the Web Story and the earlier TV Reports), and reflect the worst and harshest interpretation. Again, as I observed above, an ordinary person, not trained as a lawyer, does not think in terms of "systemic professional ***negligence***" or "habitual professional ***negligence***," and does not use the words "negligently" or "negligent" in any technical legal sense.

**376**  I do not accept Dr. Casses' pleaded meanings as the meanings that an ordinary, reasonable person would infer from the September 9 TV Report.

**377**  In my opinion, the September 9 TV Report, in the context of the words and the visuals, would probably lead an ordinary, reasonably thoughtful and informed person to infer that:

1. before being licensed by the College, Dr. Casses had a history in Arizona of very poor surgical practice in numerous cases, leading to a loss of his licence to practice there. This occurred around the same time Dr. Casses moved to B.C. and became licensed by the College;
2. because of Dr. Casses' history in Arizona, it is reasonable to ask questions about how Dr. Casses came to be licensed by the College and to receive hospital privileges here;
3. some former patients or their family members (or both) feel that Dr. Casses failed to acknowledge and failed properly to treat complications arising from the surgeries he had performed on them or family members;
4. the College needs to take patient complaints about Dr. Casses more seriously, and should not believe what Dr. Casses says.

**378**  In my opinion, in the context of the whole broadcast, these are the inferential meanings that an ordinary person, not avid for scandal, would draw from the September 9 TV Report.

**379**  Based on these meanings, I find that the September 9 TV Report was in fact defamatory of Dr. Casses. It had the tendency to injure Dr. Casses' reputation as a surgeon in the eyes of a reasonable person. This TV Report questions and impugns Dr. Casses' professional skills and his fitness to be licenced in B.C. as a general surgeon. Such imputations are clearly defamatory.

**(viii) Meanings of the September 10, 2009 TV Report**

**380**  Dr. Casses says that the September 10 TV Report conveyed the following inferential meanings:

1. The individual plaintiff had a disgraceful history of systematic professional misconduct and habitual professional ***negligence*** in Arizona before coming to British Columbia and being licensed by the College of Physicians and Surgeons of British Columbia to practise medicine in British Columbia;
2. The individual plaintiff has been guilty of systematic professional misconduct and habitual professional ***negligence*** in British Columbia since being licensed by the College of Physicians and Surgeons of British Columbia, in relation to his surgical care and post-surgical treatment of patients Edith Backer, Krystal Cook, Robin Odiorne, and Stephanie Aaslie, together with numerous other cases in British Columbia;
3. The plaintiffs provided negligent surgical care to patients Edith Backer, Krystal Cook, and Robin Odiorne, together with numerous other cases in British Columbia;
4. The plaintiffs dishonestly and deceitfully concealed from patient Edith Backer, from her daughter Caroline Mitchell and her son Douglas Backer, and from other persons, serious complications arising from the surgery they had performed on Edith Backer;
5. The plaintiffs deliberately failed to admit or treat serious complications arising from the surgery they performed on patients Edith Backer, Krystal Cook, and Robin Odiorne, together with numerous other cases in British Columbia, or alternatively, the plaintiffs negligently failed to do so;
6. The plaintiffs negligently performed surgery on patient Krystal Cook thereby causing the amputation of the big toe on her left foot;
7. The plaintiffs dishonestly and deceitfully denied serious complications arising from the surgery they performed on patients Krystal Cook and Robin Odiorne, together with numerous other cases in British Columbia;
8. The plaintiffs' conduct concerning patients Edith Backer, Krystal Cook, and Robin Odiorne, together with numerous other cases in British Columbia, warranted severe disciplinary sanctions by the College of Physicians and Surgeons of British Columbia; and/or
9. One or more of the above.

**381**  Dr. Casses alleges in the alternative, and by way of legal innuendo, that these meanings were conveyed by the combined effect of the Web Story and all of the TV Reports.

**382**  According to Dr. Casses, these (or one or more of them) are the "stings" of the September 10 TV Report.

**383**  Once again, in my opinion, the pleaded meanings are at the most extreme end of what might be inferred from the September 10 TV Report (either alone or together with the Web Story and the other TV Reports), and reflect the worst and harshest interpretation. Again, as I observed above, an ordinary person, not trained as a lawyer, does not think in terms of "systemic professional ***negligence***" or "habitual professional ***negligence***," and does not use the words "negligently" or "negligent" in any technical legal sense.

**384**  I do not accept Dr. Casses' pleaded meanings as the meanings that an ordinary, reasonable person would infer from the September 10 TV Report.

**385**  In my opinion, the September 10 TV Report, in the context of the words and the visuals, would probably lead an ordinary, reasonably thoughtful and informed person to infer that:

1. before being licensed by the College, Dr. Casses had a history in Arizona of poor surgical practice in numerous cases, leading to a loss of his licence to practice there. This occurred around the same time Dr. Casses moved to B.C. and became licensed by the College;
2. because of Dr. Casses' history in Arizona, it is reasonable to ask questions about how Dr. Casses came to be licensed by the College and to receive hospital privileges here;
3. some patients have complained to the College about Dr. Casses, but they are disappointed at the College's response;
4. the College needs to take patient complaints about Dr. Casses more seriously;
5. since being licensed to practice in B.C., Dr. Casses has had a number of cases where patients or family members of patients (or both) have raised serious issues concerning the quality of his surgical and post-surgical care;
6. there were incidents in which Dr. Casses did not adequately admit or treat complications after surgery;
7. some former patients or family members of former patients feel that Dr. Casses was careless, dismissive of their concerns and unprofessional.

**386**  In my opinion, in the context of the whole broadcast, these are the inferential meanings that an ordinary person, not avid for scandal, would draw from the September 10 TV Report.

**387**  Based on these meanings, I find that the September 10 TV Report was in fact defamatory of Dr. Casses. It had the tendency to injure Dr. Casses' reputation as a surgeon in the eyes of a reasonable person. This TV Report questions and impugns Dr. Casses' professional skills and his fitness to be licenced in B.C. as a general surgeon. Such imputations are clearly defamatory.

**(ix) Has Dr. Casses met his burden to prove that the CBC publications bore the inferential meanings he alleges, or something substantially the same?**

**388**  I have concluded that all of the CBC publications bore defamatory meanings. However, the meanings I found were not the inferential meanings pleaded by Dr. Casses, which I rejected. Does this matter?

**389**  The law on this point is discussed in ***Lawson v. Baines***, at paras. 35 and following. It is also discussed in *Brown on Defamation*, where the learned author writes, at pp. 19-82 to 19-83 (footnotes omitted):

Where false innuendoes are pleaded by the plaintiff, he or she is confined to the meanings relied upon or something substantially the same. If the imputation specified in the pleading is found not to be the imputation made by the published material, the plaintiff's action will fail even though another and different defamatory imputation was present and could have been pleaded...

A plaintiff's claim will not be defeated merely because the pleaded imputation does not state with complete accuracy the imputation in the published material if the essence of the plaintiff's complaint is otherwise clear to the finder of fact. "The critical consideration is whether it is prejudicial, disadvantageous or unfair to the defendant, to allow a plaintiff to seek a verdict on the basis that the matter complained of bears a meaning different from that previously relied on".

**390**  In closing argument, the plaintiffs accepted that this is a correct statement of the law.

**391**  Although in closing submissions, Mr. Burnett (for the CBC Defendants) argued that none of Dr. Casses' pleaded inferential meanings had been made out, he did not seek dismissal of the CBC Action on that basis. Rather, the CBC Defendants have pleaded alternative defamatory meanings (the "CBC's Pleaded Meanings"), which I set out in Section 3(b)(i) below. The CBC Defendants assert (among other things) that the CBC's Pleaded Meanings were justified. The meanings I have found are much closer to the CBC's Pleaded Meanings than to those pleaded by Dr. Casses, but nevertheless carry a greater "sting" than the CBC's Pleaded Meanings.

**392**  In those circumstances, I conclude that it would not be prejudicial or unfair to the CBC Defendants to allow Dr. Casses to seek a verdict on the basis that the Web Story and the TV Reports bear meanings different from those pleaded by Dr. Casses and on which he relied.

1. **Was Dr. Casses defamed by Krystal Cook?**

**393**  Dr. Casses asserts that, on or before September 8, 2009, Ms. Cook published the following words (and certain photographs) about him to Ms. Tomlinson:

I suffered needlessly and was damaged permanently when Dr. Casses failed to address serious complications arising from a surgery he performed on me.

As a result of the surgery Dr. Casses performed on the big toe on my left foot, it became grossly swollen and infected and had to be amputated.

Dr. Casses also refused to acknowledge and/or treat those complications.

Dr. Casses did not reveal or treat my serious post-surgical infections.

He told me that he was sympathetic but I was milking it, quit being a baby.

That was what my toe looked like [identifying photographs].

**394**  Dr. Casses describes the words he alleges Ms. Cook said to Ms. Tomlinson as the "Cook Words" and the photographs depicting Ms. Cook's left foot as the "Cook Photographs."

**395**  Dr. Casses does not complain about the literal meanings of either the Cook Words or the Cook Photographs. Rather, he alleges that "in the context of the interviews as a whole," the Cook Words and the Cook Photographs conveyed the following inferential meanings:

1. [Dr. Casses] negligently performed surgery on [his] patient, Krystal Cook, thereby causing her to suffer needless pain;
2. [Dr. Casses] negligently performed surgery on [his] patient, Krystal Cook, thereby causing her permanent damage;
3. [Dr. Casses] negligently performed surgery on [his] patient, Krystal Cook, thereby requiring the amputation of the big toe on her left foot;
4. [Dr. Casses] dishonestly and deceitfully concealed from [his] patient, Krystal Cook, serious complications arising from the surgery [he] performed on her;
5. [Dr. Casses] deliberately failed to treat serious complications arising from the surgery [he] performed on [his] patient, Krystal Cook, or alternatively, [Dr. Casses] negligently failed to do so;
6. [Dr. Casses] deliberately and deceitfully failed to reveal and treat serious post-surgical infections caused by the surgery [he] performed on [his] patient, Krystal Cook; and/or
7. One or more of the above.

**396**  However, I find that, apart from the last two statements ("He told me that he was sympathetic but I was milking it, quit being a baby" and "That was what my toe looked like," accompanied by photographs), Ms. Cook did not say the Cook Words to Ms. Tomlinson.

**397**  Ms. Cook communicated her story about events in 2004 by way of the e-mail message sent to Ms. Uda on May 28, 2009 by Ms. Hix. This message from Ms. Hix forwarded a lengthy e-mail message from Ms. Cook describing, in detail and from her perspective, what happened to her in 2004. Ms. Tomlinson read these messages. Ms. Cook's lengthy message mentioned Dr. Casses, but it also mentioned that other doctors had been involved in Ms. Cook's care. Dr. Casses makes no allegations about the statements in this message. Rather, his claim is based on what he alleges Ms. Cook communicated to Ms. Tomlinson during interviews by Ms. Tomlinson "on or before September 8, 2009." This would include statements Ms. Cook made at the August 24 gathering at Mr. Backer's.

**398**  The statement "I suffered needlessly and was damaged permanently," and the other words in the first four statements pleaded by Dr. Casses as the Cook Words are not in Ms. Cook's voice at all. This is obvious when they are compared with words that are actually written or said by Ms. Cook (such as her e-mail messages in evidence), and I find she did not say or publish them. Rather, these are close to words written by Ms. Tomlinson as part of the Web Story and scripts for the TV Reports. Although Ms. Cook had a poor opinion of Dr. Casses, the story she related about her experience (and which provided the context for the photographs) was much more nuanced than the Cook Words, and included criticism of her family doctor and others, in addition to Dr. Casses. In context, the statement "Quit being a baby," which Ms. Cook told Ms. Tomlinson Dr. Casses had said to her, is not capable of bearing any of the inferential defamatory meanings alleged.

**399**  I find that, in the full context of Ms. Cook's statements to Ms. Tomlinson on or before September 8, 2009, what Ms. Cook said and the photographs that she showed to Ms. Tomlinson and others do not bear the inferential meanings alleged by Dr. Casses or anything substantially the same.

**400**  It follows that Dr. Casses' claim against Ms. Cook must fail unless Ms. Cook can be liable for republication.

**401**  On this point, Dr. Casses says that Ms. Cook is liable for defamatory inferences that would be drawn from her words and the photographs of her toe in the TV Reports and the Web Story. Dr. Casses says that, with respect to the TV Reports and the Web Story, Ms. Cook comes within the exceptions that makes an initial publisher liable for republication. In this case, he says that Ms. Cook either authorized or intended the republication or the republication was the natural and probable result of the original publication (or both). Dr. Casses says that Ms. Cook's encouragement and recommendation to others that they access the CBC website to read the Web Story and view the TV Reports demonstrates that the republication on the CBC's website was not only the natural and probable result of her statements to Ms. Tomlinson and others, but that Ms. Cook, by her recommendation, must be taken to have authorized the republication.

**402**  Ms. Cook on the other hand says that she is not liable for republication by the CBC.

**403**  It is true that Ms. Cook appears in every TV Report. However, that was a decision made by Ms. Tomlinson over which Ms. Cook had no control and no input. Mr. Beckmann, Ms. Cook's counsel, submitted that her words are merely bits and pieces of each TV Report, and most of her story was not told by the CBC. I agree. Ms. Cook had already published her story in her own words. That story is much more detailed than what appears in the TV Reports and the Web Story. However, what Ms. Cook said on those earlier occasions is not the subject of any complaint by Dr. Casses.

**404**  In the circumstances in which Ms. Cook appeared in the TV Reports and the Web Story, I find that she did not authorize or intend the republication, nor was the content of the TV Reports and the Web Story the natural and probable result of Ms. Cook's communications with Ms. Uda and Ms. Tomlinson. I find that, so far as Ms. Cook is concerned, neither the TV Reports nor the Web Story capture the sum and substance of what she originally communicated to the CBC.

**405**  There may be occasions when encouraging others to watch or tune into a broadcast for which you were interviewed may lead to the conclusion that you intended or authorized the republication of defamatory statements made in the original interview. However, I find this is not one of them. On the facts, Ms. Cook's case is distinguishable from ***Pressler***, where much of what the defendant Dr. Lethbridge had communicated to the reporter was subsequently published.

**406**  I find, therefore, that Ms. Cook is not liable for what I have found to be the defamatory meanings arising from the TV Reports and the Web Story. She is not the original publisher of any of them, and the exceptions under which she might be liable for republication do not apply.

1. **Was Dr. Casses defamed by Robin Odiorne?**

**407**  Dr. Casses asserts that, on or before September 8, 2009, Ms. Odiorne published the following words about him to Ms. Tomlinson:

I filed a complaint with the College of Physicians & Surgeons of British Columbia against Dr. Fernando Casses.

Dr. Casses caused me to suffer needlessly.

I was damaged permanently when Dr. Casses failed to address serious complications arising from a surgery he performed on me.

My complaint to the College also concerned how Dr. Casses refused to acknowledge and/or treat those complications.

Dr. Casses did not reveal or treat my serious perforations.

My bladder was nicked during surgery.

Another surgeon who operated on me after Dr. Casses told me that it was a bloody mess in there -- and if it had been the next day -- I probably wouldn't have survived.

Dr. Casses defines these as the "Odiorne Words."

**408**  Dr. Casses also asserts that, while speaking these words, Ms. Odiorne shook her head and adopted "facial expressions." This is a reference to what can be seen in the TV Reports, in the scenes from the August 24 gathering.

**409**  Dr. Casses says that Ms. Odiorne's words and expressions communicated to Ms. Tomlinson conveyed the following inferential meanings:

1. [Dr. Casses] negligently performed surgery on [his] patient, Robin Odiorne, thereby causing her to suffer needless pain;
2. [Dr. Casses] negligently performed surgery on [his] patient, Robin Odiorne, thereby causing her permanent damage;
3. Dr. Casses dishonestly and deceitfully concealed from [his] patient, Robin Odiorne, serious complications arising from the surgery [he] performed on her;
4. [Dr. Casses] deliberately failed to treat serious complications arising from the surgery [he] performed on [his] patient, Robin Odiorne, or alternatively, [Dr. Casses] negligently failed to do so;
5. [Dr. Casses] deliberately and deceitfully failed to reveal and treat serious perforations caused by the surgery [he] performed on [his] patient, Robin Odiorne;
6. [Dr. Casses] negligently performed surgery on [his] patient, Robin Odiorne, thereby creating a terrible mess of her internal organs and related physiology;
7. [Dr. Casses] negligently performed surgery on [his] patient, Robin Odiorne, thereby nearly causing her death;
8. The plaintiff Casses' aforesaid conduct concerning his patient, Robin Odiorne, warranted severe disciplinary sanction by the College of Physicians and Surgeons of British Columbia; and/or
9. One or more of the above.

**410**  Dr. Casses alleges further that the Odiorne Words were republished in the TV Reports and the Web Story.

**411**  For example, with respect to the Web Story, Dr. Casses alleges that Ms. Tomlinson and the CBC republished the substance and sting of Ms. Odiorne's interviews with Ms. Tomlinson, in particular by stating:

Several people in Quesnel, B.C., have filed complaints about their hospital's general surgeon, Dr. Fernando Casses. They claim they suffered needlessly -- and were damaged permanently -- when he failed to address serious complications from his surgeries.

The most common complaint is not just that they suffered complications after Casses operated on them, but that he refused to acknowledge and/or treat those complications.

In most cases, they said, serious perforations ... were not revealed or treated...

"[The other surgeon] told me that it was 'a bloody mess' in there -- and if it had been the next day -- he would have been on the golf course, and I probably wouldn't have survived," said Odiorne, who's suffered complications after she said her bladder was "nicked" during surgery by Casses.

**412**  Dr. Casses asserts that, in context of the Web Story as a whole, these words would be understood to mean:

1. [Dr. Casses] negligently performed surgery on [his] patient, Robin Odiorne, thereby causing her to suffer needless pain;
2. [Dr. Casses] negligently performed surgery on [his] patient, Robin Odiorne, thereby causing her permanent damage;
3. [Dr. Casses] negligently performed surgery on [his] patient, Robin Odiorne, thereby nearly causing her death;
4. [Dr. Casses] dishonestly and deceitfully concealed from [his] patient, Robin Odiorne, serious complications arising from the surgery they performed on her;
5. [Dr. Casses] deliberately refused to acknowledge or treat serious complications arising from the surgery [he] performed on [his] patient, Robin Odiorne, or alternatively, [Dr. Casses] negligently failed to do so;
6. [Dr. Casses] deliberately and deceitfully did not reveal and treat serious perforations caused by the surgery [he] performed on [his] patient, Robin Odiorne;
7. The plaintiff Casses's aforesaid conduct concerning his patient, Robin Odiorne, warranted severe disciplinary sanction by the College of Physicians and Surgeons of British Columbia; and/or
8. One or more of the above.

**413**  I will first address whether the "Odiorne Words" and expressions were published by Ms. Odiorne and are defamatory as alleged.

**414**  At trial, Ms. Odiorne confirmed that she made a complaint to the College (something about which there is no dispute). Ms. Odiorne also told Ms. Tomlinson that her complaint had not been upheld, that she was upset about the College's response and that she had thrown away the College's letter. Ms. Odiorne communicated (or "published") all of this to Ms. Tomlinson prior to the August 24 gathering at the Backers'.

**415**  Ms. Odiorne had no recollection of saying that Dr. Casses had caused her to suffer needlessly, or that she was damaged permanently as a result of complications from surgery performed by Dr. Casses. I find that Ms. Odiorne did not make either statement to Ms. Tomlinson. Rather, these were more general conclusions that Ms. Tomlinson drew on her own, based on what she was being told by Dr. Casses' former patients (including Ms. Odiorne), and which she included in the Web Story and her scripts for the TV Reports.

**416**  According to Ms. Odiorne, she told Ms. Tomlinson that part of her complaint to the College was about post-operative care she received from Dr. Casses, and his failure to tell her what in fact happened during the surgery. This might be understood as a complaint to the College about a refusal by Dr. Casses to acknowledge a complication. Ms. Odiorne did not recall telling Ms. Tomlinson that "Dr. Casses did not reveal or treat my serious perforations," although she did tell Ms. Tomlinson that, during surgery, Dr. Casses had "nicked" her bladder. This, in fact, was true. Ms. Odiorne also recalled telling Ms. Tomlinson about what she recalled the other surgeon (Dr. Thomas) had said to her concerning the repair, including about the "bloody mess."

**417**  I find that Ms. Odiorne did not say to Ms. Tomlinson that "Dr. Casses did not reveal or treat my serious perforations." Again, this is a conclusion Ms. Tomlinson drew based on her interviews with Dr. Casses' former patients. The words are Ms. Tomlinson's, not Ms. Odiorne's.

**418**  However, although Dr. Casses told Ms. Odiorne that her bladder had been nicked in the surgery, I find that Dr. Casses was not candid with Ms. Odiorne about what had happened in the operating room, and did not tell her that it was his failed attempt to repair her bladder that led to Dr. Thomas' involvement. Dr. Casses was not candid with the College about this either.

**419**  I find that Ms. Odiorne told Ms. Tomlinson that, during surgery, Dr. Casses had nicked (i.e., made a small cut in) her bladder and that, later, Dr. Casses was not forthcoming with Ms. Odiorne about what had been done during surgery to make the repair. I find further that Ms. Odiorne also told Ms. Tomlinson about what Dr. Thomas had told her (and Dr. Casses had not) about the repair.

**420**  The result, in my opinion, is that Dr. Casses has failed to prove, on a balance of probabilities, that Ms. Odiorne published most of the "Odiorne Words" to Ms. Tomlinson.

**421**  Based on my findings concerning the statements Ms. Odiorne made to Ms. Tomlinson, I find that Ms. Odiorne's statements do not bear any of the inferential meanings pleaded, which represent the harshest and most extreme inferences that might be drawn from Ms. Odiorne's statements.

**422**  Nothing defamatory can be inferred from (for example) the fact that Ms. Odiorne's bladder was nicked during surgery (since a reasonable person would appreciate that accidents can happen during surgery) or that Ms. Odiorne filed a complaint about Dr. Casses with the College, and certainly nothing at the extreme alleged by Dr. Casses. Ms. Odiorne shaking her head and adopting facial expressions are, in the circumstances, too ambiguous to support the conclusion that her words bear any of the inferential meanings pleaded by Dr. Casses.

**423**  However, what of Ms. Odiorne's statements that Dr. Casses had not been forthcoming about what had been done during surgery to make the repair and about the "bloody mess" comment from Dr. Thomas? In context, and in my opinion, a reasonable person, not avid for scandal, would infer that Dr. Casses is not candid and forthcoming with patients concerning surgical complications. This impugns his professionalism. Accordingly, I find the inferential meaning of these statements to be defamatory of Dr. Casses.

**424**  In contrast to the position taken by the CBC Defendants, Mr. West, Ms. Odiorne's counsel, argues that if Dr. Casses fails to meet his burden to prove that statements published by Ms. Odiorne bear the inferential meanings pleaded, or something substantially the same, Dr. Casses' case against her must be dismissed.

**425**  I find that Dr. Casses has failed to prove that Ms. Odiorne's statements bear the meanings alleged or something substantially the same. Rather, the "sting" of what Ms. Odiorne said is that Dr. Casses is not candid and forthcoming with patients concerning surgical complications. In my opinion, it would be unfair and prejudicial to Ms. Odiorne to allow Dr. Casses to seek a verdict against her on the basis of that meaning, rather than his pleaded inferential meanings.

**426**  Is Ms. Odiorne nevertheless liable for republication?

**427**  Based on my conclusion that Dr. Casses has failed to prove that Ms. Odiorne published most of the "Odiorne Words, and has failed to prove that what Ms. Odiorne published bears the inferential meanings alleged, or anything substantially the same, it follows that Dr. Casses has failed to meet the burden of proving that, in relation to the TV Reports and the Web Story, Ms. Odiorne has republished the substance and sting of the "Odiorne Words," as alleged. In addition, I reject Dr. Casses' pleaded inferential meanings in relation to each of the TV Reports and the Web Story, for the same reasons that I rejected his pleaded meanings with respect to the Odiorne Words. Moreover, Ms. Odiorne had no control over, and no input into, what Ms. Tomlinson included in the TV Reports or the Web Story.

**428**  Accordingly, I find that Dr. Casses' claims against Ms. Odiorne, on the basis of republication, must fail.

1. **Was Dr. Casses defamed by Douglas Backer?**

**429**  Dr. Casses alleges that "on or before September 8, 2009," Mr. Backer defamed Dr. Casses by publishing the following words to Ms. Tomlinson and the CBC:

My family filed a complaint with the College of Physicians & Surgeons of British Columbia against Dr. Fernando Casses concerning how our mother, Edith Backer, suffered needlessly when Dr. Casses failed to address serious complications arising from a surgery he performed on her.

My mother died last year after her bile duct and pancreas were sutured during the surgery.

Our complaint to the College also concerned how Dr. Casses refused to acknowledge and/or treat those complications.

Dr. Casses did not reveal or treat my mother's serious perforations and post- surgical infections.

Dr. Casses describes these as the "Backer Words."

**430**  Dr. Casses says that the inferential meanings of the Backer Words are as follows:

1. [Dr. Casses] negligently performed surgery on [his] patient, Edith Backer, thereby causing her to suffer needless pain;
2. [Dr. Casses] negligently performed surgery on [his] patient, Edith Backer, thereby causing her death;
3. [Dr. Casses] dishonestly and deceitfully concealed from [his] patient, Edith Backer, from the defendant Backer and from other persons, serious complications arising from the surgery [he] performed on Edith Backer;
4. [Dr. Casses] deliberately failed to treat serious complications arising from the surgery [he] performed on [his] patient, Edith Backer, or alternatively, [Dr. Casses] negligently failed to do so;
5. [Dr. Casses] deliberately and deceitfully failed to reveal and treat serious perforations and post-surgical infections caused by the surgery [he] performed on [his] patient, Edith Backer;
6. The plaintiff Casses' aforesaid conduct concerning his patient, Edith Backer, warranted severe disciplinary sanction by the College of Physicians and Surgeons of British Columbia; and/or
7. One or more of the above.

**431**  However, I find that Mr. Backer did not publish the alleged Backer Words to Ms. Tomlinson or the CBC. At most, he communicated:

1. that his family, and specifically Ms. Watkins, filed a complaint with the College concerning Dr. Casses;
2. that his mother had died in 2008 after her bile duct and pancreas were sutured during surgery performed by Dr. Casses;
3. his opinion concerning the response from the College (that, as far as the College was concerned, "our case is written off");
4. his opinion that that Baker Hospital needed to go back and do a follow-up on each of Dr. Casses' surgeries.

**432**  I note that Dr. Casses does not complain about the last two statements.

**433**  Before contacting Mr. Backer and before the August 24 gathering, Ms. Tomlinson had received copies of the letters that Ms. Watkins had sent to the Northern Health Authority and to the College, and copies of the replies. Ms. Tomlinson had read them thoroughly and carefully. She drew her own conclusions about the contents, and about Dr. Casses based on the contents. Her conclusions were not a product of anything that Mr. Backer said to her, either before or at the August 24 gathering. Prior to the August 24 gathering, Mr. Backer's communications with Ms. Tomlinson were brief, and dealt mainly with logistics.

**434**  At the August 24 gathering, Mr. Backer (at the urging of his wife) said little, although he acknowledged making the statements (quoted in the Web Story) that: "As far as [the College] is concerned, our case is written off" and "The hospital should go back to every surgery that man has performed -- and do a followup on every one of them." However, as I noted above, these statements are not the subject of complaint by Dr. Casses. Mr. Backer thought he probably also made a statement to the effect that "His mother, Edith Baxter, died last year -- after her bile duct and pancreas were sutured during gallbladder surgery."

**435**  Therefore, with respect to the "Backer Words," I find that Mr. Backer did not publish most of them. He communicated to Ms. Tomlinson that his family filed a complaint with the College and that his mother had died in 2008 after her bile duct and pancreas were sutured during surgery performed by Dr. Casses.

**436**  In my opinion, Mr. Backer's words published to Ms. Tomlinson, in their full context (including that the College rejected the complaint), cannot bear the inferential meanings pleaded by Dr. Casses, which are harsh and extreme, or anything substantially the same. I find that Mr. Backer's words that his mother died in 2008 after her bile duct and pancreas were sutured would be capable of leading a reasonable person to draw the defamatory inference that Dr. Casses lacked skill as a surgeon. However, in my opinion, it would be unfair and prejudicial to Mr. Backer to allow Dr. Casses to seek a verdict based on a defamatory meaning different from the meanings that Dr. Casses pleaded and on which he relied.

**437**  Dr. Casses goes on to allege that the CBC and Ms. Tomlinson republished the Backer Words and their substance and sting in the Web Story and the TV Reports. For example, in relation to the Web Story, Dr. Casses pleads as particulars of the defamatory expression for which he says Mr. Backer should be held liable the following:

Several people in Quesnel, B.C., have filed complaints about their hospital's general surgeon, Dr. Fernando Casses. They claim they suffered needlessly -- and were damaged permanently -- when he failed to address serious complications from his surgeries.

. . . Doug Backer. His mother, Edith Backer, died last year -- after her bile duct and pancreas were sutured during gallbladder surgery. . . .

The most common complaint is not just that they suffered complications after Casses operated on them, but that he refused to acknowledge and/or treat those complications.

In most cases, they said, serious perforations or post-surgical infections were not revealed or treated . . .

**438**  Based on these particulars from the Web Story, Dr. Casses then pleads seven inferential meanings (either singly or in combination) that he says are defamatory. Dr. Casses takes a similar approach in relation to each of the TV Reports.

**439**  However, since, in my opinion, Dr. Casses has failed to prove that Mr. Backer published most of the Backer Words, and has failed to prove that what Mr. Backer said bears the inferential meanings alleged (or anything substantially the same), his case to have Mr. Backer found liable for defamation, based on republication of the Backer Words and their substance and sting, cannot succeed.

**440**  Dr. Casses also alleges that Mr. Backer is responsible for the publication of a statement on the RateMDs website. However, the evidence is that the statement was published by Ms. Watkins, and that Mr. Backer was not involved in any way. I find that the RateMDs posting was made by Ms. Watkins, and that she was the publisher. Mr. Backer was not involved in the publication of Ms. Watkins' posting, and I find that he was not a publisher of it.

**441**  Accordingly, Dr. Casses' claim against Mr. Backer, alleging that Mr. Backer made defamatory statements about him on the RateMDs website, fails.

**(xiii) Was Dr. Casses defamed by Elizabeth Watkins?**

**442**  Dr. Casses alleges that on or before September 11, 2009, Ms. Watkins (together with Mr. Backer) defamed him by publishing the following in her statement on RateMDs:

Check out CBC.ca - weeklong investigation regarding post-op surgical complications. . . . He waited too long post-surgery on our mother before sending her to VGH - she suffered 3 weeks and 5 surgeries later trying to clean up the surgical mess left by this doctor, only to succumb to her death from infection of leaking bile, sutured pancreas and nicked bowel. Had he sent her on sooner she may still be with us today. . . .

**443**  Ms. Watkins' complete post is found in Section 2(g) above.

**444**  Dr. Casses asserts that the inferential meaning of the publication was that:

[Dr. Casses] negligently caused the death of Edith Backer by negligently nicking her bowel during surgery, and/or negligently suturing her pancreas, and/or negligently creating a surgical mess, and/or negligently failing to treat in a timely way a serious infection caused by his negligent surgery.

**445**  Dr. Casses asserts in the alternative that his pleaded meaning was conveyed by way of legal innuendo, by the combined effect of the Web Story and the TV Reports, or alternatively by virtue of extrinsic facts known to viewers who personally knew Ms. Watkins and her family and knew that Edith Backer had died.

**446**  There is no dispute that Ms. Watkins made the post to RateMDs, and I find she is the publisher. There is also no dispute that the post refers to Dr. Casses.

**447**  Ms. Watkins' complete post does not appear alone. There are numerous other postings that pre-date her post. For example, the posting immediately below Ms. Watkins' post (stated to be submitted September 10, 2009) reads (as posted):

I had the pleasure of dealing with this man when my dads family doc sent him to see him to get a biopsy done. he had a lump on his neck, after the surgery Dr. Casses called my dad at home and told him he was fine not to worry about anything.. later they found that my dad had cancer in his limpnoids it moved to his lungs he died within 6 months.

**448**  The implication of this posting is that Dr. Casses failed to diagnose a serious medical condition (that turned out to be fatal) and actively misled his patient.

**449**  However, the posting that followed (also stated to be submitted September 10, 2009) gave Dr. Casses the highest rating available, and reads (as posted):

First of all I am so sorry to hear of the many problems patients have had with Dr. Casses. I am just writing from my perspective what our family experienced when our sister had cancer.. we found Dr. Casses to be very kind and compassionate with us and my sister he was very patient with her.. as she was not dealing with the diagonise very well ...he performed her surgeries with no problems at all... my sister adores him as he helped her through a very tough time.. we say he save her life as I said I am sorry to hear of the problems others have had as I know how that feels as I have had a bad experience with a Dr also...I just wanted to say how we had a positive experience with Dr. Casses.. we will be for ever grateful for his help in saving my sisters life...

**450**  There are other postings, dated before Ms. Watkins' posting, that are highly critical of Dr. Casses, and still others that rate him highly or very highly and describe him in very positive terms. All of these postings are part of the context in which Ms. Watkins' posting appears.

**451**  In my opinion, Dr. Casses' pleaded meanings (with their repetition of "negligently") might be inferences drawn by a lawyer, who is familiar with the concept of ***negligence***. However, I do not think these are what an ordinary, reasonably thoughtful individual would take from Ms. Watkins' posting. Rather, I find the following inferences would likely be drawn:

1. Ms. Watkins has a very poor opinion of Dr. Casses and his skills as a surgeon (she gave him one star out of a possible five);
2. Dr. Casses bore some responsibility for the death of Edith Backer;
3. the College should not have granted Dr. Casses a licence to practice in B.C.

**452**  These meanings are defamatory of Dr. Casses.

1. **Summary on the Plaintiffs' defamation claims**

**453**  At this point, I will summarize my conclusions respecting the plaintiffs' defamation claims.

1. **The claims by Casses Inc. in all actions**

**454**  The claims by Casses Inc. in all of the actions are dismissed. Casses Inc. has failed to prove, on a balance of probabilities, that any of the publications or statements in issue in fact referred to it.

**(B) The claims by Dr. Casses in the CBC Action**

**455**  With respect to Dr. Casses' claims against the CBC, Ms. Tomlinson and Mr. Williams (subject to his limitation defence):

1. I find that each of the Web Story and the TV Reports was published, and each of them referred to Dr. Casses;
2. with respect to the Web Story, I reject Dr. Casses' pleaded meanings as what an ordinary, reasonably thoughtful person would infer. However, I find that there are inferential meanings that would be drawn from the Web Story that are defamatory of Dr. Casses. These meanings are set out in Section 3(a)(iv) above;
3. with respect to the September 8 Local TV Report, I reject Dr. Casses' pleaded meanings as what an ordinary, reasonably thoughtful person would infer. However, I find that there are inferential meanings that would be drawn from that TV Report that are defamatory of Dr. Casses. These meanings are set out in Section 3(a)(v) above;
4. with respect to the September 8 National TV Report, I reject Dr. Casses' pleaded meanings as what an ordinary, reasonably thoughtful person would infer. However, I find that there are inferential meanings that would be drawn from that Report that are defamatory of Dr. Casses. These meanings are set out in Section 3(a)(vi) above;
5. with respect to the September 9 TV Report, I reject Dr. Casses' pleaded meanings as what an ordinary, reasonably thoughtful person would infer. However, I find that there are inferential meanings that would be drawn from that Report that are defamatory of Dr. Casses. These meanings are set out in Section 3(a)(vii) above; and
6. with respect to the September 10 TV Report, I reject Dr. Casses' pleaded meanings as what an ordinary, reasonably thoughtful person would infer. However, I find that there are inferential meanings that would be drawn from that Report that are defamatory of Dr. Casses. These meanings are set out in Section 3(a)(viii) above;
7. although I have not accepted Dr. Casses' pleaded meanings, I conclude that it is not unfair or prejudicial to the CBC Defendants to allow Dr. Casses to seek a verdict on the basis of meanings different from his pleaded meanings.

**456**  Accordingly, I find that Dr. Casses has proved the necessary elements of a defamation claim against the CBC Defendants (subject to Mr. Williams' limitation defence).

1. **The claims by Dr. Casses against Ms. Cook**

**457**  I find that Ms. Cook did not make most of the statements alleged to be the "Cook Words," and, in the full context of her communications with Ms. Uda and Ms. Tomlinson, her words and her photographs were not defamatory of Dr. Casses.

**458**  I find further that, with respect to the Web Story and the TV Reports, Ms. Cook is not liable for republication.

**459**  Accordingly, I find that Dr. Casses has failed to prove the necessary elements of a defamation claim against Ms. Cook.

**(D) The claims by Dr. Casses against Ms. Odiorne**

**460**  I find that Dr. Casses has failed to prove that Ms. Odiorne published most of the "Odiorne Words." With respect to the statements I have found Ms. Odiorne published, I find that Dr. Casses has failed to prove that they bear the meanings alleged by him or anything substantially the same. Finally, with respect to the defamatory meaning I have concluded certain of Ms. Odiorne's words bear, I have concluded that it would be unfair and prejudicial to Ms. Odiorne to allow Dr. Casses to seek a verdict based on a meaning he did not plead or rely on.

**461**  I find further that, with respect to the Web Story and the TV Reports, Ms. Odiorne is not liable for republication.

**462**  Accordingly, I find that Dr. Casses has failed to prove the necessary elements of a defamation claim against Ms. Odiorne.

**(E) The claims by Dr. Casses against Mr. Backer**

**463**  I find that Dr. Casses has failed to prove that Mr. Backer published most of the "Backer Words." With respect to the statements I have found Mr. Backer published, I find that they cannot bear the inferential meanings pleaded by Dr. Casses or anything substantially the same. Although the statement to the effect that Mr. Backer's mother died after her bile duct and pancreas were sutured would be capable of leading a reasonable person to draw a defamatory inference, it would be unfair and prejudicial to Mr. Backer to allow Dr. Casses to seek a verdict based on a meaning he did not plead or rely on.

**464**  Further, Dr. Casses' claims based on republication of the "Backer Words" in the Web Story and the TV Reports must fail. In addition, I find that Mr. Backer did not publish the September 11, 2009 RateMDs posting.

**465**  Accordingly, I find that Dr. Casses has failed to prove the necessary elements of a defamation claim against Mr. Backer.

**(F) The claims by Dr. Casses against Ms. Watkins**

**466**  I find that Ms. Watkins published the September 11, 2009 RateMDs posting, and that it was defamatory of Dr. Casses.

**467**  Accordingly, I find that Dr. Casses has proved the necessary elements of a defamation claim against Ms. Watkins.

1. **The Defences**
2. **Introduction and the CBC's Pleaded Meanings**

**468**  Once a plaintiff proves the required elements in a defamation claim, the onus then shifts to the defendant to advance a defence in order to escape liability: see ***Grant***, at para. 29.

**469**  In the CBC Action, the CBC Defendants have pleaded three separate defences: responsible communication, justification and fair comment. They have also pleaded alternative defamatory meanings as follows (underlining indicating amendments omitted):

1. Edith Backer, Krystal Cook, Robin Odiorne and Stephanie Aaslie together with numerous other cases in British Columbia about Dr. Casses's surgery, raise troubling questions about the oversight and licensing of Dr. Casses in British Columbia given his history of quality assurance concerns, suspension, unprofessional conduct and ***negligence*** in Arizona before coming to British Columbia and being licenced to practise in British Columbia.
2. In the British Columbia cases involving complaints against Dr. Casses, either with the College of Physicians and Surgeons, the Health Authority, or informally, including the Edith Backer, Krystal Cook, Robin Odiorne and Stephanie Aaslie cases, there were cases in which the College of Physicians and Surgeons or Health Authority did not find fault with Dr. Casses, other cases in which he was found to have fallen below the required standard of care, and other cases in which there has been no ruling one way or the other or no ruling available to the defendants.
3. There were incidents in which Dr. Casses did not adequately admit or treat complications after surgery.

I will refer to these as the "CBC's Pleaded Meanings."

**470**  In addition, Mr. Williams has pleaded a limitation defence in relation to the TV Reports, relying on s. 3(2)(c) of the former ***Limitation Act***, [*R.S.B.C. 1996, c. 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=), which provides for a limitation period of 2 years from the time the cause of action arose. He says that any cause of action for defamation in relation to the TV Reports arose in September 2009, and the limitation period had long since expired by the time he was named as a defendant in 2013. Mr. Williams concedes that, under the law as it currently stands in Canada, there is no limitation defence in relation to the Web Story, which continued to be available as of trial.

**471**  The CBC and Ms. Tomlinson have also filed amended responses to civil claim in each of the Individual Actions, pleading the three defences pleaded in the CBC Action. They have done so in their capacity as third parties named in the Individual Actions, relying on Rule 3-5(12) of the ***Supreme Court Civil Rules***, which provides:

A third party who has filed a response to third party notice may, within the period for filing and serving a response to the third party notice, file and serve on all parties of record a response to civil claim to the plaintiff's notice of civil claim, raising any defence open to a defendant.

**472**  In closing argument, Mr. McConchie submitted that an Individual Defendant could not rely on the response to civil claim filed by the CBC and Ms. Tomlinson in that Defendant's Individual Action. Rather, in Mr. McConchie's submission, the Individual Defendant was confined, by way of defence, to whatever had been pleaded in the response to civil claim filed by that Individual Defendant. The CBC Defendants, on the other hand, could rely on everything in the Individual Defendant's response and in their response. Mr. McConchie did not cite any authority in support of his submissions.

**473**  I reject Mr. McConchie's submissions on this point. In my opinion, they are fundamentally inconsistent with Rule 3-5(12). Where a defendant and a third party have both filed a response to civil claim, the defence or response consists of both pleadings. A defendant can rely on the contents of the response to civil claim filed by the third party as setting out the defendant's defence(s) to the plaintiff's claim, in addition to whatever has been pleaded in the defendant's response to civil claim. Both pleadings taken as a whole constitute the defence in response to the plaintiff's claims.

**474**  However, the third party notice filed in the Backer and Watkins action was in respect of the Web Story and the TV Reports only. It did not make any claim in respect of Ms. Watkins' RateMDs posting. In my opinion, it follows that Ms. Watkins cannot take advantage of the amended response to civil claim filed by the CBC and Ms. Tomlinson in the Backer and Watkins action. Her defence is found in the statement of defence filed January 19, 2010 only.

1. **Responsible Communication**

**475**  This defence is pleaded both in the CBC Action and in the Individual Actions (except for the claim against Ms. Watkins) through the third parties' amended responses to civil claim.

**476**  ***Grant*** is the leading case on the defence of responsible communication. There, the Supreme Court of Canada concluded that the law of defamation should be modified to provide greater protection for communications on matters of public interest. McLachlin C.J. wrote, at paras. 53 and 65:

[53] Freedom does not negate responsibility. It is vital that the media act responsibly in reporting facts on matters of public concern, holding themselves to the highest journalistic standards. But to insist on court-established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate. The existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law, should a suit be filed. Verification of the facts and reliability of the sources may lead a publisher to a reasonable certainty of their truth, but that is different from knowing that one will be able to prove their truth in a court of law, perhaps years later. This, in turn, may have a chilling effect on what is published. Information that is reliable and in the public's interest to know may never see the light of day.

. . .

[65] Having considered the arguments on both sides of the debate from the perspective of principle, I conclude that the current law with respect to statements that are reliable and important to public debate does not give adequate weight to the constitutional value of free expression. While the law must protect reputation, the level of protection currently accorded by the law -- in effect a regime of strict liability -- is not justifiable. The law of defamation currently accords no protection for statements on matters of public interest published to the world at large if they cannot, for whatever reason, be proven to be true. But such communications advance both free expression rationales mentioned above -- democratic discourse and truth-finding -- and therefore require some protection within the law of defamation. When proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know.

**477**  The defence of responsible communication is described at para. 98:

[98] This brings us to the substance of the test for responsible communication. In *Quan*, Sharpe J.A. held that the defence has two essential elements: public interest and responsibility. I agree, and would formulate the test as follows. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.

**478**  Chief Justice McLachlin summarized the more detailed elements of the defence, at para. 126:

[126] The defence of public interest responsible communication is assessed with reference to the broad thrust of the publication in question. It will apply where:

1. The publication is on a matter of public interest, and
2. The publisher was diligent in trying to verify the allegation, having regard to:
3. the seriousness of the allegation;
4. the public importance of the matter;
5. the urgency of the matter;
6. the status and reliability of the source;
7. whether the plaintiff's side of the story was sought and accurately reported;
8. whether the inclusion of the defamatory statement was justifiable;
9. whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
10. any other relevant circumstances.

**479**  With respect to "other relevant circumstances," Chief Justice McLachlin noted (at paras. 122-125) that:

[122] . . . the factors serve as non-exhaustive but illustrative guides. Ultimately, all matters relevant to whether the defendant communicated responsibly can be considered.

[123] Not all factors are of equal value in assessing responsibility in a given case. For example, the "tone" of the article . . . may not always be relevant to responsibility. While distortion or sensationalism in the manner of presentation will undercut the extent to which a defendant can plausibly claim to have been communicating responsibly in the public interest, the defence of responsible communication ought not to hold writers to a standard of stylistic blandness [citation omitted]. Neither should the law encourage the fiction that fairness and responsibility lie in disavowing or concealing one's point of view. The best investigative reporting often takes a trenchant or adversarial position on pressing issues of the day. An otherwise responsible article should not be denied the protection of the defence simply because of its critical tone.

[124] If the defamatory statement is capable of conveying more than one meaning, the jury should take into account the defendant's intended meaning, if reasonable, in determining whether the defence of responsible communication has been established. This follows from the focus of the inquiry on the conduct of the defendant. The weight to be placed on the defendant's intended meaning is a matter of degree: "The more obvious the defamatory meaning, and the more serious the defamation, the less weight will a court attach to other possible meanings when considering the conduct to be expected of a responsible journalist in the circumstances" [citation omitted]. Under the defence of responsible communication, it is no longer necessary that the jury settle on a single meaning as a preliminary matter. Rather, it assesses the responsibility of the communication with a view to the range of meanings the words are reasonably capable of bearing.

[125] Similarly, the defence of responsible communication obviates the need for a separate inquiry into malice. (Malice may still be relevant where other defences are raised.) A defendant who has acted with malice in publishing defamatory allegations has by definition not acted responsibly.

**480**  When determining responsibility, the trier of fact must consider the broad thrust of the publication as a whole rather than minutely parsing individual statements: see ***Quan v. Cusson***, [*2009 SCC 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1GY-00000-00&context=), at para. 30.

**481**  I find that the "public interest" aspect of the test is satisfied for all of the Web Story and the TV Reports. Health care, patient safety, the qualifications and licencing of health care providers, and the oversight of physicians by the College are all clearly matters of public interest. There was no dispute about this.

**482**  Mr. Burnett, for the CBC Defendants, submits that the necessary elements of the second part of the defence -- that the publisher was diligent in trying to verify the allegation -- have also been satisfied in this case.

**483**  Mr. Burnett submits the evidence shows that Ms. Tomlinson, both on her own and in the support she received from Ms. Uda and the guidance from Mr. Williams, conducted extensive research into numerous cases of patient concerns. The story started with the contact from Ms. Hix about Beverly North's case and Dr. Casses' surrender of his licence in Arizona. However, it did not stop there. The cases researched included those where the patient's concerns were found by the College to be justified (e.g., Ms. Mead) and where they were found not to be (e.g., Mr. Giesbrecht and Edith Backer). In Mr. Burnett's submission, in that light, in the development of the story, it was not a matter of speculating about whether there were issues with Dr. Casses' practice. Rather, it had been established that there were issues, since Dr. Casses had in fact surrendered his licence in Arizona and he had been the subject of criticism by the College (most of which Dr. Casses ultimately accepted at trial). It was a matter of determining the extent of the problem, and whether the known issues were part of a larger concern or simply aberrations. Mr. Burnett points out that Ms. Tomlinson and the CBC stayed away from the extreme allegations made by Larry North, who was identified very early on as an unreliable source. Mr. Burnett points out that Ms. Tomlinson messaged everyone commenting about Dr. Casses on RateMDs, not merely those who had bad or negative opinions. In Mr. Burnett's submission, Ms. Tomlinson's notes show that she consulted and interviewed many sources, including an individual whose husband had died and who nevertheless spoke positively about Dr. Casses.

**484**  Mr. Burnett notes that Ms. Tomlinson's collected research included some medical records from Ms. Mead and Mr. Giesbrecht. Ms. Tomlinson explained why she was not more insistent that patients she interviewed provide her with their medical records. In response to the repeated criticism of Ms. Tomlinson that she should have obtained and reviewed medical records for all of the patients, and that her failure to do so demonstrates her lack of diligence (and possibly malice), Mr. Burnett argues that, at trial, all of the medical records were available, but, in the end, very few of them were admitted into evidence and they made no real difference to the story.

**485**  In Mr. Burnett's submission, the sheer number of patients interviewed, and the commonality between many of them, are indicative of reliability of what they were telling Ms. Tomlinson concerning Dr. Casses.

**486**  In addition to contacting people in B.C., Mr. Burnett notes that Ms. Tomlinson travelled to Arizona to interview Ms. Hix and Dr. Hunter. She contacted individuals at the College and at Northern Health. Mr. Burnett also points out that Ms. Tomlinson made a number of attempts to hear what Dr. Casses had to say. Following the trip to Quesnel, Ms. Tomlinson sent a written request to Mr. McConchie detailing the subject areas she wished to ask Dr. Casses about. Dr. Casses never spoke to her, and responded through his lawyer to the written request. Ms. Tomlinson reported what he had communicated about his complication rate and his position that he could not speak to the CBC because of patient confidentiality. Mr. Burnett submits that Dr. Casses' claim that he was prevented from speaking by patient confidentiality was a disingenuous excuse, and that Dr. Casses would never have spoken to Ms. Tomlinson even with patient consent.

**487**  With respect to whether there was any urgency in broadcasting the stories, Mr. Burnett submits that, while there was no rush to get the story to air and the research had taken place over about three and a half months (since late May), there was nevertheless a pressing issue, namely patient safety, which could not wait forever. Dr. Casses was, at the time, one of only two general surgeons practicing in Quesnel. In Mr. Burnett's submission, Ms. Tomlinson's evidence that many potential Go Public stories are killed, sometimes very close to air, is indicative of a good faith attitude and an ongoing open mind regarding stories being researched.

**488**  On the factor concerning the justifiability of including the allegedly defamatory statements, Mr. Burnett emphasized that Dr. Casses is not complaining that the actual words, in their literal meanings, are defamatory. In that light, in Mr. Burnett's submission, Dr. Casses' criticism of Ms. Tomlinson's repeated statements about the Arizona Bomex resolution and the "paper trail" should not be given much (or any) weight, since Dr. Hunter's comments about the "paper trail" would still have been featured in the story, even though they were not part of the Arizona Bomex resolution.

**489**  On the other hand, Mr. McConchie, for Dr. Casses, argues that the CBC Defendants have failed utterly to satisfy the onus to prove that they were diligent in trying to verify the defamatory expressions, having regard to the factors described in ***Grant***. Mr. McConchie argues that the TV Reports and the Web Story are a disgrace to journalism. In Mr. McConchie's submission, deliberate lies, reckless invention, malignant distortion, calculated ambiguity, superficial and lazy research, and callous indifference to the public's interest in fair, balanced and accurate reporting, made a potent recipe for devastating injury to reputation.

**490**  One of Dr. Casses' main arguments is that the defence of responsible communication must fail because Ms. Tomlinson (and others) were actuated by malice toward him.

**491**  Mr. McConchie submits that there was nothing urgent about publishing any story concerning Dr. Casses. He argues that proper diligence in verifying the allegations required that Ms. Tomlinson obtain medical records from all of the patients interviewed, which she did not do, preferring instead to rely on what she was told in oral interviews with patients. Mr. McConchie submits that this approach displayed a reckless indifference to the facts. He submits that Ms. Tomlinson should not have treated Ms. Hix as either a credible or reliable source of information. Mr. McConchie says that there is no evidence Ms. Tomlinson made any efforts to get independent advice from a physician. He submits that Ms. Tomlinson's lack of due diligence, indeed her recklessness (and hence her malice), is illustrated by her failure to press Dr. Hunter (when she interviewed him in Arizona) about the actual content of the Arizona Bomex resolution, which she repeatedly misquoted in the Web Story (until corrected in December 2014, at the close of the evidence), in the TV Reports and elsewhere.

**492**  Mr. McConchie submits that the people who gathered at the Backers' house on August 24, 2009 were not independent of one another. Rather, in his submission, Ms. Tomlinson, in organizing the gathering, had created the equivalent of a lynch mob to solidify her agenda against Dr. Casses. Mr. McConchie notes that, for example, Ms. Tomlinson did not make any arrangements to ensure that the College's response to Ms. Watkins' complaint concerning Dr. Casses' treatment of Edith Backer was circulated to those at the gathering.

**493**  In Mr. McConchie's submission, all of these circumstances (and more) demonstrate Ms. Tomlinson's malice toward Dr. Casses, and her malice is fundamentally incompatible with her acting responsibly in publishing the Web Story and the TV Reports.

**494**  However, in my opinion, the CBC Defendants are entitled to succeed on the defence of responsible communication, in relation to both the Web Story and each of the TV Reports. I will now explain why I have come to that conclusion.

**495**  The story began as one about a surgeon who had surrendered his licence in Arizona, but nevertheless obtained a licence and was practicing in B.C. In my opinion, Ms. Tomlinson's essential perspective concerning each of the publications is reflected in the CBC's Pleaded Meanings. In that context, and in the light of the circumstances I describe below, I find that Ms. Tomlinson was diligent, in the sense used in ***Grant***, in trying to verify the allegations about Dr. Casses.

**496**  The allegations about Dr. Casses in the Web Story and the TV Reports were serious, as were the inferences likely to be drawn by an ordinary, reasonable person. Indeed, although I did not accept Dr. Casses' pleaded meanings, I concluded that the inferential meanings that I found the publications bore were defamatory of Dr. Casses.

**497**  However, Dr. Casses was one of only two general surgeons practicing in Quesnel. For that community in particular, his background, qualifications and skill as a surgeon were very important indeed. He could, quite literally, have their lives in his hands. This was one of the reasons why Ms. Odiorne, for example, spoke out. Concern for the community also motivated Mr. Backer and Ms. Cook.

**498**  Moreover, many of the statements in the Web Story and the TV Reports were substantially true.

**499**  The statements concerning Dr. Casses' history in Arizona provide examples.

**500**  In the Fall of 2000, Dr. Casses' staff privileges at the Boswell Memorial and Del E. Webb Memorial Hospital were in fact summarily suspended based on quality assurance concerns, something Dr. Casses admitted was true. In the Consent Agreement, Dr. Casses formally admitted that in connection with a surgery (in fact, the surgery on Beverly North) he fell below the standard of care which might have been harmful to the health of a patient, and that his conduct constituted unprofessional conduct. At trial, rather than testifying he admitted facts that were not true, Dr. Casses confirmed his admissions. In my view, there can be no doubt that Dr. Casses voluntarily surrendered his medical licence in Arizona, rather than face further disciplinary proceedings.

**501**  Dr. Casses had in fact been found liable for ***negligence*** by the Arizona jury in the ***negligence*** case concerning Beverly North's death. The fact that he had not participated in the trial because he had settled earlier was not reported. However, Dr. Casses acknowledged on cross-examination that he did not dispute that he was partially at fault, although he disputed the jury's finding that he was 90% at fault.

**502**  In my opinion, the circumstances in which Dr. Casses applied for and became licenced by the College raise very troubling questions. This also goes to the truth of one of the CBC's Pleaded Meanings, and to the truth of some of the defamatory meanings that I have found in relation to the Web Story and the TV Reports.

**503**  Dr. Casses' conduct in relation to the B.C. Application was consistent with that of someone with something to hide, and intent on hiding it. His patients, such as Mr. Caskey, Ms. Odiorne and Mr. Field, complained that he was not forthcoming with them about the medical care he had rendered and that he concealed relevant facts. I find this is true. This same pattern of concealing uncomfortable facts can be seen in Dr. Casses' dealings with the College in relation to the B.C. Application for his medical licence. It was only when Dr. Casses had no other choice and was forced to answer a specific inquiry from the College, that he disclosed his history in Arizona. In the meantime, he had been performing surgery on patients in Port Alberni.

**504**  I find that, during the application process in B.C., Dr. Casses deliberately did not disclose anything about events in Arizona (the suspension of his hospital privileges, the investigation by the Arizona Bomex and the surrender of his licence) to the College. Dr. Casses did not disclose what was happening in Arizona, even when he knew his statements on the B.C. Application were no longer true. His explanation, essentially, was that, after he submitted the B.C. Application, he was not specifically asked about these events, and therefore he had no obligation to disclose them to the College. Dr. Casses' explanation strongly implies that he will not disclose or acknowledge, or will minimize, facts and circumstances which reflect (or may reflect) poorly on him as a surgeon, unless he has no other option, even if making full and candid disclosure would likely be in the best interests of patients.

**505**  I find that is how Dr. Casses conducted himself in relation to his B.C. medical licence. It was only after he was confronted by the College by letter at the end of February 2001, and required to give an explanation about events in Arizona, that he did so. Even then, Dr. Casses' explanation was self-serving and (for example) he did not disclose that he had signed the Consent Agreement.

**506**  I find that this is also how he conducted himself in relation to patient complaints. At trial, Dr. Casses "humbly" accepted criticism from the College. But earlier, in a number of his responses to the College, he very firmly rejected any possibility that he might have made a slip or error, or that a patient criticism might be valid. His response to Ms. Mead's complaint -- a complaint that the College upheld and which Dr. Casses ultimately accepted -- provides an example.

**507**  Dr. Casses' answers on the annual questionnaires he completed for the College were also not truthful. A truthful answer would have required him to say "yes" in response to the question whether he had ever entered into an agreement with a licensing authority in the face of potential disciplinary action. Instead, he answered "no." His explanation for doing so provides no justification for giving an answer that is not true, and that Dr. Casses knows is not true. However, it is consistent with a pattern where Dr. Casses will not disclose or acknowledge, or will minimize, facts and circumstances which reflect poorly on him as a surgeon, unless he has no other option. Dr. Casses' conduct in relation to the College's annual questionnaire again raises troubling questions about the oversight by the College.

**508**  With respect to whether there was any urgency in publishing the Web Story and the TV Reports, I agree with Mr. Burnett. This Go Public story had been developed and researched over about 3 months. Dr. Casses was a surgeon who had surrendered his medical licence in Arizona and whose conduct had been found to be unprofessional by the governing body there. There was a jury verdict against him in a ***negligence*** action in the U.S. He had been the subject of complaints to the College and been sued for ***negligence*** in B.C. He was continuing to operate on patients in Quesnel. As of August 28, 2009, Dr. Casses was not going to provide any further information to or answer questions posed by Ms. Tomlinson. Publication of the Web Story and the TV Reports was delayed so that Ms. Tomlinson could investigate further Dr. Casses' statements about his complication rates. In my opinion, in the circumstances, a timely report was justified, and there was no undue haste or cutting corners in the CBC publishing the Web Story and the TV Reports when it did.

**509**  Mr. McConchie argues that Ms. Tomlinson, acting responsibly and not maliciously, should have taken the time to obtain and review all of the medical records for all of the relevant patients before publishing anything about Dr. Casses. She did not do this. Thus (he argues), she failed to carry out proper due diligence and relied on sources that were unreliable. Mr. McConchie describes her conduct as reckless.

**510**  I do not agree.

**511**  I find that, in the circumstances, responsible reporting did not require Ms. Tomlinson to obtain and review all of the medical records. Ms. Tomlinson asked patients that she interviewed for their records, and reviewed what she was provided. To require a journalist in Ms. Tomlinson's position to do more and not report at all on a story such as the stories here without obtaining and reviewing medical records is not reasonable, in my opinion. As Mr. Burnett pointed out in closing submissions, at the trial, all of the medical records were available, but little use was made of the vast majority of them.

**512**  According to Ms. Tomlinson, some Go Public stories had been killed at the last minute. However, Mr. McConchie did not identify anything in particular that would have been found -- if only Ms. Tomlinson had reviewed the medical records -- that would or should have altered in Dr. Casses' favour the fundamentals of the Web Story or any of the TV Reports, or led the CBC to kill any of them. In my opinion, there was nothing.

**513**  On the other hand, the medical records that are in evidence do little to help Dr. Casses, in my view. At trial, Dr. Casses often qualified or elaborated on statements in his own operative reports, for example, and implied that simply reading the reports would not present an accurate picture. The medical records do not support Mr. McConchie's argument that Ms. Tomlinson acted irresponsibly in not obtaining medical records from everyone.

**514**  The records concerning Ms. Odiorne's surgery provide an example. In his operative report for Ms. Odiorne, Dr. Casses states clearly that "I made the . . . injury" in the bladder. This is the "nick" Ms. Odiorne described to Ms. Tomlinson. Any reasonable person reading Dr. Casses' operative report would conclude that he, personally, cut the bladder. However, at trial, Dr. Casses attempted to distance himself from his own words. Dr. Casses did not mention in his operative report that he had made a failed effort to repair the bladder, before calling in Dr. Thomas, so a reader who had spoken to Ms. Odiorne (as Ms. Tomlinson did) might well question whether Dr. Casses told Ms. Odiorne anything about it, or had concealed it from her. In that light, Dr. Casses' operative report would support what Ms. Odiorne communicated to Ms. Tomlinson, that she found out what happened, not from Dr. Casses, but from Dr. Thomas. Someone reviewing Dr. Casses' operative report (which in fact described a complication) might also question why it was dictated 11 days after the surgery, and after Dr. Thomas' report (dictated the same day as the surgery), and question whether Dr. Casses' conduct was consistent with his patient's best interests.

**515**  The medical records for Mr. Caskey would have shown that Dr. Casses did not have any consent from Mr. Caskey for the additional surgery he performed. Mr. Caskey did not learn what had happened during his surgery until after he had been discharged home and removed the bandages. He then had to ask Dr. Casses what had been done. This is a far cry from what Dr. Casses describes in his September Statement as his "rigid practice" following surgery, of ensuring that each patient is given a truthful and accurate explanation, in plain English, of what went on. Plainly, in Mr. Caskey's case, Dr. Casses did not do this. Mr. Caskey's case also goes to the truth of even some of the extreme defamatory meanings pleaded by Dr. Casses, in addition to defamatory meanings that I have found and the CBC's Pleaded Meanings.

**516**  There were no medical records that contradicted the version of events that Ms. Mead communicated to Ms. Tomlinson. Although, in his response to the College in relation to Ms. Mead's complaint, Dr. Casses attempted to create a scenario where physicians in Prince George were responsible for Ms. Mead's problems, the College rejected his theory, and ultimately (at trial) Dr. Casses accepted the conclusions reached by the College. Again, this supports the truth of some of the defamatory meanings pleaded by Dr. Casses, meanings found by me and the CBC's Pleaded Meanings.

**517**  The operative report for Mr. Field's hernia surgery provides another example where, in my view, having more records would not have assisted Dr. Casses. In his evidence, Dr. Casses emphasized the importance of dictating the operative report promptly after the surgery is completed, since the surgeon is relying on memory, and he was critical of other physicians for not doing so. However, his report for Mr. Field was dictated a week after the surgery, and was incomplete and inaccurate. Dr. Casses attempted to minimize the fact that he had not described the use of two plugs in his operative report (indeed, a reader would conclude a single plug was used). However, based on the opinion evidence I accept, using two plugs was unusual. It should have been mentioned in the operative report and disclosed to Dr. Casses' patient, Mr. Field. Mr. Field's case is an example where Dr. Casses failed to acknowledge, and attempted to minimize, a complication suffered by his patient from the surgery Dr. Casses performed. The College was critical of Dr. Casses and, for the most part, at trial, Dr. Casses accepted the criticism.

**518**  In Ms. Aaslie's case, VGH's records described a bile duct injury. This description (although ultimately wrong) was consistent with what Ms. Aaslie communicated to Ms. Tomlinson. It shows that reading the VGH medical records would probably not have fundamentally altered the story.

**519**  In August 2009, Ms. Tomlinson also had the College's response to the complaint by Ms. Watkins concerning Edith Backer. This set out in some detail Dr. Casses' and Dr. Scudamore's versions of the facts. In my opinion, having all of Mrs. Backer's medical records would have made little difference.

**520**  Accordingly, in my opinion, Ms. Tomlinson was not required to obtain medical records from all of the patients before she could publish the Web Story and the TV Reports. She was not required to track down and review every possible source of information concerning surgeries performed by Dr. Casses on the patients she was interviewing. In the circumstances, obtaining medical records was not required as an element of responsible communication. A failure to do so was neither reckless nor evidence of malice.

**521**  With respect to other sources, Ms. Tomlinson's (and Ms. Uda's) research and development of the story about Dr. Casses began with Ms. Hix and Ms. Cook, but certainly did not stop there. Larry Hix was quickly identified as unreliable, and they paid no attention to him. Ms. Hix's story was confirmed by the admissions made by Dr. Casses in the Consent Agreement, and which he confirmed at trial.

**522**  Ms. Tomlinson reviewed the material Ms. Uda had collected from the Arizona Bomex, a reliable source. It is true that Ms. Tomlinson misread the content of the Arizona Bomex resolution concerning Dr. Casses. Dr. Hunter's statement concerning the "paper trail" was not part of the actual resolution. However, Dr. Casses does not complain about the literal words in any of the publications, but about the inferential meanings. The "paper trail" statement had been made at the Arizona Bomex public meeting by the Vice-chairman and was recorded in the meeting minutes, and Ms. Tomlinson testified that, as a result, it still would have been featured in the story. In the circumstances, I find that there is little substantial difference between what was reported as the resolution, and a statement about the actual resolution accompanied by a statement that the Vice-chairman wanted to see a paper trail, in terms of the inferences that a reasonable person would draw.

**523**  Ms. Tomlinson was even-handed in locating patients who would speak to her. She did not seek out only those who had an axe to grind. She interviewed everyone separately, by telephone, first. She confirmed at trial that her notebook illustrates the extent of the contacts and what she was told. Many people (although not all) described similar experiences with Dr. Casses. Ms. Mead's story, for example, was confirmed through the response (which took into account what Dr. Casses had to say) of the College to her complaint. The gathering at the Backers' was set up after the telephone interviews. This was not creating a lynch mob of people out to get Dr. Casses. Individual citizens are entitled to have opinions about the medical care they receive and the physicians who provide it. Ms. Tomlinson spoke to Dr. O'Dwyer and Dr. Hutchinson about Dr. Casses' time in Port Alberni, and used Dr. Hutchison as someone who could help, off-the-record, with occasional questions about medical matters.

**524**  As far as Ms. Tomlinson was concerned, the role of the College was an important part of the story. In cross-examination, questions were put to Ms. Tomlinson suggesting that she acted irresponsibly in not educating herself better about the workings of the College and about why Ms. Prins was telling her the College could not disclose information, by, for example, consulting the ***Health Professions Act***, especially s. 53, which (as of August and September 2009) provided:

**Confidential Information**

53 (1) Subject to the *Ombudsman Act*, a person must preserve confidentiality with respect to all matters or things that come to the person's knowledge while exercising a power or performing a duty under this Act unless the disclosure is

1. necessary to exercise the power or to perform the duty, or
2. authorized as being in the public interest by the board of the college in relation to which the power or duty is exercised or performed.
3. Insofar as the laws of British Columbia apply, a person must not give, or be compelled to give, evidence in a court or in proceedings of a judicial nature concerning knowledge gained in the exercise of a power or in the performance of a duty under Part 2.1 or Part 3 unless
4. the proceedings are under this Act, or
5. disclosure of the knowledge is authorized under subsection (1) (b) or under the bylaws or regulations made under this Act.
6. The records relating to the exercise of a power or the performance of a duty under Part 2.1 or Part 3 are not compellable in a court or in proceedings of a judicial nature insofar as the laws of British Columbia apply unless
7. the proceedings are under this Act, or
8. disclosure of the knowledge is authorized under subsection (1) (b) or under the bylaws or regulations made under this Act.

**525**  Ms. Tomlinson acknowledged that it may have been a good idea to include some discussion of these provisions in the story. They indicate that the "troubling questions" are unlikely to be answered.

**526**  However, in my opinion, Ms. Tomlinson was not acting irresponsibly by not including some discussion of these legislative provisions. The absence of such a discussion did not alter the fundamentals of the story.

**527**  Ms. Tomlinson made attempts to speak to Dr. Casses directly. These were rebuffed, and by the morning of August 25, 2009, Dr. Casses had retained legal counsel. I conclude that, by this stage, Dr. Casses had decided he would not speak with Ms. Tomlinson under any circumstances. Dr. Casses' and Ms. Schoenauer's description of events at this time reflect a strong view Dr. Casses was being unfairly persecuted and hounded by Ms. Tomlinson, and was driven to take unusual steps to escape. Ms. Tomlinson's written request for an interview met with predictable results, in the form of what Ms. Tomlinson and Mr. Williams described as a "chill letter." Nevertheless, Ms. Tomlinson reported what Dr. Casses said about his complication rate and his reason for not speaking to her. She reported what Dr. Temple had to say about whether something done by the Arizona Bomex would influence decisions made by the Northern Health Authority. She also reported that the College had sided with Dr. Casses on a number of the patient complaints.

**528**  Shortly after the last of the TV Reports was broadcast, Dr. Casses published his side of the story in the September Statement. Of course, Dr. Casses could characterize matters as he saw fit, although he testified that everything he said was true and also that it was very important to be forthcoming. However, in my opinion, his statement that "I voluntarily surrendered my medical license" is disingenuous and shades the truth. In fact, he agreed to surrender his licence in exchange for not facing a potentially much more serious level of scrutiny and discipline in Arizona. Moreover, his statement that this event happened "10 years ago" is simply untrue, and implies that the events were more distant in the past than in fact they were. His statement that "I fully disclosed the Arizona facts and all the associated circumstances . . . to the BC College" leaves out the facts that he had not done this when he obtained a license in the Fall of 2000 and only did so in early 2001 when he had no other option. The September Statement reflects the pattern that was part of the Go Public story: that Dr. Casses minimized or would not acknowledge facts and circumstances that reflected poorly on him as a surgeon.

**529**  In summary, I find that Ms. Tomlinson and the CBC acted responsibly in developing and publishing the Web Story and each of the TV Reports. I find that Ms. Tomlinson, who was responsible for the contents of each publication, was diligent in trying to verify the allegations concerning Dr. Casses, having regard to all of the circumstances, and that much of what she reported in the Web Story and the TV Reports was true. The defamatory stings are no worse than the facts that have been proved at trial, and a more complete reporting of the facts would have been more damaging for Dr. Casses.

**530**  I conclude, therefore that, with respect to the Web Story and each of the TV Reports, the CBC Defendants are entitled to succeed on the defence of responsible communication.

1. **Fair Comment**

**531**  Since I have found that the CBC Defendants are entitled to succeed on the defence of responsible communication, and despite the detailed submissions I received on fair comment, I do not intend to deal with the defence of fair comment in relation to them.

**532**  However, fair comment is the only defence raised by Ms. Watkins.

**533**  A defendant claiming fair comment must satisfy the following test: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, although it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts? See ***WIC Radio Ltd. v. Simpson***, [*2008 SCC 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1CP-00000-00&context=), at para. 28

**534**  Even though the comment satisfies the objective test, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice, and that this was the defendant's primary or predominant motive in publishing the comment. See ***WIC***, at paras. 28 and 63, and ***Ross v. New Brunswick Teachers' Assn.***, [*2001 NBCA 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW91-F57G-S0CR-00000-00&context=), at paras. 113-116. As ***Ross*** illustrates, a defendant can in fact have a great deal of ill-will towards a plaintiff, but a plaintiff may still fail to prove malice sufficient to defeat a defence of fair comment. The defence will not be defeated unless the court also concludes that the defendant's dominant purpose in publishing the material in issue was to injure the plaintiff because of spite or ill-will.

**535**  There is no doubt that Ms. Watkins' statement was on a matter of public interest. However, the three remaining elements are in issue. Moreover, Dr. Casses says that Ms. Watkins was actuated by express malice.

**536**  ***WIC*** expanded the fair comment defence by changing the traditional requirement that the opinion be one that a "fair--minded" person could honestly hold, to a requirement that it be one that "anyone could honestly have expressed", which allows for robust debate: see ***Grant***, at para. 31. As Binnie J. put it in ***WIC*** (at para. 4), "[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones."

**537**  "Honest belief" requires the existence of a relationship between the comment and underlying facts. The question is whether anyone, however prejudiced the person might be, however exaggerated or obstinate the person's views might be, could honestly express the opinions, based on the proven facts: see ***WIC***, at para. 40.

**538**  In order to determine whether a defamatory imputation can be protected as fair comment, it must be initially determined whether it is comment upon given facts or a statement of facts. The distinction is fundamental and must absolutely be made because an assertion of facts can never be defended as fair comment: see ***Ross***, at para. 55.

**539**  However, words that may appear to be statements of fact may be properly construed as comment: see ***WIC***, at para. 26. What is comment and what is fact must be determined from the perspective of a reasonable viewer or reader: see ***WIC***, at para. 27 (citing ***Ross***, at para. 62). Context is important. Whether something is fact or comment is for me to decide: see ***WIC***, at para. 55.

**540**  A properly disclosed or sufficiently indicated (or so notorious as to be already understood by the audience) factual foundation is an important objective limit to the fair comment defence: see ***WIC***, at para. 34. If the factual foundation is unstated or unknown, or turns out to be false, the fair comment defence is not available: see ***WIC***, at para. 31 (citing ***Price v. Chicoutimi Pulp Co.*** [*(1915), 51 S.C.R. 179*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F956-S16C-00000-00&context=)], at p. 194). A single fact, proved to be substantially true, can provide a sufficient foundation for a fair comment defence: see ***Simpson v. Mair and WIC Radio Ltd.***, [*2004 BCSC 754*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3V4-00000-00&context=), at paras. 56-60.

**541**  Here, I find that Ms. Watkins' statements about Dr. Casses would be understood as comment, not fact, particularly given the context (RateMDs) in which her statements were made. The facts that form the basis for the comment are that: (a) Dr. Casses performed surgery on Mrs. Backer; (b) after a period in hospital in Quesnel, she was transferred to VGH, where she had further surgeries; and (c) Mrs. Backer later died in hospital in Vancouver. All of these facts are true, and are sufficiently stated in Ms. Watkins' posting. These facts provide the anchor for her opinions: that Dr. Casses waited too long before sending Mrs. Backer to Vancouver, and if he had acted sooner, Mrs. Backer may not have died; that Dr. Casses had left a mess that needed to be cleaned up in Vancouver; that Mrs. Backer suffered through further surgeries and complications led to her untimely death; and the College should not have granted Dr. Casses a licence to practice in B.C. I find that these are opinions that anyone could honestly have expressed, based on the facts. Ms. Watkins' opinions do not have to be reasonable or fair-minded.

**542**  I turn then to Dr. Casses' assertion that the defence should be defeated because of malice.

**543**  In my opinion, Dr. Casses has failed to prove that, in posting on RateMDs, Ms. Watkins was actuated by express malice. First, he has failed to prove that Ms. Watkins did not honestly hold the views she expressed, and I find that, since of August 2008, following the death of her mother, she held these views. Moreover, Dr. Casses has failed to prove Ms. Watkins' primary or predominant motive for publishing her comments on RateMDs was to injure him because of spite or animosity, or that she had some other dominant improper purpose. Ms. Watkins explained that she made her RateMDs posting after seeing the TV Reports and realizing that there were other people affected, and that she wanted to share with others what her family had gone through. Her evidence in that respect was unchallenged.

**544**  I find, therefore, that Ms. Watkins is entitled to succeed on her defence of fair comment.

**545**  Although I have found that Dr. Casses failed to make out his defamation claims against Ms. Cook, Ms. Odiorne and Mr. Backer, I will say a few words concerning the fair comment defence raised by each of them. Had it been necessary for me to do so, I would have given effect to that defence.

**546**  For Ms. Cook and Ms. Odiorne, the basic factual foundation (communicated to Ms. Tomlinson) was that each had surgery performed by Dr. Casses and each suffered a complication in connection with the surgery (either after, in Ms. Cook's case, or during, in Ms. Odiorne's case). These facts were true. In Ms. Odiorne's case, she communicated the additional fact that she had complained to the College about Dr. Casses, which was also true. The defamatory meanings that Dr. Casses pleaded in respect of the "Cook Words" and the "Odiorne Words" are opinions, not facts, and, apart from the basic facts, what Ms. Cook and Ms. Odiorne communicated to Ms. Tomlinson were their opinions about how they had been treated by Dr. Casses and (in Ms. Odiorne's case) the College. The basic factual foundation would, and in my opinion did, provide a sufficient foundation for the opinions later expressed by Ms. Cook and Ms. Odiorne. They were opinions that anyone could honestly express, based on the proven facts.

**547**  In Mr. Backer's case, the basic factual foundation (also communicated to Ms. Tomlinson) was that Dr. Casses had sutured Mrs. Backer's bile duct and pancreas during surgery and she died about a month later. Both facts were true. Again, the defamatory meanings that Dr. Casses pleaded in respect of the "Backer Words" are opinions not facts, and what Mr. Backer communicated to the gathering on August 24 were his opinions. The basic factual foundation would, and in my opinion did, provide a sufficient foundation for the opinions expressed by Mr. Backer. They were opinions that anyone could honestly express, based on the proven facts.

**548**  I would also have found that each of Ms. Cook, Ms. Odiorne and Mr. Backer honestly held the views they expressed, and, in the case of each of them, although they had very poor opinions about Dr. Casses, their predominant motive in saying what they said was concern for their own welfare and the welfare of their community, and not to injure Dr. Casses because of spite or ill-will. I would not have given effect to Dr. Casses' argument that the fair comment defence should be defeated because these Individual Defendants were actuated by express malice.

1. **The CBC's defence of justification**

**549**  Because I have concluded that the CBC Defendants are entitled to succeed on the defence of responsible communication, it is unnecessary for me to deal with justification. However, I will make a few very brief comments.

**550**  Justification is an absolute defence to defamation. It applies to statements of fact. It will succeed if the defendant proves, on a balance of probabilities, the truth of what is alleged to be defamatory. However, what is required to be proven is not the truth of each and every word or the literal truth of the statement. Rather, a defendant must only prove on a balance of probabilities that the gist or sting of the defamation was true, and it is sufficient if the defendant proves that a defamatory expression was substantially true. Minor inaccuracies do not preclude a defence of justification so long as the publication conveyed an accurate impression. The test is whether the defamatory expression, as published, would have a different effect on a reader or listener than what the pleaded truth would have produced. See ***Cimolai v. Hall***, at paras. 171-173; ***Wilson v. Switlo***, [*2011 BCSC 1287*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62B3-00000-00&context=), at paras. 440-441; and ***Jay v. Hollinger Canadian Newspapers***, [*2002 BCSC 1840*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61VV-00000-00&context=), at para. 4.

**551**  The CBC Defendants have pleaded justification in respect of both the CBC's Pleaded Meanings, and, in the alternative, the defamatory meanings alleged by Dr. Casses. From the findings I made in the "Background Facts" section and the discussion above regarding the defence of responsible communication, it can be seen that, in my opinion, much of what was reported in the Web Story and the TV Reports was substantially true, and, in my opinion, the CBC's Pleaded Meanings can be justified.

**552**  However, I have not accepted that the defamatory "stings" were as Dr. Casses alleged, nor have I accepted that they are reflected in the CBC's Pleaded Meanings. Rather, I concluded that the inferential meanings of the Web Story and the TV Reports were much milder than Dr. Casses alleged, although still defamatory. Indeed, they are closer to the CBC's Pleaded Meanings, than to the extreme meanings pleaded by Dr. Casses. Nevertheless, in order to succeed on their justification defence, the CBC Defendants would have to justify the "stings" found by me: see ***Miller v. Canadian Broadcasting Corp.***, at paras. 18-19.

**553**  Both the CBC Defendants and Dr. Casses made detailed submissions on justification. The CBC Defendants say that they are entitled to succeed on the defence and that the truth in relation to Dr. Casses' handling of many of the cases was worse and more stinging than what was reported in the Web Story and the TV Reports.

**554**  On the other hand, Dr. Casses says (although in relation to his pleaded inferential meanings, which I have rejected) that the CBC Defendants have failed to make out the elements of the defence.

**555**  I have concluded that there will be no real benefit to either Dr. Casses or the CBC Defendants in engaging in a full analysis of the CBC's justification defence. Rather, in my opinion, this case illustrates the importance and value of the defence of responsible communication.

1. **Mr. Williams' limitation defence**

**556**  Since I have found that the CBC Defendants are entitled to succeed on their responsible communication defence, it is unnecessary for me to deal with Mr. Williams' limitation defence. Indeed, very little was said about it in closing submissions.

**557**  Had it been necessary for me to do so, I would have found that the limitation period for a defamation claim against Mr. Williams in relation to the TV Reports had expired within 2 years of September 2009. As of 2013, when Mr. Williams was joined as a defendant, any such claim was statute-barred, and his limitation defence would be entitled to succeed. However, I would have found that the limitation period in relation to the Web Story had not expired, and his limitation defence was not entitled to succeed in respect of a defamation claim based on the Web Story.

1. **Damages**

**558**  I have concluded that, although the Web Story and each of the TV Reports were defamatory of Dr. Casses, the CBC Defendants are entitled to succeed on their defence of responsible communication. I have concluded that Dr. Casses has failed to make out his defamation claims against Ms. Cook, Mr. Backer and Ms. Odiorne. I have concluded that, although Ms. Watkins' RateMDs post was defamatory of Dr. Casses, she is entitled to succeed on her defence of fair comment.

**559**  In that light, it follows that Dr. Casses' claims must be dismissed and it is unnecessary for me to address damages.

**560**  Nevertheless, I will make some relatively brief comments, principally in relation to the CBC Defendants.

**561**  Dr. Casses was seeking very substantial damages against the CBC Defendants, on the basis that the four TV Reports may be said to represent "the most savage attack on the reputation of a professional person by the news media of this province in living memory." Mr. McConchie submitted that this case warranted damages in excess of the substantial damages awarded in ***Leenen*** and ***Myers***, and that an award in the range of $1 million (including general, special, aggravated and punitive damages) or more would be justified.

**562**  Dr. Casses sought more modest damages against Ms. Cook, Ms. Odiorne and Mr. Backer, in the order of between $50,000 and $70,000 each. As against Ms. Watkins, Mr. McConchie suggested damages in the range of $20,000 would be justified.

**563**  General damages in defamation cases are presumed from the very publication of the false statement and are awarded at large: see ***Hill***, at para. 164 and ***Grant***, at para. 28. A plaintiff is not required to prove a specific financial loss. Nevertheless, in this case, the plaintiffs tendered expert opinion evidence, relating to past and future income loss, from Mr. Robert Carson, an economist. The CBC Defendants countered with their own expert report from Mr. Stephen Cheng, an expert in pension and actuarial consulting. They say further that any damages would be mitigated either entirely or at least substantially by the damaging true information about Dr. Casses.

**564**  In my view, this case is, on the facts, very far from ***Leenen*** or ***Hill***. Anyone who did a Google search on Dr. Casses would find the Arizona Bomex resolution, for example. Dr. Casses and Ms. Hix agreed to a press release, the content of which is not flattering to Dr. Casses. RateMDs contains some very harsh criticism of Casses. Finally, what I have found in this trial to be true would likely also have a negative impact on Dr. Casses.

**4. Summary and disposition**

**565**  In summary:

1. the claims by Casses Inc. in all actions are dismissed, as Casses Inc. has failed to make out one of the essential elements of a claim for defamation, namely, that the publications and statements in fact referred to it;
2. in relation to the CBC Action, I find that Dr. Casses has proved he was defamed by each of the Web Story and each of the TV Reports, but I find that the CBC Defendants are entitled to succeed on their defence of responsible communication. In that light, I have not addressed the defences of justification or fair comment;
3. in relation to the Cook Action, I find that Dr. Casses has failed to prove that he was defamed by Ms. Cook;
4. in relation to the Odiorne Action, I find that Dr. Casses has failed to prove that he was defamed by Ms. Odiorne;
5. in relation to the Backer and Watkins Action, I find that Dr. Casses has failed to prove that he was defamed by Mr. Backer. I find that Dr. Casses has proved that he was defamed by Ms. Watkins. However she is entitled to succeed on her defence of fair comment;
6. in the light of those conclusions, I decline to make any assessment of damages.

**566**  Accordingly, each action is dismissed and the third party proceedings are also dismissed.

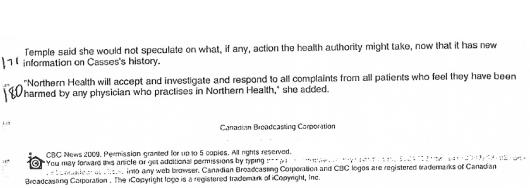
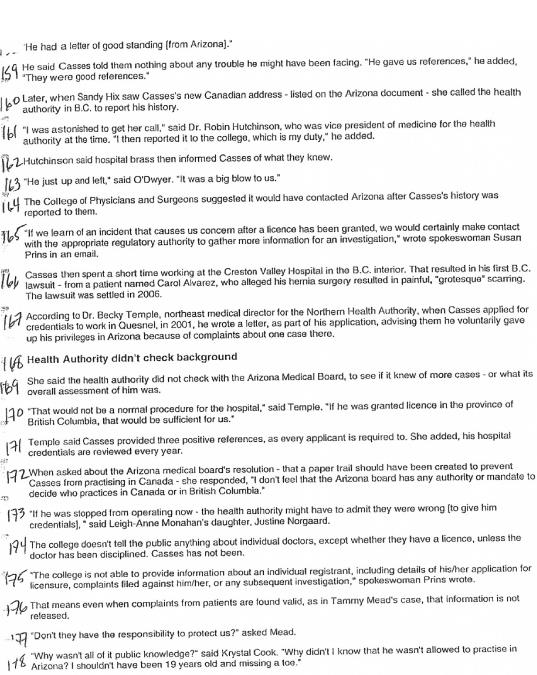
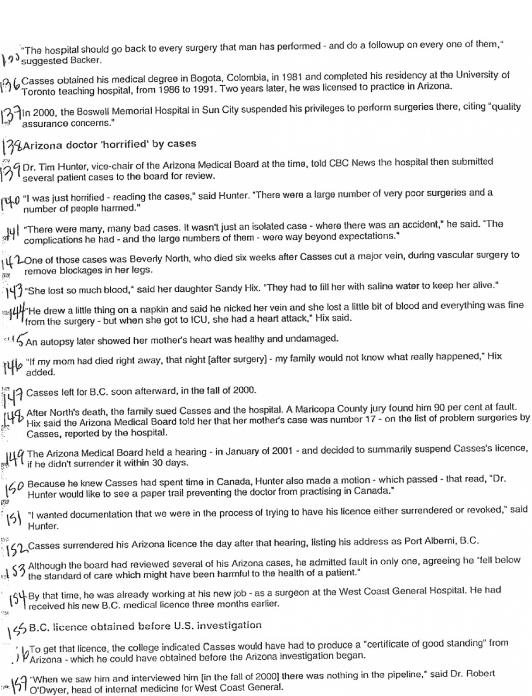
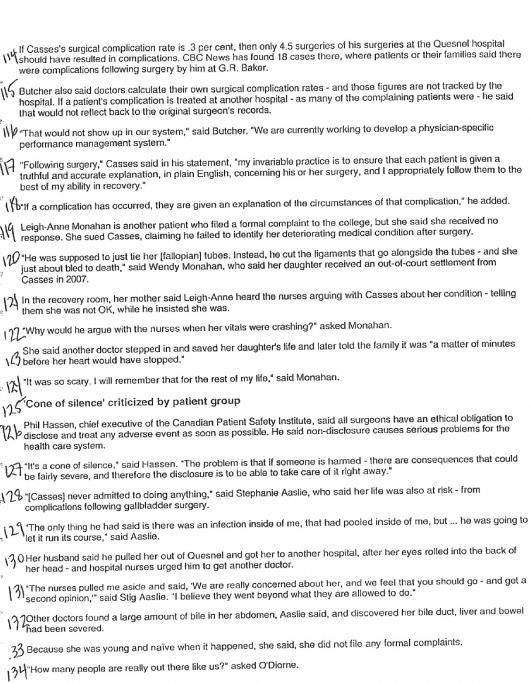
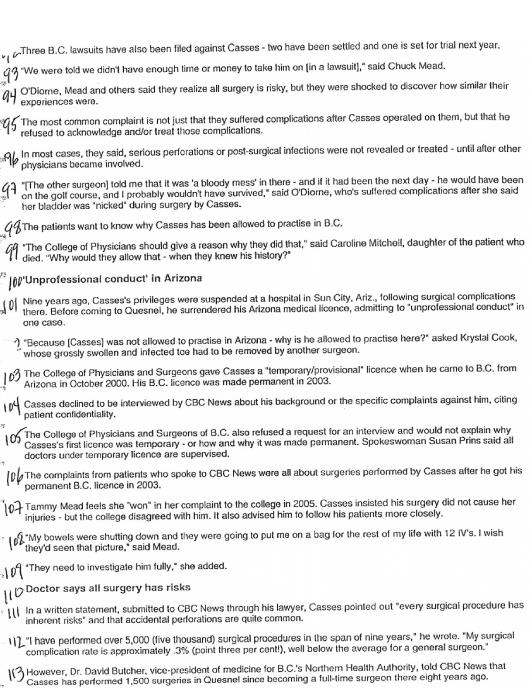
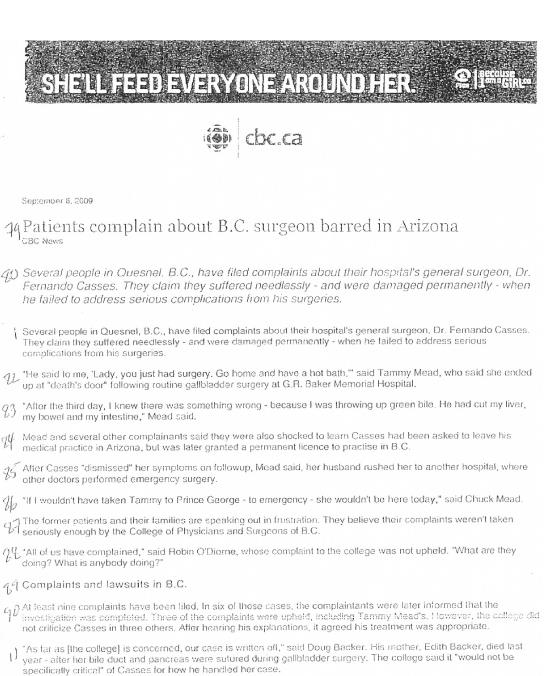
**567**  If the parties are unable to agree on costs and wish to make submissions, they should contact Scheduling within the next 30 days to make arrangements for a hearing at a date and time convenient to counsel and the court.

E.J. ADAIR J.

\* \* \* \* \*

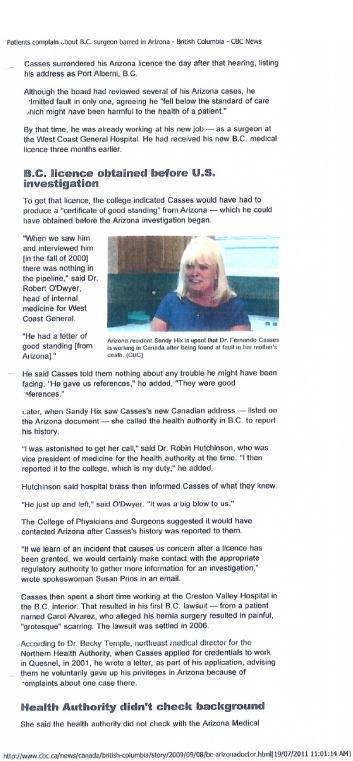
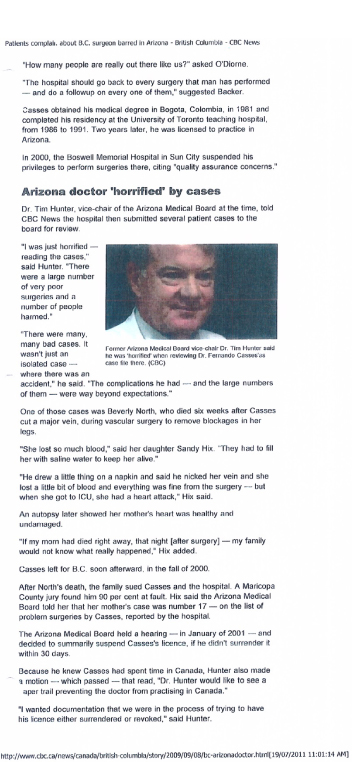
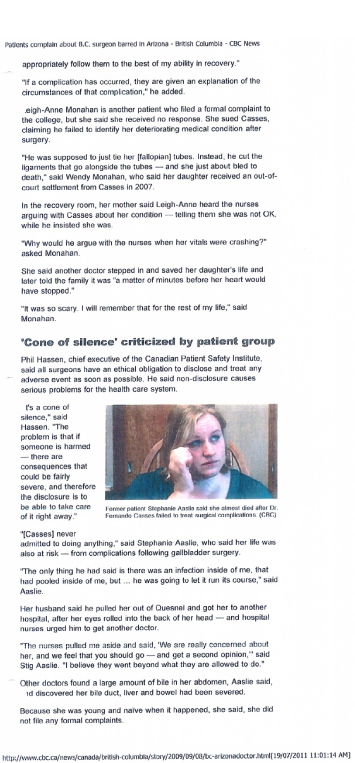
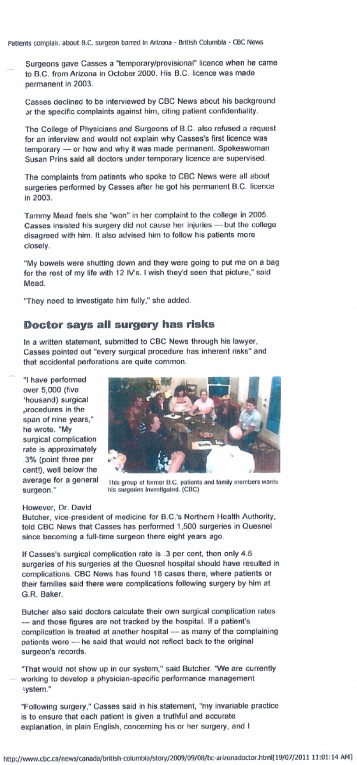
**Appendix "A" -- the Web Story -- Text only**

**Appendix A**



\* \* \* \* \*

**Appendix "B" -- the Web Story -- Text and pictures**



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[***Cavezza Estate v. Seifred, [2009] B.C.J. No. 648***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S45P-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.K. Ballance J.

Heard: October 27-31, 2008.

Judgment: April 1, 2009.

Docket: M055177

Registry: Vancouver

**[2009] B.C.J. No. 648** | 2009 BCSC 447 | 176 A.C.W.S. (3d) 893

Between Bonnie Lee Mills, executor of the estate of Darren James Cavezza (deceased), Anthony Davis Cavezza, an infant by his Guardian Ad Litem, Bonnie Lee Mills, Isabella Daryn Cavezza, an infant, by her Guardian Ad Litem, Bonnie Lee Mills, Katie Dianne Cavezza, an infant by her Guardian Ad Litem, Bonnie Lee Mills, and the said Bonnie Lee Mills, Plaintiffs, and Darren Seifred, Defendant

(107 paras.)

**Case Summary**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Action by estate and dependents of deceased for damages for motor vehicle accident resulting in death of deceased allowed in part — Conduct of each of deceased and defendant was negligent and combined to cause accident — Deceased's excessive speed was marked departure from expected standard of care and played causative role in occurrence of accident — Defendant failed to exercise very high degree of care and caution in crossing over double solid lines — Conduct of defendant was more blameworthy than conduct of deceased and liability was apportioned 65 per cent to defendant and 35 per cent to deceased.**

**Transportation law — Motor vehicles and highway traffic — Liability — Civil actions — *Negligence* — Contributory *negligence* — Action by estate and dependents of deceased for damages for motor vehicle accident resulting in death of deceased allowed in part — Conduct of each of deceased and defendant was negligent and combined to cause accident — Deceased's excessive speed was marked departure from expected standard of care and played causative role in occurrence of accident — Defendant failed to exercise very high degree of care and caution in crossing over double solid lines — Conduct of defendant was more blameworthy than conduct of deceased and liability was apportioned 65 per cent to defendant and 35 per cent to deceased.**

|  |
| --- |
| Action by the estate of the deceased and dependents of the deceased for damages for a motor vehicle accident which resulted in the death of the deceased. The deceased had been riding his motorcycle eastbound on a road which was a two-lane designated truck route. He collided with a dump truck driven by the defendant as it was making a left turn into a lumberyard. There were two entrances to the lumberyard. The first entrance was situated after a gradual incline and the second entrance was situated after a steeper incline. The second entrance was marked with sign denoting that trucks may be pulling onto the road from the south. Although the posted speed limit was 60 km/ h, the flow of traffic on that roadway normally moved at a much faster pace. Shortly before the accident, the deceased pulled out from the eastbound lane to pass a group of five eastbound vehicles and was travelling at a speed greater than the posted speed limit. At the place where the deceased pulled out to pass, the eastbound and westbound lanes were divided by broken lanes. The deceased continued to speed in the westbound lane after the dividing line became solid for eastbound traffic. After passing the vehicles, the deceased returned to the eastbound lane and collided with the dump truck as it made a slow turn into the lumberyard. Witnesses testified that the defendant did not come to a complete stop before making his turn and the defendant testified that he did not see the motorcycle until just before the collision. Liability was the sole issue before the court.  HELD: Action allowed in part.  The conduct of each of the deceased and the defendant was negligent and combined to cause the accident. The deceased's excessive speed was a marked departure from the expected standard of care and played a causative role in the occurrence of the accident. The defendant failed to exercise a very high degree of care and caution in crossing over the double solid lines. The conduct of the defendant was more blameworthy than the conduct of the deceased and liability was apportioned 65 per cent to the defendant and 35 per cent to the deceased. |

**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. 156

***Negligence*** Act, [*RSBC 1996, CHAPTER 333, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B066-00000-00&context=), s. 4(1), s. 6

**Counsel**

Counsel for the Plaintiffs: W.D. Mussio.

Counsel for the Defendant: L.G. Harris.

**Reasons for Judgment**

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| **S.K. BALLANCE J.** |

**INTRODUCTION**

**1**  A tragic accident took the life of Darren James Cavezza on the morning of September 1, 2005.

**2**  Mr. Cavezza had been riding his motorcycle eastbound along 16th Avenue in Langley, B.C. when he collided with a westbound dump truck and transfer driven by the defendant, Darren Seifred, as it turned left intending to enter the yard of the Dawson-Brill Lumber Co. (the "Lumberyard"). The weather was sunny and clear and the roads were dry.

**3**  Liability for the accident is the sole issue before the Court.

**BACKGROUND**

**4**  16th Avenue is a two-lane designated truck route. The Lumberyard sits on the south side of 16th Avenue. There are two entrances to it from 16th Avenue. The main entrance is the first entrance by which a westbound vehicle could access the Lumberyard (the "Primary Entrance"). The secondary entrance to the Lumberyard lays roughly 127 metres to the west of the Primary Entrance, and is the first driveway into the Lumberyard for eastbound vehicles (the "Secondary Entrance").

**5**  As one approaches the Lumberyard from the east, there is a gradual incline along 16th Avenue to the crest of a hill situated approximately 150.5 metres east of the Primary Entrance (the "Westbound Hill"). A short distance, roughly 37.7 metres, to the west of the Secondary Entrance is a sign posted by the municipality for the attention of eastbound drivers denoting that trucks may be pulling onto 16th Avenue from the south (the "Truck Sign"). The distance from the Truck Sign to the western edge of the Primary Entrance is approximately 164-165 metres. There is also a fairly steep uphill section of 16th Avenue as it moves eastward in its approach toward the Secondary Entrance. The crest of that hill lies between the Truck Sign and the Secondary Entrance (the "Eastbound Hill").

**6**  The evidence indicates that the lane dividing line along 16th Avenue changes at a location just to the east of the mailbox for the civic address of 24340 16th Avenue. That mailbox is at a key point along 16th Avenue in relation to this case. For ease of reference, I will refer to it as "24340".

**7**  At 24340, the two lanes on 16th Avenue are divided by a broken line. Slightly east of 24340, the divided line for eastbound traffic becomes solid; the westbound line remains unchanged. There is a further line change around the Truck Sign. There, the lanes become divided by yellow solid double lines which extend well east of the Primary Entrance.

**8**  The posted speed limit for 16th Avenue is 60 km/h. The evidence establishes that the flow of traffic on that roadway ordinarily moves at a much faster pace; the majority of traffic along 16th Avenue exceeds the speed limit.

**9**  The evidence shows that shortly before the accident, Mr. Cavezza pulled out from the eastbound lane to pass a group of five eastbound vehicles. At the lead, was a minivan, followed by a car driven by Natasha Toews. Behind Ms. Toews was a Peterbilt truck driven by Brian Henderson, then a car and finally, a pickup truck at the rear driven by Eric Beck.

**LAY WITNESSES**

**Eric Beck**

**10**  Mr. Beck testified that he was travelling eastbound along 16th Avenue at approximately the speed limit. As he neared the base of the incline of the Eastbound Hill, his attention was attracted to the loud sound of Mr. Cavezza's motorcycle. He noticed that the motorcycle had pulled out of the eastbound lane and was travelling in the oncoming lane in order to pass. Mr. Beck confirmed that when Mr. Cavezza commenced his pass, the eastbound and westbound lanes were divided by broken lines.

**11**  According to Mr. Beck, Mr. Cavezza passed him at a "great rate of speed" relative to his own speed. He "guessed" that Mr. Cavezza was doing about 60 mph (which converts to 96.56 km/h) as he passed by. He states that had Mr. Cavezza decided to return to the eastbound lane between his vehicle and the car in front, there was sufficient room to accommodate the merge.

**12**  Mr. Beck testified that Mr. Cavezza continued to speed in the westbound lane after the dividing line became solid for eastbound traffic and thus, in Mr. Beck's mind, at a time when it was not safe for him to do so. When Mr. Cavezza's motorcycle was just about parallel to the front of the line of the convoy of eastbound vehicles, he disappeared from Mr. Beck's view. Mr. Beck did not witness the collision.

**Brian Henderson**

**13**  At the time of the accident, Mr. Henderson had been a professional truck driver for more than twenty-six years. He has trained and evaluated other drivers. Mr. Henderson testified that he was travelling between 60 and 70 km/h and keeping up with the flow of traffic along 16th Avenue. In his experience, 16th Avenue is a "very fast road" where the typical speed ranges between 80 and 90 km/h.

**14**  Mr. Henderson had an unobstructed view eastward along 16th Avenue from the elevated seat of his 73 foot long truck. Like Mr. Beck, he became aware of Mr. Cavezza's motorcycle by its sound. Its loud noise startled him as it "flew by" in the westbound lane. He described the sound of the motorcycle like a "jet" as it passed. Mr. Henderson's recollection is that he was more or less at 24340 when the motorcycle started to pass. The dividing line for both lanes was still broken at that point.

**15**  Mr. Henderson watched Mr. Cavezza as he overtook Ms. Toews' car ahead and the minivan in the lead. He testified that it did not take the motorcycle very long to pass his and those vehicles. He estimated that the motorcycle passed him at a speed of between 100 and 120 km/h. In cross-examination, he agreed that his estimation of the range of speed of the motorcycle was basically a guess on his part.

**16**  Mr. Henderson saw the motorcycle return to the eastbound lane in front of the minivan, and then lost sight of it. He then noticed the defendant's truck ahead blocking both lanes of traffic. He testified that the motorcycle "did not have a chance to make a decision" because "there was not that much distance for the speed he was travelling". Mr. Henderson was not able to see what action the motorcyclist took as he closed in on the defendant's vehicle and was not aware whether Mr. Cavezza had even applied his brakes.

**17**  Mr. Henderson heard a short tire screech which he believed came from the minivan. That sound directed his focus to Ms. Toews' car directly ahead which was also coming to a stop. Although the minivan tires emitted a screech, Mr. Henderson did not believe that the minivan had to slam hard on its brakes to come to a stop. He testified that his vehicle and the two vehicles in front of him were able to stop in plenty of time. He heard a loud bang and saw Mr. Cavezza being propelled through the air and land in the westbound lane. He understandably felt traumatized by the gruesome event he had just witnessed.

**18**  Mr. Henderson initially testified that his truck had come to rest approximately next to the Truck Sign. However, upon further probing he recalled that he had in fact stopped closer to the Secondary Entrance to the east of the Truck Sign, and had later backed up to the Truck Sign in order to accommodate the arrival of emergency vehicles. Using some of the photographs of the surrounding area, Mr. Henderson showed where he and the two vehicles in front had stopped. I am satisfied on the evidence that the front of Mr. Henderson's truck came to rest at the eastern boundary of the Secondary Entrance and that Ms. Toews' vehicle and the minivan had stopped closely in front.

**19**  After the accident, Mr. Henderson spoke briefly with the female driver of the minivan. She too appeared to be very shaken. For reasons not explained at trial, she was evidently given permission by police to leave the scene before her statement or contact particulars were taken. She did not testify at trial.

**20**  Mr. Henderson also spoke directly to the defendant at the scene. The defendant struck him as being in shock. He said to the defendant words to the effect that it had happened so quickly that the defendant could not have seen the motorcycle. I accept Mr. Henderson's evidence that in response, the defendant agreed that he had not seen the motorcycle.

**21**  During the early stage of his cross-examination, Mr. Henderson agreed more than once that the motorcycle completed its pass of his truck and the two vehicles in front, below the crest of the Eastbound Hill. At a later juncture, however, he would not agree with that proposition. Plaintiffs' counsel took him to his statement given to the police approximately twelve days after the accident. In that statement, Mr. Henderson reported that Mr. Cavezza had overtaken his vehicle and the two vehicles ahead between the place where the dividing line is solid for eastbound traffic and broken for westbound, and where the dividing line becomes solid both ways. Based on the evidence, that point would be situated somewhere between slightly east of 24340 and the Truck Sign, which is before the crest of the Eastbound Hill for eastbound traffic. Mr. Henderson repeatedly stated that his statement to the police on this subject was "roughly" accurate, but did not, and was not asked to, elaborate on what he meant by "roughly". At a subsequent point in cross-examination, he and plaintiffs' counsel revived their exchange about where Mr. Cavezza had completed his pass. Mr. Henderson would not agree that the motorcycle had already overtaken the eastbound vehicles when he arrived at the crest of the Eastbound Hill. Plaintiffs' counsel then directed Mr. Henderson's attention to the portion of his police statement where he appeared to inform the officer that Mr. Cavezza had passed the minivan in the lead before the crest of the Eastbound Hill:

"Ok. I was travelling uh eastbound. There was a car in front of me and a van in front of the car and we're heading eastbound, heading up towards 248th. Ok. Roughly around the address of uh 24340 a bike flew by me. Then I reached 24436, 'cause I looked at it 'cause I saw it over and over. And flew by me, it flew by the car, and then he flew by the van and then proceeding up overtop of the next grade."

**22**  At first, Mr. Henderson would not agree that this part of his statement represented an accurate description of what he had seen. However, he rather quickly clarified that he had not understood the question. Mr. Henderson readily agreed that his recollection of the unfolding of the pre-accident events were "definitely" better at the time that he provided his statement to police than they were now. He also agreed that he was trying to be as accurate as he could when reporting to the police. Mr. Henderson explained that he has tried to block the accident from his memory. In the end, he agreed that his statement to police, including the portion reproduced above and about which he was questioned in cross-examination, was accurate.

**Natasha Toews**

**23**  Ms. Toews had been travelling eastbound directly in front of Mr. Henderson. She believes that she was moving at a speed of approximately 80 km/h which she recalled was consistent with the pace of traffic that morning. Ms. Toews drove the route regularly and was familiar with it. She testified that it is common for traffic to speed and that the flow usually moves between 80 and 100 km/h.

**24**  The noise made by Mr. Cavezza's motorcycle as it "flew past" Ms. Toews in the westbound lane made her "jump in her seat". She testified that as she climbed the Eastbound Hill in her older model vehicle, she slowed to about 73 km/h and lost sight of the motorcycle. Ms. Toews confirmed that there was enough room between her vehicle and the minivan in front for the motorcycle to have merged between them as they approached the crest of the Eastbound Hill.

**25**  Once Ms. Toews reached the brow of the Eastbound Hill, she spotted the defendant's truck turning left across the eastbound lane. It occurred to her that the motorcycle must have already passed by the defendant because she assumed that the defendant would not have initiated his turn had the motorcycle been approaching. Ms. Toews was confident that the defendant's left turning truck was far enough ahead on the roadway from her, that she would not collide with it.

**26**  Ms. Toews recalls hearing the screech of tires and then the sound of the impact. She slammed on her brakes abruptly and pulled over to call 911. She was spared witnessing the collision itself.

**27**  Ian Carter is a retired police officer. Long after the accident, he prepared useful schematic diagrams showing distances between various landmarks along 16th Avenue and also took a number of photographs of the area.

**28**  Ms. Toews spoke to Mr. Carter around October 2, 2008. At that time, she was not able to recall precisely where along 16th Avenue Mr. Cavezza had overtaken her vehicle. At a subsequent time, but before trial, Ms. Toews drove the route herself and claims that it prompted her recollection. At trial, she testified that after driving the stretch along 16th Avenue, she was able to recall that Mr. Cavezza had passed her vehicle just before she arrived at the crest of the Eastbound Hill.

**29**  I found Ms. Toews to be a truthful and credible witness. However, I am concerned that her reconstruction of the place where she thinks that Mr. Cavezza passed her is simply not reliable. It is not consistent with Mr. Henderson's evidence, which I accept, to the effect that Mr. Cavezza had overtaken all of the eastbound vehicles before the crest of the Eastbound Hill. I conclude that it would be unsafe to accept her recently remembered evidence evidently triggered by revisiting the area shortly before trial.

**Len George**

**30**  Len George is the owner of the Lumberyard. He was outside in the Lumberyard off the roadway at a distance of at least 200 feet speaking to Michael Kallen, when he heard a loud noise made by the motorcycle. They were standing closer to the Primary Entrance than to the Secondary Entrance. Mr. George assumed that it was the same motorcycle that had been driving past his work yard every morning at "an excessive rate of speed". The noise drew his attention toward 16th Avenue where he says he saw the motorcycle near the top of the Secondary Entrance. It was already in a skid. Mr. George turned his head to his right and saw that the defendant's truck was in a committed left turn across 16th Avenue. He testified that the nose of the defendant's truck was part way into the driveway of the Primary Entrance at this point in time. His observation was that the defendant's speed entering the Lumberyard was "typical". Mr. George had not seen when the defendant had initiated his left turn. He watched the motorcycle skid and witnessed the collision.

**31**  Mr. George estimated the speed of the motorcycle to be about 100 to 110 mph (which converts to 160.93 to 177.03 km/h), but conceded that it was little more than a guess. In my view, it was an inaccurate guess. Aside from Mr. George's evidence about the motorcycle's pre-impact speed, and that of Mr. Seifred (which I have rejected, as discussed later), the preponderance of the evidence does not support a finding that the motorcycle was travelling at such a grossly excessive speed, either while it was passing the eastbound vehicles or once it had resumed its path in the eastbound lane and particularly while it was in a deceleration skid.

**32**  The defendant had been a regular customer of the Lumberyard and was known to Mr. George. Mr. George admitted that he felt compassion and sorry for the defendant at the accident scene. To my mind, those are natural and expected human emotions in response to the horrifying circumstances. While I found that Mr. George's demeanour on cross-examination was needlessly antagonistic on occasion, there was no evidence indicating that his business association with the defendant influenced the truthfulness of his testimony.

**Michael Kallen**

**33**  Mr. Kallen also knows the defendant. As he stood in the Lumberyard next to Mr. George, he cast his attention east, to his right. He recognized the defendant and saw that he was crossing the eastbound lane to access the Lumberyard through the Primary Entrance. He said "there's Darren", referring to the defendant.

**34**  Mr. Kallen testified that the defendant's truck was carrying a load and was moving at a "crawl" as it entered the mouth of the driveway to the Lumberyard. He next became aware of a high squealing sound. At first, he was not sure of its source. He saw the motorcycle only fleetingly before it struck the defendant's truck. Mr. Kallen described the speed of the motorcycle as being very fast, but refused to try to estimate its speed.

**35**  I have no concerns that Mr. Kallen's personal association with Mr. Seifred impacted the veracity of his testimony at trial.

**Richard Hattenhauer**

**36**  Messrs. Hattenhauer and Weisehahn were each following the defendant's westbound truck. Mr. Hattenhauer was immediately behind the defendant. He had travelled the route for many years. In his experience, vehicles along 16th Avenue move at an average speed of approximately 90 km/h.

**37**  As Mr. Hattenhauer climbed the Westbound Hill, he caught up to the defendant's truck. He testified that after the defendant's vehicle arrived at the crest of the Westbound Hill, it slowed as it moved down the other side. Mr. Hattenhauer recalls that the left turn signal on the defendant's vehicle was activated for about 10-15 seconds before the defendant began to manoeuvre left. He backed off his distance from the defendant's vehicle in order to enable the defendant to negotiate the left turn. Mr. Hattenhauer testified that the defendant slowed to make his left turn and "probably yielded" before accelerating into it, but did not come to a complete stop. There was nothing about the manner of the left turn that appeared to him to be unsafe.

**38**  While the defendant's left turn was in progress, Mr. Hattenhauer heard the sound of a loud motorcycle. He next heard a skid and then the slamming sound of the collision. He did not witness the impact.

**39**  On a photograph of the view of the Primary Entrance from the east, Mr. Hattenhauer indicated that the front of the defendant's truck was across the eastbound lane and into the mouth of the driveway when he became aware the sound of the motorcycle.

**Menno Weisehahn**

**40**  Mr. Weisehahn was driving his SUV behind Mr. Hattenhauer. He too was very familiar with the route along 16th Avenue. He testified that the pace of traffic on that roadway usually moves between 60 and 80 km/h.

**41**  Mr. Weisehahn had reached the crest of the Westbound Hill and was proceeding down the other side toward the Primary Entrance. Due to the downward slope of his position, he was seated higher up than was the defendant in his truck. He was aware of the presence of the defendant's vehicle and recalls that it was moving considerably slower than the posted speed limit. He slowed down to accommodate the defendant's left turn. Although Mr. Weisehahn stated that he believes he saw the brake lights on the defendant's truck activate, he was clear that the defendant did not come to a full stop or hesitate before he initiated his turn.

**42**  Mr. Weisehahn agreed that the defendant signalled left and made a slow left turn. He guessed that it took "sort of ten seconds or a little bit more" from the commencement of the left turn until the impact. Mr. Weisehahn readily conceded that his time estimate was just a guess and explained that it was not something he thought he should remember at the time. Although he admitted it was somewhat difficult to judge, he shared Mr. Hattenhauer's recollection that the front of the defendant's truck had already crossed the eastbound lane and the fog line and was moving into the mouth of the driveway of the Primary Entrance at the time of the accident.

**43**  Mr. Weisehahn's SUV has a diesel engine and is fairly loud. His windows were rolled up and he did not hear the motorcycle or see the collision. After the crash, he saw the defendant continue to pull his rig into the Lumberyard before he stopped.

**Darren Seifred**

**44**  Mr. Seifred has been a professional truck driver since 1982. On that fateful morning, he was driving his MACK dump truck which was towing a transfer trailer. Together the truck and transfer unit is approximately 68 feet in length. Mr. Seifred had collected two loads of sand before heading to the Lumberyard. The total weight of his vehicle carrying the load was about 52 tonnes.

**45**  Mr. Seifred testified that he was moving at roughly 20 km/h as he climbed the incline of the Westbound Hill. As he descended that hill and approached the Primary Entrance, he claims that he looked west and saw only the minivan which was "well down the next hill". He had a clear, unobstructed view westward along 16th Avenue. Mr. Seifred estimated that the minivan was a distance of 300 metres or more away from him at that stage. He believed that he had ample time to turn left across 16th Avenue. He activated his left turn signal and believes that he may have switched on a device that retards the engine, before he manoeuvred left.

**46**  Mr. Seifred admits that he negotiated the left turn without stopping. He was aware that a line of traffic behind him would be waiting on his turn and explained that he was somewhat concerned that if he came to a complete stop, those vehicles might try to pass him in the eastbound lane on his left. After he spotted the minivan, Mr. Seifred says that he looked into the Lumberyard driveway, "glanced all around" and looked behind to ensure that a vehicle to his rear had not moved into the eastbound lane to overtake him. He then proceeded into his turn.

**47**  According to Mr. Seifred, he became aware of the motorcycle when the front wheels of his truck had inched onto the gravel at the start of the driveway to the Primary Entrance. He described the motorcycle as "moving like a jet" and said that it was in a skid as it approached. He estimated that Mr. Cavezza was travelling over 200 km/h at the time. Mr. Seifred knew that a collision was inevitable and looked away to brace for the hit. He felt the impact as Mr. Cavezza's motorcycle struck the rear dual wheels of his truck.

**48**  Mr. Seifred confirmed that after the collision, he continued driving his vehicle into the Lumberyard. He stated that afterward, he started to "fall to pieces". He was not able to explain why he did not stop his truck at impact, except to say that he was stunned and in shock. I accept that.

**49**  A great deal of Mr. Seifred's evidence focused on whether and when he saw the motorcycle prior to the collision. As mentioned earlier, Mr. Henderson testified that at the scene the defendant stated that he had not seen the motorcycle. Mr. Seifred claims to have no recollection of speaking with Mr. Henderson after the accident, although he does not deny that may have occurred. He agreed that he may have told Mr. Henderson that he did not see the motorcycle before impact, but has no specific memory of doing so.

**50**  With regard to when Mr. Seifred first noticed the motorcycle, he testified that as he moved left across the eastbound lane, he looked out his front passenger window and saw it "barrelling down" upon him in its proper eastbound lane of travel "getting larger as it got closer". He stated that when he first spotted it, the motorcycle was alongside the Secondary Entrance. He had not seen it out his front window when he peered westward down 16th Avenue in anticipation of initiating his turn and noticed the minivan. Mr Seifred did not hear the motorcycle engine or the sound of it skidding.

**51**  Constable Steiger took Mr. Seifred's statement at the accident scene. In response to a question about when he first saw Mr. Cavezza, he answered: "just before he hit me". In cross-examination, Mr. Seifred testified that this description referred to Mr. Cavezza being near the Secondary Entrance when he first saw him, just a "few seconds" before impact.

**52**  In his evidence-in-chief and in cross-examination, Mr. Seifred maintained that he had seen only the minivan travelling toward him in the eastbound lane just before he negotiated his left turn. In answer to a direct question posed later in cross-examination, he testified that he had also seen the other vehicles, referring to the vehicles travelling behind the minivan, coming at him. When asked at his examination for discovery whether he saw any vehicles other than the minivan and the motorcycle when he was making his turn, Mr. Seifred replied "just the ones behind me"; he did not mention seeing the other eastbound vehicles. At trial, Mr. Seifred did not provide a plausible explanation for his inconsistencies on this vital subject pertaining to the degree of his attentiveness to the surrounding circumstances just prior to the accident.

**53**  Mr. Seifred was cross-examined at length about the speed at which he made his left turn. He contradicted himself about whether he was moving at 10 mph or 10 km/h. Initially at trial, he agreed that his speed had been 10 mph. He then suggested that he was probably going more slowly, indicating that he had been travelling at 10 km/h. At the accident scene Mr. Seifred told police that he had been turning left at a pace of "ten miles an hour, approximately". At trial he wondered aloud why he had been thinking in terms of miles as compared to kilometres. During the ensuing exchange with plaintiffs' counsel, I found Mr. Seifred's answers to be both confusing and incomplete. In the end, he stated that he did not know exactly how fast he had been travelling but appeared to agree with his report to police that it was approximately 10 mph. I find that Mr. Seifred made his left turn at a speed of about 10 mph.

**54**  Mr. Seifred was not wearing his seatbelt at the time of the accident. Nor had he completed a mandatory pre-trip inspection report for his truck and transfer. Additionally, the inspection decal for his vehicle had expired months earlier.

**55**  The accident occurred within the patrol area of Constable Laquerre. He arrived at the scene promptly and arranged for an inspector to perform an onsite mechanical inspection of the defendant's truck and transfer. The inspection took close to one hour. The inspector identified a number of deficiencies and Mr. Seifred's vehicle failed the inspection. According to Constable Laquerre, the noted deficiencies included the following: a visible excessive gap at the pintle lock securing the transfer to the truck; a secondary attachment cable between the truck and transfer was frayed; the four brake lights on the truck and those on the transfer were not operational; and the camel back suspension appeared to be worn out. The inspector completed a formal report recording these problems and others, and handed a copy to the defendant at that time. The report indicated that Mr. Seifred's truck and transfer were "out of service" and directed that they be removed from the road immediately.

**56**  When Mr. Seifred left the Lumberyard after the accident, he returned to his yard just a few minutes away. He says he emptied his load of sand, reconnected his brake light wire and replaced two rear wheels. He then took his vehicle for inspection by a certified vehicle inspector who passed it and issued a fresh inspection decal. According to Mr. Seifred, the following day he discovered that his rear axle had been smashed in the accident and attended to its repair at a subsequent date. Nearly a year later, on August 16, 2006, Mr. Seifred was issued a ticket in relation to the accident notifying him he had been charged with offences under the ***Motor Vehicle Act***.

**57**  It is conceded by plaintiffs' counsel that the accident was not caused by a mechanical failure of the defendant's vehicle. There was controversy at trial over the receipt into evidence of the inspection report and the testimony concerning the mechanical deficiencies of the defendant's vehicle immediately after the accident. In my view, the evidence is admissible for the purpose of assessing Mr. Seifred's credibility. However, it is not probative of any predisposition to drive carelessly on Mr. Seifred's part so as to legitimately found an inference that such sloppiness may have played a role in relation to the accident, as is urged by plaintiffs' counsel. Consequently, the evidence was not admitted for that purpose.

**58**  Approximately two weeks after the accident, Mr. Seifred gave a statement to a representative of the Insurance Corporation of British Columbia ("ICBC"). He informed that representative that he did not receive "any tickets at all" in respect of the accident. Technically speaking, that statement was accurate because, at that time, Mr. Seifred had not received an actual ticket and did not receive one until almost one year later. Even so, I find that Mr. Seifred was not entirely forthcoming to the ICBC representative. He chose not to reveal that his vehicle had failed the onsite inspection due to multiple infractions and was ordered off the road. The explanation offered by Mr. Seifred at trial was that he had understood that the question about whether he received a ticket was asking whether he had received any "fines", which he had not, and that he had not mentioned the poor inspection report because he had not been asked directly about it. His explanation was unsatisfactory. My impression is that Mr. Seifred deliberately attempted to skew his answer to ICBC in terms that were favourable to him. He did not avail himself of the opportunity at trial to own up to his less than candid exchange with the ICBC representative.

**59**  There were other problematic features of Mr. Seifred's testimony. For example, when evaluated against the evidence of speed given by the other lay witnesses, other than Mr. George, and the expert testimony of Donald Rempel (summarized below), it is clear that Mr. Seifred's estimation of Mr. Cavezza's speed is extremely exaggerated. I conclude that he intentionally overstated it.

**60**  In assessing Mr. Seifred's evidence as a whole, I am left with deep concerns about his overall credibility. I consider it unsafe to give any weight to his evidence that tends to implicate Mr. Cavezza as being at fault for the accident or that suggests that the defendant's actions in relation to his left turn were undertaken prudently.

**EXPERT EVIDENCE**

**61**  Each side led expert opinion evidence from engineers experienced in accident reconstruction. As mentioned, Donald Rempel gave expert evidence for the plaintiff; Bradley Heinrichs provided an opinion for the defence. Both experts relied on the contents of certain RCMP documents and photographs of the collision, and personally surveyed and took measurements at the accident scene.

**62**  The parties agreed to the following facts, which were relied on by the experts:

1. The grade of 16th Avenue near the accident scene for eastbound travel is 3%.
2. The skid marks left at the scene by Mr. Cavezza's motorcycle were 55.65 metres in length (182 feet).
3. The RCMP measured the co-efficient of friction of the roadway at the accident scene. The dynamic test resulted in a co-efficient of friction of .85; the static test yielded .8.

**63**  In his report, Mr. Rempel focused on the timing of Mr. Seifred's left turn across the path of Mr. Cavezza's motorcycle. It addressed the critical timing issues of the distance at which Mr. Cavezza could have been seen by Mr. Seifred just before he committed to his left turn, and provided a time/distance analysis for the relative positions of the vehicles when the turn was initiated.

**64**  With the assistance of a simulated accident computer program, Mr. Rempel performed an analysis to establish the approximate path of Mr. Seifred's truck through the turn and its position on impact. One of the assumptions he relied on is that the defendant's truck turned left at a steady speed of 10 mph. I have found that to be a sound assumption.

**65**  The experts agree that the defendant approached the driveway of the Primary Entrance at a 45 degree angle. The defendant, however, would not agree that he cut the entrance at that angle. He suggested that it was much closer to a 90 degree turn. Mr. Seifred's evidence on this point was emblematic of his inclination to minimize his own potential failings in relation to the accident. I accept the evidence of the experts that shows that Mr. Seifred's vehicle entered the mouth of the driveway of the Primary Entrance at 45 degrees.

**66**  Another component of Mr. Rempel's analysis considered the distance at which Mr. Cavezza would have to be in order to be out of Mr. Seifred's line of sight just before he commenced his left turn. In Mr. Rempel's opinion, at the point in time when Mr. Seifred became committed to his turn, the motorcycle and rider would have been substantially visible to him from about 260 metres away. That is a considerable distance west of the Truck Sign. Mr. Rempel explained that by "substantially visible" he meant that all parts of the motorcycle and rider vertically above the top of the front tire, including the headlight, would be seen from that distance. In other words, in Mr. Rempel's assessment, the motorcycle would have had to be more than 260 metres from impact to have been completely out of Mr. Seifred's view when he became committed to turn left.

**67**  Mr. Rempel also evaluated the amount of time before impact that Mr. Seifred could have applied his brakes in order to stop before substantially entering into the eastbound lane, and how long that was prior to impact. His evaluation allowed for a 1 second perception/response time, to take into account that as Mr. Seifred prepared to turn, he would anticipate the prospect of approaching vehicles. He determined that a period of 5 seconds was a reasonable time estimation.

**68**  Mr. Rempel explained that, based on the foregoing, the motorcycle would have had to move at a very high average speed, in the area of about 187 km/h, to travel 260 metres in the 5 second interval. Using those variables, he noted that if the motorcycle was not there to be seen by Mr. Seifred at 5 seconds prior to impact, then it was moving at an average speed in excess of 187 km/h. Mr. Rempel ultimately concluded that in order for the motorcycle to be out of Mr. Seifred's view at 5 seconds prior to impact, its initial speed had to be more than 190 km/h. That, in turn, would correspond to collision speeds of between 150 to 180 km/h. Mr. Rempel went on to provide perspective on the improbability that Mr. Cavezza had been travelling at the lightning speed of 190+ km/h.

**69**  Mr. Rempel directed his mind to potential scenarios immediately preceding the accident. One of them supposed that when Mr. Seifred initiated his left turn, the minivan was visible at the Truck Sign located about 164 metres from the point of impact, and the motorcycle was not present ahead of it. Another potential setting he considered had the motorcycle ahead of the minivan in the eastbound lane at a position closer to impact than the Truck Sign, when Mr. Seifred made his turn. In laying out the various scenarios, Mr. Rempel referred to a European study by the Association of European Motorcycle Manufacturers conducted over a three year period in respect of 921 motorcycle accidents spanning five countries. One of the findings of that study was that the drivers of other vehicles involved in collisions with motorcycles had a high frequency of "traffic scan errors", which refer to situations where the driver simply does not see the oncoming motorcycle. The numbers tabulated in that study were astounding. Traffic scan errors in accidents involving a motorcycle and another vehicle were made by the "other" driver in 70% of the cases studied.

**70**  Another approach taken by Mr. Rempel in reconstructing the manner in which the accident may have unfolded was to assess the speed of the motorcycle at impact. In Mr. Rempel's view, there was no capacity to evaluate the motorcycle's impact speed from the observed damage, short of undertaking a complex evaluation involving elaborate testing, which was not done in this case. He concluded there was no basis in the physical evidence to evaluate the speed of the motorcycle, and that it could not be legitimately inferred that the impact speed was high.

**71**  Mr. Rempel presented a time and distance table consisting of variables such as impact speeds, motorcycle braking performance (i.e. rates of deceleration during the skid), initial motorcycle speeds and Mr. Cavezza's reaction time, to evaluate where the motorcycle was from the standpoint of when Mr. Cavezza perceived the impending hazard of the defendant's vehicle in his lane. This analysis assumed that the skid mark left by the motorcycle corresponds with the onset of braking, even though a short interval of braking probably occurred before the skid was made. Mr. Rempel believes that the variables he used cover the broad range of what is conceivable and that they likely capture the actual circumstances of the collision.

**72**  Among the notable results is that the initial speed of the motorcycle is limited to about 145 km/h. They also indicate that the initial motorcycle speeds were likely within the 80 to 120 km/h range which corresponds to a motorcycle position broadly between 100 and 150 metres from impact when Mr. Seifred started to turn. Put another way, Mr. Rempel's data tends to focus on Mr. Seifred electing to turn in the presence of Mr. Cavezza's motorcycle that was available to be seen at between 100 and 150 metres from impact, travelling between 80 and 120 km/h.

**73**  Assuming the minivan was at the Truck Sign, Mr. Rempel's reconstruction puts the motorcycle in front of the minivan when Mr. Seifred started to turn. Assuming further that Mr. Rempel's table includes the actual collision circumstances, which he considers likely, then the motorcycle was within the defendant's view at 5 seconds prior to impact unless, at that time, it was behind the minivan in the eastbound lane. In Mr. Rempel's opinion, the placement and direction of the initial motorcycle skid indicates that it was in stable travel in alignment with 16th Avenue when the emergency brake application was made. To his mind, that is consistent with the motorcycle having established itself in the eastbound lane in a stable mode of travel ahead of the minivan before he began to skid. That opinion together with the lay evidence which I accept, effectively dispels any likelihood that Mr. Cavezza was travelling behind the minivan at 5 seconds prior to impact.

**74**  The basic approach of Mr. Heinrichs, the expert called by the defence, was to assess the pre-skid speed of Mr. Cavezza's motorcycle. In that context, he studied the factors of vehicle engagement, point of impact and the skid length. The police photographs of the skid marks show that the skid progressively darkens and then remains fairly uniform in appearance. Relying on the assumption that Mr. Cavezza had braked initially only with the rear wheel, and after that braked fully, meaning that he applied optimal front and rear braking over the remaining darker portion of the skid, Mr. Heinrichs deduced that Mr. Cavezza was probably travelling between 93-108 km/h before skidding. The core premise underlying Mr. Heinrichs' analysis is that the darker section of the skid resulted from optimal two-wheel braking of the motorcycle.

**75**  In rebuttal, Mr. Rempel noted that a prime difficulty in assessing the motorcycle speed is that it is not possible to know how effectively Mr. Cavezza braked while on approach to the impact. Mr. Rempel persuasively clarified that the progressive darkening of a skid mark during the initial interval of brake application is a typical feature of skid marks and does not indicate that the motorcycle driver varied his braking. He testified that the motorcycle skid likely became darker due to the heat from the braking tires. Mr. Heinrichs agreed that was possible.

**76**  Mr. Rempel clarified that optimal braking is braking that falls just short of skidding. Particularly persuasive was his observation that a motorcycle that slows with optimal two-wheel braking which Mr. Heinrichs attributes to the darker segment of the skid, would not be skidding at all. Accordingly, in Mr. Rempel's opinion, there was virtually no possibility that Mr. Cavezza braked with optimal two-wheel braking at any time during the skid interval. He effectively discredited Mr. Heinrichs' suggestion of a link between the dark section of the skid and optimal two-wheel braking, and the so-called light section and rear only braking. I accept Mr. Rempel's opinion that the light skid interval is linked to relatively effective braking and not the darker segment. That is the exact opposite of the key assumption relied on by Mr. Heinrichs. Indeed, in cross-examination, Mr. Heinrichs agreed that the patch of skid laid down by Mr. Cavezza indicates that he locked up his rear tire and had not been braking optimally.

**77**  Mr. Rempel remarked further that at some point before colliding with the truck, Mr. Cavezza would have realized that the impact was imminent and applied maximum "panic" braking of both sets of brakes which would lock up the front tire. He did not believe that Mr. Cavezza had used this maximum braking at the start of the skid, explaining that had he done so, the motorcycle would not likely have remained upright until impact. Mr. Heinrichs agreed that engaging the front brakes too quickly would have likely caused the motorcycle to become unstable. I accept Mr. Rempel's opinion that Mr. Cavezza did not apply maximum front braking from the start of the skid interval.

**78**  A significant variable in estimating the pre-impact speed of the motorcycle is the deceleration rate, or the "g" force, at play. Mr. Heinrichs' estimation of the probable travelling speed of the motorcycle at between 93 to 108 km/h before skidding, used deceleration rates of .7 g to .9 g. Mr. Rempel is critical of the deceleration rates used by Mr. Heinrichs in his speed calculations. It is his opinion that because the long patch of skid made by the motorcycle indicates that Mr. Cavezza was not applying optimal braking, his deceleration must have been poor. He points out that one of the studies relied on by Mr. Heinrichs involved an accomplished riding instructor of the motorcycle school of the Los Angeles Police Department who was braking on a very sticky service with a higher co-efficient of friction than that measured in this case. Even in those circumstances, the professional motorcycle rider could not achieve a deceleration of .7 g; he was only able to attain a .61 g deceleration for front and rear lock braking. There was credible evidence also that if only the rear brakes had been applied, then the deceleration rate could be much lower at .35 g or possibly as low as .3 g. Mr. Heinrichs' calculations are based on the footing that Mr. Cavezza was able to achieve a level of deceleration superior to that attained by the professional in that study. Yet, in cross-examination Mr. Heinrichs conceded that the lower force of .6 g represented a more reasonable middle ground rate of deceleration.

**79**  In cross-examination, Mr. Heinrichs was asked to recalculate his figures using deceleration rates, ranging between .5 g and .6 g, which I am persuaded are more realistic. His revised calculations indicated a range of pre-impact speeds in the mid to high 80 km/h range at the 20 km/h impact speed, and between 91-95 km/h at the 40 km/h vehicle impact speed.

**80**  Defence counsel contends that the reports of the experts are of relatively limited value and that the case at hand ultimately falls to be decided on the evidence of the lay witnesses. In this vein, he describes Mr. Heinrichs' report as superfluous and characterizes Mr. Rempel's estimation of the range of the pre-impact speed of the motorcycle as defying common sense. I do not share defence counsel's criticism of Mr. Rempel's opinion concerning the pre-impact speed of the motorcycle.

**81**  For the most part, Mr. Rempel's opinions were not directly challenged by Mr. Heinrichs or shown on cross-examination to be faulty in any substantive way. I accept Mr. Rempel's opinion evidence and prefer it over that of Mr. Heinrichs to the extent of any disagreement.

**DISCUSSION**

**82**  I am satisfied that the preponderance of the evidence supports the inference that, in all probability, Mr. Cavezza completed his pass of the five vehicle convoy before he crested the Eastbound Hill. I find that Mr. Cavezza then rejoined the eastbound lane in front of the minivan just before he arrived at the crest of the Eastbound Hill.

**83**  The lay witness evidence that I accept addressed Mr. Cavezza's speed as he passed them in the oncoming lane. I conclude that during his passing sequence he was racing along at a speed between approximately 95 and 100 km/h. By the time he had completed his passing manoeuvre and re-established himself in the eastbound lane at the front of the pack, he was out of their view. None of them were able to testify about his speed once he was repositioned in the lead. I think it is reasonable to infer that when Mr. Cavezza was overtaking the five eastbound vehicles, he was accelerating and, in all likelihood, did not maintain that accelerated speed once he had merged into the eastbound lane. In any event, the most reliable evidence about Mr. Cavezza's speed as he proceeded along the straight eastbound stretch heading towards the collision, comes from the experts. Based on that evidence, I conclude that the probable speed of Mr. Cavezza once he was in front of the minivan in his proper lane of travel was between 85 and 95 km/h.

**84**  Speed removes options for effective collision avoidance manoeuvres. Counsel for Mr. Seifred argues that Mr. Cavezza's speed and nothing that Mr. Seifred did or omitted to do, caused the accident. He points out that the experts agreed that had Mr. Cavezza been travelling at the posted speed limit, he could have avoided his own death. Defence counsel also emphasizes the expert evidence which indicates that if Mr. Cavezza had braked optimally he could have avoided his death, even had he been moving at a speed as high as 94 km/h. As to this latter matter, the skid mark is ample evidence of the fact that Mr. Cavezza did not brake optimally. In this context, optimal braking is essentially tantamount to perfect braking. That Mr. Cavezza did not apply his brakes in a perfect way does not constitute ***negligence***.

**85**  In ***Canada v. Saskatchewan Wheat Pool***, [*[1983] 1 S.C.R. 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M278-00000-00&context=), the Supreme Court of Canada established that the breach of a statute does not amount to ***negligence*** *per se* nor is *prima facie* evidence of ***negligence***. The Court concluded that the nature and degree of a party's fault, as distinct from a statutory breach, should govern the imposition of civil liability. Consequently, the bare fact that Mr. Cavezza was exceeding the speed limit does not, of itself, amount to ***negligence***.

**86**  In this case, despite the fact that the users of the particular roadway generally exceed the speed limit, there can be no doubt that Mr. Cavezza's excessive speed marked a departure from the expected standard of care and played a causative role in the occurrence of the accident. Counsel for the plaintiffs concedes there is an element of contributory ***negligence*** on the part of Mr. Cavezza due to his high speed. He submits, however, that Mr. Seifred's conduct was also negligent and considerably more blameworthy and that Mr. Seifred should therefore assume the significant share of liability.

**87**  Plaintiffs' counsel contends that the crossing by Mr. Seifred of the yellow solid double line is the critical feature of his ***negligence***. In this regard, counsel has drawn the Court's attention to ss. 155 and 156 of the ***Motor Vehicle Act***, *RSBC 1996, c. 318* which stipulate, in relevant part, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **155** (1) |  | Despite anything in this Part, if a highway is marked with |  |

1. a solid double line, the driver of the 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. |  |

**88**  In ***Dickie Estate v. Dickie*** [*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=) (B.C.C.A.), the plaintiff was in the process of making a u-turn when he was struck by the defendant's vehicle travelling at the grossly excessively speed of approximately 137 km/h. In negotiating his u-turn the plaintiff had crossed over the solid double lines. At trial, the judge concluded that the defendant's speed was the sole cause of the accident and found no contributory ***negligence*** on the part of the plaintiff. The defendant appealed on the question of contributory ***negligence***. The Court of Appeal found that the trial judge had erred in principle in failing to assess any degree of ***negligence*** against the plaintiff on the issue of keeping a proper lookout.

**89**  In allowing the appeal, Hollinrake, J.A., speaking for the Court, made the following instructive remarks at paras. 12 and 13:

[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 [the plaintiff] from seeing the oncoming [defendant] vehicle before his vehicle entered the northbound lanes of travel.

**...**

In my opinion, on these facts the only possible inference is that [the plaintiff] failed to keep a lookout which the law required of him in these circumstances. If he had been keeping such a lookout I think the inference is irresistible that as a reasonable driver he would have become aware that the [defendant] vehicle was exceeding the speed limit by a margin such as to make it dangerous for him to proceed into the northbound lanes.

In my opinion, [the plaintiff's] failure to keep the lookout that the law required of him in these circumstances was ***negligence*** which played an effective part in producing the collision.

**90**  Counsel for the plaintiffs also relies on the decision of our Court of Appeal in ***Redlack v. Vekved***, [*[1996] B.C.J. No. 3040*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S10D-00000-00&context=), [*1996 CarswellBC 2179*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S10D-00000-00&context=) (B.C.C.A.) [***Redlack***], for the proposition that a *prima facie* presumption of ***negligence*** is triggered against Mr. Seifred by virtue of the fact that he crossed the solid double lines and into the opposite lane of travel. In ***Redlack***, the defendant driver encountered black ice and skidded off the roadway injuring the plaintiff passenger. The Court of Appeal effectively, though not explicitly, invoked the maxim of *res ipsa loquitur* and held that a *prima facie* case of ***negligence*** arises against the driver of a motor vehicle that goes off the road or into the oncoming lane of traffic. In my view, the ratio in ***Redlack*** was not intended to encompass the factual situation in this case. Moreover, since the decision of the Supreme Court of Canada in ***Fontaine v. Insurance British Columbia (Official Administrator)***, [*[1998] 1 S.C.R. 424*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WJ-00000-00&context=) [***Fontaine***], it is of doubtful authority. In ***Fontaine***, the Court rejected the argument that an inference of ***negligence*** will arise as a matter of law whenever a vehicle leaves the roadway in a single car accident. It concluded that the law would be better served if *res ipsa loquitur* was treated as expired. The British Columbia Court of Appeal recently revisited the validity of *res ipsa loquitur* in ***Nason v. Nunes***, [*2008 BCCA 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2HR-00000-00&context=), [*82 B.C.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2HR-00000-00&context=). There the Court made a passing reference to ***Redlack*** and stated that its earlier decision in ***Savinkoff v. Seggewiss*** [*(1996), 77 B.C.A.C. 98*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1SV-00000-00&context=) (B.C.C.A.), which had been relied on in ***Redlack***, had been superseded by ***Fontaine.*** It follows that ***Redlack*** has likewise been superseded.

**91**  I have considered the balance of the case authorities provided by the parties. While some general propositions are endorsed, the decisions are largely fact-specific and for that reason are of limited use.

**92**  Counsel for the plaintiffs did not contend that Mr. Seifred's statement to Mr. Henderson to the effect that he had not seen the motorcycle, constitutes an admission by Mr. Seifred and should be received in evidence as proof that he did not see the motorcycle. Before the Court embarks on an analysis concerning the admissibility of such a statement, there is a preliminary threshold issue as to whether Mr. Seifred actually uttered the statement, and if he did, whether in the context of making it he uttered any other qualifying remarks. I accept Mr. Henderson's evidence that Mr. Seifred made such an utterance. However, given that he was in some measure of shock when conversing with Mr. Seifred and in light of the fact that Mr. Seifred had begun to "fall to pieces", I conclude there was no admission by Mr. Seifred of failing to see the motorcycle to which I would attach any weight.

**93**  A recurring theme voiced by the defence was that Mr. Cavezza's dark motorcycle travelling on a grey road was "black on black" and, in that sense, was camouflaged and hence difficult to spot from afar. There was no cogent evidence to support that line of argument. Moreover and in any event, it did not discredit Mr. Rempel's persuasive opinion concerning the probable distance of Mr. Seifred's sightline. The plaintiffs have shown that Mr. Cavezza was in Mr. Seifred's sightline for considerably more than the "fleeting instant" suggested by defence counsel. I find that it is more probable than not, that when Mr. Seifred looked westward along 16th Avenue just prior to launching into his left turn and saw the minivan, it was at least as far away as the Truck Sign. At that moment, Mr. Cavezza was travelling in the eastbound lane ahead of the minivan and was there to be seen by Mr. Seifred before he initiated his left turn. Unfortunately, Mr. Seifred did not see Mr. Cavezza approaching until both men had reached a point of no return.

**94**  Also in evidence was video footage attempting to reconstruct the motorcycle approaching the accident scene at various speeds. Although not essential to my findings, it rather compellingly showed that at 100 km/h, the Cavezza motorcycle would have been there to be seen from Mr. Seifred's vantage point for many seconds.

**95**  Although Mr. Seifred did not turn left quickly, he was concerned, and probably somewhat distracted, about having the traffic behind him pile up and therefore chose not to come to a complete stop and likely did not even hesitate before turning. Instead, he swooped across the eastbound lane taking the driveway of the Primary Entrance at a 45 degree angle. Mr. Seifred was expected to exercise a very high degree of care and caution in crossing over the yellow double solid lines. The preponderance of the evidence persuades me that he failed to do so. He did not take sufficient time or care to keep a sharp lookout at the oncoming traffic just before committing to the left turn. Consequently, he did not see Mr. Cavezza's motorcycle which, I conclude was there to be seen, coming upon him quickly and which made it obviously dangerous for Mr. Seifred to proceed with his left turn. The significantly long skid mark left by the motorcycle indicates that Mr. Seifred's manoeuvre unreasonably affected the travel of Mr. Cavezza's motorcycle.

**96**  In summary, the conduct of each of Mr. Cavezza and Mr. Seifred was negligent and combined to cause the accident.

**97**  Where, as here, the fault of two or more persons combine to cause a loss, liability will be apportioned. Apportionment is governed by the ***Negligence Act,*** *R.S.B.C. 1996, c. 333*. The relevant provisions are set out below:

**s. 1 Apportionment of liability for damages**

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

**s. 4 Liability and right of contribution**

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

**...**

**s. 6 Questions of fact**

In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

**98**  In assessing apportionment, the court examines the extent of blameworthiness, that is, the degree to which each party is at fault, and not the degree to which each party's fault has caused the loss. Put another way, the court is not assessing degrees of causation, rather, it is assessing degrees of fault: ***Cempel v. Harrison Hot Springs Hotel Ltd.*** [*(1997), 43 B.C.L.R. (3d) 219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=), [*100 B.C.A.C. 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=) [***Cempel***]; ***Aberdeen v. Langley (Township)***, [*2007 BCSC 993*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XT-00000-00&context=) [***Aberdeen***]; reversed in part, ***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=).

**99**  In ***Alberta Wheat Pool v. Northwest Pile Driving Ltd.*** [*(2000), 80 B.C.L.R. (3d) 153*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=), [*2000 BCCA 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=), Finch, J.A. (now the Chief Justice), for the majority of the Court of Appeal, explained this important principle at paras. 45-47:

In my view, the test to be applied here is that expressed by Lambert, J.A. in ***Cempel***, *supra*, and the court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each.

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

**100**  In ***Aberdeen***, Groves J. provided insight into the difficulty that the court faces in quantifying the concept of blameworthiness under the ***Negligence Act***. At para. 62 he endorsed the enumeration of factors in assessing relative degrees of fault set out by the Alberta Court of Appeal in ***Heller v. Martens***, [*[2002] A.J. No. 638*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JYYX-63KP-00000-00&context=), as follows:

1. The nature of the duty owed by the tortfeasor to the injured person ...
2. The number of acts of fault or ***negligence*** committed by a person at fault ...
3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose ***negligence*** comes as a result of the initial fault ...
4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy... Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis ...
5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy ...

[Authorities omitted.]

**101**  To the foregoing factors, Groves J. added the following at para. 67:

1. the gravity of the risk created;
2. the extent of the opportunity to avoid or prevent the accident or the damage;
3. whether the conduct in question was deliberate, or unusual or unexpected; and
4. the knowledge one person had or should have had of the conduct of another person at fault.

**102**  After surveying the authorities, Groves J. summarized at para. 67 the approach to be taken in assessing the relative degree of blameworthiness of the parties:

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

**103**  On appeal, the decision in ***Aberdeen*** in relation to the issue of contributory ***negligence*** was remitted for retrial. However, the Court of Appeal did not criticize Mr Justice Groves' careful summation of the governing legal principles on apportionment.

**104**  Mr. Cavezza continued in the oncoming lane at an excessive speed in order to pass a trail of vehicles long after the dividing line for eastbound traffic had become solid. He persisted in doing so on his approach to the Eastbound Hill, which would have hampered his view of oncoming traffic, and after the appearance of double solid lines which would tell him that the oncoming traffic had impaired visibility his way. He did not take advantage of the openings in the line of eastbound vehicles to merge earlier; had he done so, there would have been no accident. Instead, Mr. Cavezza chose to merge near the brow of the Eastbound Hill and once in the lead, maintained an excessive speed. In assessing the degree of Mr. Cavezza's blameworthiness, I have borne in mind the fact that traffic as a whole speeds along that segment of 16th Avenue. Even so, it cannot be overlooked that Mr. Cavezza's deliberate conduct violated, in a substantial way, the expected standard of care of a user of that road in those circumstances. He showed a reckless disregard for the safety of fellow users and created a substantial level of risk for himself and others.

**105**  Turning to Mr. Seifred's fault, the law imposes upon him a very high degree of care to observe caution in crossing double solid lines. Although he was not speeding, he did not come to a complete stop or likely even hesitate prior to crossing the oncoming lane and cut the driveway at a 45 degree angle. Mr. Seifred travelled 16th Avenue frequently and is taken to know that speeding vehicles along that route were more the rule than the exception. Had he kept the sharp look-out reasonably expected of him, he would have seen Mr. Cavezza advancing in the eastbound lane and would not have initiated his turn in such patently unsafe circumstances. Mr. Seifred breached his duty to take reasonable care to a severe degree and created a grave risk for himself and a fatal one for Mr. Cavezza.

**106**  In all the circumstances, I consider Mr. Seifred's conduct more blameworthy than Mr. Cavezza's. I apportion liability 65% against Mr. Seifred and 35% against Mr. Cavezza.

**107**  Counsel are at liberty to make submissions on costs if they are not able to agree. Counsel for the plaintiffs is to file his written submissions by May 15, 2009. Counsel for the defendant will have 30 days after receipt to file his submissions. Plaintiffs' counsel will then have an additional 15 days to file any reply.

S.K. BALLANCE J.

**End of Document**

[***Cobble Hill Holdings Ltd. v. British Columbia, [2019] B.C.J. No. 169***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5VDC-2BC1-F900-G00K-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

J.A. Power J.

Heard: April 17-18, October 2 and 5, 2018.

Judgment: February 6, 2019.

Docket: 17-3135

Registry: Victoria

**[2019] B.C.J. No. 169** | 2019 BCSC 151 | 54 C.C.L.T. (4th) 142 | 2019 CarswellBC 237

Between Cobble Hill Holdings Ltd., Respondent, and Her Majesty the Queen in Right of the Province of British Columbia, Applicant, and Mary Polak, Applicant

(126 paras.)

**Statutes, Regulations and Rules Cited:**

Environmental Management Act, s. 5, s. 18(1), s. 18(3)(c), s. 18(3)(i)

Supreme Court Civil Rules, Rule 9-5(1)(a), Rule 19(24)9a)

**Counsel**

Counsel for Cobble Hill Holdings Ltd.: L.G. Oss-Cech, B.A. Marlatt, and D.G. Quantz.

Counsel for Her Majesty the Queen and Mary Polak: J.D. Eastwood, Q.C., M. Butler, and B. Wagner.

**Reasons for Judgment**

|  |
| --- |
| **J.A. POWER J.** |

**INTRODUCTION**

**1**  The plaintiff in the underlying action is Cobble Hill Holdings Ltd. ("Cobble Hill Holdings"), a British Columbia corporation. Cobble Hill Holdings owns property near Shawnigan Lake. This property was the site of a mine quarry.

**2**  The defendants in the underlying action are the provincial Crown ("the province") and former Minister of the Environment, Mary Polak.

**3**  Cobble Hill Holdings has brought a claim in tort, based in both ***negligence*** and misfeasance in public office, against the defendants.

**4**  These reasons concern the defendants' application to strike Cobble Hill Holdings' claim. The defendants argue that Cobble Hill Holdings' pleadings should be struck as disclosing no reasonable cause of action under Rule 9-5(1)(a) or in the alternative that Cobble Hill Holdings' claim based in misfeasance in public office is a collateral attack and should be dismissed as an abuse of process under Rule 9-5(1)(d).

**5**  The background to this matter is complex. Issues relating to it have been the subject of three decisions of this court: [*2014 BCSC 728*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2CS-00000-00&context=), [*2015 BCSC 1995*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HBP-0CG1-F8SS-64ND-00000-00&context=), [*2016 BCSC 489*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JC7-X551-JP4G-61YB-00000-00&context=). There followed three decisions in the Court of Appeal: [*2016 BCCA 160*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JM8-YV01-F22N-X0TD-00000-00&context=), [*2016 BCCA 215*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JY7-RCM1-DXHD-G2TJ-00000-00&context=), and [*2016 BCCA 432*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M43-BH51-DXHD-G250-00000-00&context=) (with supplementary reasons at [*2017 BCCA 176*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NHH-T831-JGHR-M05C-00000-00&context=)).

**6**  In August 2013, Cobble Hill Holdings obtained a permit from the Ministry which authorized Cobble Hill Holdings to accept contaminated soils at its quarry site and discharge waste into the environment, subject to express terms and obligations.

**7**  The permit's issuance and the facility's operation were the subject of a great deal of public concern. The previous court decisions relate to the issuance of the permit. Mr. Justice MacKenzie's reasons on the injunction application at para. 8 convey the level of public interest in this matter:

[8] Not surprisingly, there is significant concern about the importation of contaminated soil to the quarry site, resulting in a 31-day hearing in 2014 before the Environmental Appeal Board ("EAB") ...

**8**  The province supported Cobble Hill Holdings in those earlier proceedings. See, for example, *Shawnigan Residents Assn. v. British Columbia (Ministry of Environment)*, [*[2015] B.C.E.A. No. 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5FWB-J0S1-JX8W-M3PS-00000-00&context=) (B.C.E.A.B.) at para. 145, where the panel wrote:

[145] Both the Delegate and Cobble Hill submit that the Permit was properly issued and will protect human health and the environment.

**9**  Ultimately the Minister cancelled the permit in 2017, after numerous instances of non-compliance with the permit had been noted. The Minister gave as reason for cancellation Cobble Hill Holdings' failure to provide an updated security.

**10**  Cobble Hill Holdings chose not to seek judicial review of that decision to cancel the permit. Instead it brought the underlying action in tort. Cobble Hill Holdings states in argument that it chooses to seek damages rather than to continue operating its facility and therefore judicial review would not provide a useful remedy. In essence, Cobble Hill Holdings does not wish to continue with this business, and it appears it is financially unable to continue operating the facility.

**11**  The notice of civil claim pleads ***negligence*** and misfeasance in public office by the defendants.

**12**  The defendants argue that the pleaded facts do not disclose a duty of care based on the analytical framework derived from *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) and *Cooper v. Hobart*, [*2001 SCC 79*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49J-00000-00&context=) (referred to collectively as "*Anns / Cooper*"). They argue that there is insufficient proximity to the regulated party, here Cobble Hill Holdings. They also argue that Cobble Hill Holdings' claim based in misfeasance in public office against former Minister Polak has not been properly pled. Finally, the defendants say that the proper process for Cobble Hill Holdings is to take judicial review of the Minister's decision. It is not open to the plaintiff to attack the decision collaterally by claiming misfeasance in public office simply because it now wishes for damages rather than to continue operating its facility, and if there is a sufficiently pled claim on that ground then it should be dismissed as an abuse of the court's process.

**13**  For the reasons that follow, I am persuaded only in some respects by the arguments of the defendants and only partially grant the relief they seek. Pursuant to Rule 9-5(1)(a), I grant an order striking the plaintiff's claim against the provincial Crown and Mary Polak as disclosing no reasonable cause of action in ***negligence***. I also find that Cobble Hill Holdings' tort claim of misfeasance in public office is not sufficiently pled. However, I use my discretion to allow the plaintiff to amend its pleadings in this regard. Finally, even if Cobble Hill Holdings' current pleadings had disclosed one or both causes of action in tort already properly pled, I would not find that to be an abuse of process under Rule 9-5(1)(d) on grounds of collateral attack in these circumstances.

**BACKGROUND**

**14**  There is not much dispute on the factual background to this matter so I will outline the facts set out in the application and supplemented in the reply.

**15**  As already noted, Cobble Hill Holdings' property near Shawnigan Lake is the site of a former mine quarry.

**16**  At some point around 2011, Cobble Hill Holdings began the process of applying to the Ministry of the Environment for a permit to allow the use of certain contaminated soils for the reclamation of the mine.

**17**  As described by counsel in the hearing before me, Cobble Hill Holdings saw a business opportunity: instead of simply allowing the unused quarry to fill with water, as was common with other quarries in the area, the plaintiff would instead fill the quarry with remediated soil. As framed by Cobble Hill Holdings, this plan was a "win-win": the quarry would be filled, and in doing so, there was an opportunity to dispose safely of contaminated soil. Cobble Hill Holdings suggested that this was preferable to the alternative of shipping the soil by barge to the mainland.

**18**  On August 21, 2013, the Ministry issued a permit to the plaintiff allowing the project to move forward. The permit was issued with conditions. It required, among other things, that Cobble Hill Holdings submit a cost estimate for maintaining, monitoring, remediating, and closing the landfill for the active life of the site at least every five years, and on a more frequent basis at the Ministry's discretion; and it also required Cobble Hill Holdings to provide and maintain security in a form and an amount specified by "the Director," as outlined in the *Environmental Management Act*, *S.B.C. 2003, c. 53*.

**19**  In December 2013, the Ministry approved the estimated cost for the closure plan provided by Cobble Hill Holdings, and specified that $220,000 was to be provided as security in the form of a letter of credit. Cobble Hill Holdings provided this letter of credit.

**20**  Between October 2013 and June 2016, the mine underwent reclamation pursuant to the permit. Again, it appears to be common ground between the parties that this process attracted significant negative attention from local residents, politicians, and municipal government. Cobble Hill Holdings refers to this in its Statement of Facts. Although the defendants have not yet filed and served a response, they refer to the same negative attention obliquely in their application pleadings at paras. 7 and 15, where they narrate contested proceedings that followed the permit's issuance.

**21**  Indeed the Cowichan Valley Regional District, the Shawnigan Residents Association and some local residents launched an appeal to the Environmental Appeal Board, and also filed a petition in this court seeking an injunction. Both efforts were ultimately unsuccessful.

**22**  In upholding the issuance of the permit, the Environmental Appeal Board directed certain additions and amendments be made.

**23**  The Ministry's ongoing inspections of the site noted numerous instances of non-compliance. The Ministry issued warning letters on November 18, 2015, June 28, 2016, and August 8, 2016.

**24**  In June 2016, the Ministry requested that Cobble Hill Holdings submit drafts for an updated plan and a water management plan, as well as a revised closure plan cost estimate to monitor the facility for fifty years. On October 11, 2016, Minister Polak advised Cobble Hill Holdings that she was considering suspending or cancelling the permit for, among other things, failing to submit the updated plans.

**25**  On November 4, 2016, Minister Polak followed up on her earlier correspondence. She advised Cobble Hill Holdings that she would provide it with an opportunity to clarify, by December 20, 2016, how it planned to rectify identified issues of non-compliance before any final decision was made by her.

**26**  On January 27, 2017, the Ministry suspended the permit until such time as the Director (under the Act) confirmed to Cobble Hill Holdings that:

1. the Director had approved a closure plan for the site and a cost estimate for this closure plan;
2. Cobble Hill Holdings had provided adjusted financial security, in the form of an irrevocable letter of credit, in an amount consistent with the approved cost estimate; and
3. the Director had approved a final contact water management review report and a final non-contact water management review report.

**27**  At this time, the Minister also advised Cobble Hill Holdings that the permit would be cancelled if, among other things, the corporation failed to provide an updated cost estimate for closure within 15 business days of service of the letter.

**28**  On February 20, 2017, Cobble Hill Holdings submitted a revised updated plan and cost estimate to the Ministry for review and approval. The corporation did not provide adjusted financial security.

**29**  On February 23, 2017, Minister Polak cancelled the permit for failure to provide an updated security in the form of an irrevocable letter of credit.

**30**  Mary Polak ceased to be Minister of the Environment on June 12, 2017.

**31**  On August 22, 2017, Cobble Hill Holdings filed a notice of civil claim in tort against the defendants alleging ***negligence*** and misfeasance in public office. As mentioned previously, Cobble Hill Holdings has not sought judicial review of the Minister's decision to cancel the permit.

**32**  The defendants apply here to strike the claim for disclosing no reasonable claim on either ground of tort, or in the alternative for being an abuse of process.

**POSITIONS OF THE PARTIES**

*Position of the Applicants*

**33**  In order to strike Cobble Hill Holdings' claim, the defendants rely on Rules 9-5(1)(a) and (d) of the Supreme Court Civil Rules, which state:

**Scandalous, frivolous or vexatious matters**

1. At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
2. it discloses no reasonable claim or defence, as the case may be,

...

1. it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

**34**  The defendants argue that the ***negligence*** claim discloses no reasonable cause of action because they owed no duty of care to Cobble Hill Holdings.

**35**  The defendants concede the harm suffered by Cobble Hill Holdings was reasonably foreseeable as a result of the decision to cancel the permit.

**36**  The defendants also argue, however, that there is insufficient proximity between the plaintiff and defendants to support a claim in ***negligence***.

**37**  With regard to Cobble Hill Holdings' claim of misfeasance in public office, the defendants say that, at a minimum, this tort requires the plaintiff to show that the defendant "knowingly engaged in a [deliberate] unlawful act with an awareness that her conduct would likely harm the plaintiff."

**38**  The defendants argue that Cobble Hill Holdings has failed to plead material facts showing a deliberate unlawful act on the part of the defendants. In response to the defendants' demand for particulars, Cobble Hill Holdings indicated that the relevant act was the cancellation of the permit. The defendants say this is insufficient for the tort of misfeasance in public office.

**39**  The defendants also say that the aspect of the claim based in misfeasance in public office is an abuse of process. They say that this civil action constitutes a collateral attack on the decision to cancel the permit -- if Cobble Hill Holdings was unhappy with the decision, the proper course of action would have been to seek judicial review.

*Position of the Plaintiff / Respondent*

**40**  Cobble Hill Holdings argues that, in the context of an application to strike, the court must assume the truth of all pleadings. A claim should only be struck if it is plain and obvious that the pleadings disclose no reasonable cause of action. Cobble Hill Holdings says that it has adequately pleaded the torts of ***negligence*** and misfeasance in public office; it is not the role of the court to weigh its evidence at this point.

**41**  Cobble Hill Holdings also says that it was not bound to seek judicial review in priority to bringing a civil claim in tort. Because Cobble Hill Holdings no longer can nor wants to continue with its previous enterprise, judicial review could not give a useful remedy. Cobble Hill Holdings seeks damages, which can only be provided in a civil claim, in these circumstances grounded in tort.

**LEGAL ANALYSIS**

*Test for Striking Out Claims*

**42**  The parties seemed to agree on the relevant test for striking out claims under Rule 9-5(1). I find it sufficient to reproduce the summary from *R. v. Imperial Tobacco Canada Ltd.*, [*2011 SCC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1XK-00000-00&context=) at para. 17. This excerpt refers to former Rule 19(24)(a), but the same principles apply:

[17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, [*2003 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YX-00000-00&context=), [*[2003] 3 S.C.R. 263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YX-00000-00&context=), at para. 15; *Hunt v. Carey Canada Inc.*, *[1990] 2 S.C.R. 959*, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, [*2007 SCC 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B19J-00000-00&context=), [*[2007] 3 S.C.R. 83*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B19J-00000-00&context=); *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [*[1980] 2 S.C.R. 735*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1XV-00000-00&context=).

***Negligence***

**43**  Cobble Hill Holdings alleges the tort of ***negligence***.

**44**  In order to make out a claim in ***negligence***, the plaintiff must establish duty of care, breach of standard of care, causation, and actual loss. In *Mustapha v. Culligan of Canada Ltd.*, [*2008 SCC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1C7-00000-00&context=), the Supreme Court characterized the elements of ***negligence*** in this way:

[3] A successful action in ***negligence*** requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach.

**45**  The existence of a duty of care is not often at issue. As stated in *Cooper* at para. 23: "For the most part, lawyers apply the law of ***negligence*** on the basis of categories as to which proximity has been recognized in the past." For example, where facts turn on a motor vehicle injury, the parties and court need not focus on the duty of care because it has long been established that a motorist owes a duty of care to others on the road while driving. Similarly, in a medical malpractice case, it is not controversial that a doctor owes a duty of care to the patient. Where courts have previously established a categorical duty of care, the analysis can focus on other elements of ***negligence***.

**46**  However, where a claim asserts a duty of care that does not fall into a prior established category, then the court must decide whether a new duty of care relationship can be found. The analytic framework for doing so is an integrated one based on the *Anns / Cooper* test.

**47**  During the hearing before me, Cobble Hill Holdings argued that there is an analogous duty of care that has already been established in the case law, and relied for this in its notice of civil claim and in argument on *James v. British Columbia*, [*2005 BCCA 136*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M45W-00000-00&context=), as an example of a governmental authority found to have a duty of care.

**48**  While this case is useful, and binding in terms of its analysis, I do not find it establishes a duty of care applicable to the facts before me.

**49**  In *James*, the plaintiff was a former employee at a sawmill community located in Youbou, British Columbia. The sawmill had operated in conjunction with a tree-farm licence issued by the Minister of Forests. Before 2001, the licence had included a clause preventing the licensee from reducing or ceasing operations without the consent of the Minister. In 1997, the new licence did not include this clause. The defendant Crown conceded that the clause's omission was inadvertent (para. 8). The mill closed. Mr. James, who with others lost his job, began a class action in ***negligence***.

**50**  The Court of Appeal ultimately concluded that it was not plain and obvious that the plaintiff could *not* establish a common law duty of care (para. 38).

**51**  The Court of Appeal in *James* established the possibility of a duty of care by the Minister of Forests to sawmill employees when renewing a tree-farm licence. But this did not establish a duty of care in that action, nor does it determine the existence of a duty of care on the facts, owed by the Minister of the Environment in cancelling a corporation's permit to accept contaminated soils and discharge waste into the environment. In considering whether there could be a duty of care in *James*, the Court of Appeal looked closely at *Forest Act* provisions, including a requirement that the Minister evaluate the impact of the issuance of a licence on employment opportunities and other social benefits in the province (para. 27). These same considerations do not necessarily apply to the cancellation of a permit under the *Environmental Management Act*.

**52**  I also note that the search for precedent in cases like these must focus more on relationships, and less on other superficial factual similarities: *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, [*2013 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M35K-00000-00&context=) at para. 25. It is true that both the case at bar and *James* involved a British Columbia Cabinet Minister. Again, in *James* the court simply held that it was not plain and obvious that the class-action plaintiffs could *not* establish that the Minister had the alleged duty of care to mill workers who were affected by an omission in the issuance of a tree farm licence. In my view the relationship in *James* is different from the relationship before me, which involves a Minister and a corporation that had secured a regulatory permit.

**53**  As stated by McLachlin C.J.C. in *Childs v. Desormeaux*, [*2006 SCC 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B16R-00000-00&context=) at para. 15, "if a case does not clearly fall within a relationship previously recognized as giving rise to a duty of care, it is necessary to carefully consider whether proximity is established."

**54**  Having considered these principles, I am not satisfied that this is a case where it can be said that a duty of care has previously been found in an analogous decision. Therefore I turn to the application of the *Anns / Cooper* framework.

**55**  An overview of the framework was provided in *Cooper* at para. 30:

[30] In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. 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.

[Emphasis in original].

**56**  To summarize, the *Anns / Cooper* analysis can be set out as follows:

1. Stage One: Is there a *prima facie* duty of care?
2. Was the harm reasonably foreseeable?
3. Is there a relationship of proximity?
4. Stage Two: Are there conflicting policy considerations?
5. Are there residual policy concerns against the imposition of a duty of care?

Stage 1(a): Was the Harm Reasonably Foreseeable?

**57**  The defendants, in their application pleadings and in oral submissions, conceded that the harm suffered by Cobble Hill Holdings was reasonably foreseeable as a result of the decision to cancel the permit. As a result, I accept that the first step of stage one is satisfied.

Stage 1(b): Is there a Relationship of Proximity?

**58**  The defendants argue that there is no relationship of proximity between the Cobble Hill Holdings and themselves. They say that the relationship between the province and Cobble Hill Holdings is that of a regulator and a regulated entity, and no private law duty of care exists between them.

**59**  In support, the defendants point to *Cooper*; *Edwards v. Law Society of Upper Canada*, [*2001 SCC 80*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49K-00000-00&context=); *Gill v. Canada (Minister of Transport)*, [*2015 BCCA 344*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GM0-J411-JJYN-B3Y1-00000-00&context=); *Gill v. Canada (Minister of Transport)*, [*2015 BCCA 344*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GM0-J411-JJYN-B3Y1-00000-00&context=); *British Columbia (Workers' Compensation Board) v. Flanagan Enterprises (Nevada) Inc.*, [*2017 BCSC 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MS1-JVC1-F7VM-S3T1-00000-00&context=); *St. Elizabeth Home Society v. Hamilton (City)*, [*2010 ONCA 280*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFB1-DYFH-X2W9-00000-00&context=); and *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, [*2009 ONCA 326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-FBN1-22KH-00000-00&context=).

**60**  The difficulty that I have with the defendants' position is that it appears to oversimplify the range of circumstances in which proximity can be found between a government entity and a regulated entity. In *Imperial Tobacco*, the Supreme Court accepted that there were three situations in which a *prima facie* duty of care relationship could be found between a state actor and a plaintiff: explicitly or by implication from a statutory scheme; from the interactions between the plaintiff and the government; and as a result of a combination of the first two situations (paras. 43-46).

**61**  In the case before me, it seems that a *prima facie* duty of care did not arise between the province and Cobble Hill Holdings as a result of the statutory scheme. As argued by the defendants, the purposes of the *Environmental Management Act* are to protect the environment and human health while allowing industry to operate under regulated conditions. Under s. 18(3)(i), the Minister may cancel a permit if (among other lawful bases) the permit is not in the public interest. The overall context of the Act appears to be oriented towards striking a reasonable balance between protecting the environment and allowing economic growth and development. In my view, a *prima facie* duty of care is not created explicitly or implicitly by the Act.

**62**  However, I am not certain the same can be said with regard to the second scenario described in *Imperial Tobacco*. In Cobble Hill Holdings' application response, it argued:

... the fact that the MOE [Minister of the Environment] fought alongside CHH [Cobble Hill] to defend the permit when it came under attack, is evidence of a direct and close relationship between the parties such as contemplated in the *Anns* test and supports a finding that once the permit had been issued, a *prima facie* duty of care existed.

**63**  The plaintiff did not specifically refer to the Minister "fighting alongside" Cobble Hill Holdings in the notice of civil claim. But there is evidence of this relationship within the record before me. Specifically, in the decision of the British Columbia Environmental Appeal Board included in the application record (*Shawnigan Residents Assn. v. British Columbia (Ministry of Environment)*, [*[2015] B.C.E.A. No. 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5FWB-J0S1-JX8W-M3PS-00000-00&context=) (B.C.E.A.B.)), the first page shows appearances by counsel for the province and Cobble Hill Holdings. The body of the decision suggests that the province and Cobble Hill Holdings supported each others' positions (see e.g. para. 145).

**64**  On this basis, I am not prepared to conclude that it is plain and obvious that no *prima facie* duty of care relationship existed between the defendants and Cobble Hill Holdings in this case. Here, I accept that, as in *Imperial Tobacco*, the specific interactions that occurred between the parties is sufficient to give rise to a *prima facie* duty of care.

Stage 2: Conflicting policy considerations

**65**  The *Anns / Cooper* analysis at the second stage looks at whether there are residual policy considerations that militate against finding a new duty of care, even where the test is otherwise satisfied. As it was framed in *Cooper*:

[37] This brings us to the second stage of the *Anns* test. As the majority of this Court held in *Norsk*, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in *Hercules Managements, supra*, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.

[38] It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. It is established that government actors are not liable in ***negligence*** for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in ***negligence*** for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second stage of the *Anns* test. The exclusion does not relate to the relationship between the parties. Apart from the legal characterization of the government duty as a matter of policy, plaintiffs can and do recover. The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons - more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters. Similar considerations may arise where the decision in question is quasi-judicial (see *Edwards v. Law Society of Upper Canada*, [*[2001] 3 S.C.R. 562*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49K-00000-00&context=), [*2001 SCC 80*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49K-00000-00&context=)).

**66**  As stated in *Cooper*, there is a threshold issue that must be determined at the second stage of the *Anns / Cooper* test: was the decision of a policy nature, or an operational nature? If the decision was a policy decision, then I cannot find a duty of care. As stated by Cory J. in *Just v. British Columbia*, [*[1989] 2 S.C.R. 1228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-652N-00000-00&context=) at 1240, "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors."

**67**  What constitutes a policy decision? In *Imperial Tobacco*, Chief Justice McLachlin wrote:

[90] I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from ***negligence*** liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

**68**  In this case, there are facts pointing in both directions. The high level position of Minister Polak suggests that this was a policy decision. The rank of the decision maker, although not determinative, often correlates with this determination: "Without suggesting that the question can be resolved simply by reference to the rank of the actor, there is something to Scalia J.'s observation in *Gaubert* that employees working at the operational level are not usually involved in making policy choices" (*Imperial Tobacco*, para. 89).

**69**  But other aspects suggest that the decision was operational. The decision did not affect a broad swath of the public, as would a tax or social-services policy change. The Minister's decision to cancel the permit was primarily concerned with one actor: Cobble Hill Holdings. I acknowledge that the decision likely had broader impacts and ripple effects. For example, the cancellation arguably had consequences on the local environment and community. But it seems inescapable that the decision to cancel Cobble Hill Holdings' permit mostly concerned the interests of Cobble Hill Holdings itself.

**70**  There is another consideration in play in this case, as mentioned in *Imperial Tobacco* (para. 90):

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

[Emphasis added].

**71**  As I discuss below, when considering the claim of misfeasance in public office, the pleadings imply the allegation that the Minister acted without reason. The notice of civil claim states, for example: "[c]ontrary to s. 18(3)(c) the Defendants cancelled the Permit when they knew or ought to have known that CHH [Cobble Hill Holdings] had complied with the requests of Minister Polak by the February 20, 2017 deadline."

**72**  In the analysis of the claim in misfeasance in public office, I discuss the implications in the pleadings. For the sake of completing the current *Anns / Cooper* analysis, I will assume that the pleadings sufficiently explicate this allegation against the Minister.

**73**  Given this assumption and the statement from *Imperial Tobacco* at para. 90, I conclude on this motion to strike that the plaintiff's proposed duty of care survives the *Anns / Cooper* threshold issue of whether the decision could be considered an operational one: many factors point to the decision being operational; and even if the decision could be interpreted as a policy decision, the plaintiff has pled that it was made without reason, leaving it without protection from ***negligence*** liability.

**74**  However, a proposed new duty of care must still not be found to conflict with residual policy considerations. As stated in *Cooper* at para. 37:

These [residual policy considerations] are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

**75**  The first question raised - whether the law already provides a remedy - requires discussion of collateral attack. The defendants argued this separately as part of their alternative position that Cobble Hill Holdings' misfeasance claim specifically constitutes a collateral attack and should be struck as abuse of process. For this reason and because the issue has no effect on the analysis of the ***negligence*** pleadings, collateral attack will be discussed below.

**76**  Returning to *Cooper* at para. 37, above: the second reason listed as to why a new duty of care may fail on residual policy grounds is that recognition of the duty of care could create the spectre of unlimited liability to an unlimited class. In *Design Services Ltd. v. Canada*, [*2008 SCC 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1C2-00000-00&context=) at para. 62, Rothstein J. held that "in cases of pure economic loss ... care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate."

**77**  I do not find that this is a case where there is a risk of unlimited liability to an unlimited class. The Minister of the Environment has control over who receives permits and therefore knows who the recipients are. Permit recipients do not constitute an indeterminate, unknowable class, unlike in *Imperial Tobacco* at para. 101 and *Hercules Managements Ltd. v. Ernst & Young*, [*[1997] 2 S.C.R. 165*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3VR-00000-00&context=) at para. 54.

**78**  In *Cooper*, the court also accepted that a *prima facie* duty of care could be negated where there are "other reasons of broad policy that suggest that the duty of care should not be recognized" (para. 37). In *Edwards v. Law Society of Upper Canada*, [*2001 SCC 80*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49K-00000-00&context=) at para. 10, the court wrote:

Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

**79**  The defendants argue that imposing a duty of care between the Minister of the Environment and Cobble Hill Holdings would conflict with the Minister's responsibilities to society and the public at large. The defendants say that the Minister's duties to the public under the *Environmental Management Act* preclude the establishment of a private duty of care to individual regulated entities. I agree with this position.

**80**  The *Environmental Management Act* does not have a "purposes" section, and so does not explicitly lay out the legislative intentions underlying the Act. However, a review of the Act makes clear enough that the legislation is intended to provide protection for the environment while also allowing economic development. For example, the Act, s. 5, states:

**Minister's authority**

5 The duties, powers and functions of the minister extend to any matter relating to the management, protection and enhancement of the environment including, but not limited to, the following matters:

1. planning, research and investigation in relation to the environment;
2. development of policies for the management, protection and use of the environment;
3. planning, design, construction, operation and maintenance of works and undertakings for the management, protection or enhancement of the environment;
4. providing information to the public about the quality and use of the environment;
5. preparing and publishing policies, strategies, objectives, guidelines and standards for the protection and management of the environment;
6. preparing and publishing environmental management plans for specific areas of British Columbia which may include, but need not be limited to, measures with respect to the following:
7. flood control, flood hazard management and development of land that is subject to flooding;
8. drainage;
9. soil conservation;
10. water resource management;
11. fisheries and aquatic life management;
12. wildlife management;
13. waste management;
14. air management.

**81**  In particular, I note the language in the Act, s. 5, that the "duties, powers and functions of the minister extend to any matter relating to the management, protection and enhancement of the environment" (emphasis added). This suggests to me an emphasis on the protection of the environment, but also an acknowledgement of economic interests. Along with the Act as a whole, this indicates that the legislature intended to give the Minister the power to strike a balance between protecting British Columbia's environmental heritage while also allowing responsible economic development.

**82**  In *Syl Apps Secure Treatment Centre v. B.D.*, [*2007 SCC 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B19J-00000-00&context=) at para. 28, Madam Justice Abella wrote:

[28] Where an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity ... Such a conflict exists where the imposition of the proposed duty of care would prevent the defendant from effectively discharging its statutory duties.

**83**  In *Los Angeles Salad*, writing in the context of a claimed duty of care against the Canadian Food Inspection Agency, Smith J.A. wrote:

In my view, the clear purpose of the relevant legislative scheme is to protect the health of Canadians by preventing the sale of contaminated food in Canada. To recognize a private law duty of care to food sellers would conflict with that purpose. It would put food inspectors in the untenable position of having to balance the paramount interests of the public with private interests of food sellers and would thereby have a chilling effect on the proper performance of their duties. Thus, the statutory scheme excludes the possibility of sufficient factual proximity to make it just and reasonable to impose a *prima facie* duty of care in the circumstances of this case[.]

**84**  I am of the view that the purpose of the Act is to allow the Minister of the Environment to strike a balance between environmental protection and economic development. As a result, the Act does require the Minister to take economic interests into consideration. However, the Act does not support the establishment of a private law duty of care to any particular regulated entity. To do so would, in my view, render her unable to effectively accomplish the balancing of interests that the Act requires. The imposition of a private law duty of care between the Minister of the Environment and a regulated entity would, I believe, have a chilling effect on the proper performance of her duties. I cannot accept that this was the intention of the legislature.

**85**  I conclude that the recognition of a new duty of care in this case fails on the second stage of the *Anns / Cooper* analysis. Although I am prepared to accept that a duty of care might have otherwise arisen in this case, I conclude that there are residual policy considerations for why such a duty of care would have to fail.

*Misfeasance in Public Office*

**86**  In addition to pleading ***negligence***, the plaintiff also claims that Minister Polak committed the tort of misfeasance in public office.

**87**  The parties appeared to largely agree on the legal principles underlying the tort of misfeasance in public office. However, they disagree on the degree of detail to be pled in this tort, specifically with respect to the Minister's state of mind. They also disagree on the application of these principles to the facts of the case.

**88**  In *Odhavji Estate v. Woodhouse*, [*2003 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YX-00000-00&context=), the Supreme Court of Canada discussed the elements of the tort of misfeasance in public office. Iacobucci J. wrote:

[22] What then are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. This understanding of the tort has been endorsed by a number of Canadian courts: see for example *Powder Mountain Resorts, supra*; *Alberta (Minister of Public Works, Supply and Services)* (C.A.), *supra*; and *Granite Power Corp. v. Ontario*, [*[2002] O.J. No. 2188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDG1-F4GK-M25X-00000-00&context=) (QL) (S.C.J.). It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.

**89**  In the case at bar, Cobble Hill Holdings has indicated that it is only claiming misfeasance in public office based on Category B. It is not alleging that Minister Polak specifically intended to injure them by cancelling the permit, but rather that the Category B variation of the claim was engaged. To understand Category B, it is useful to quote again from Iacobucci J.'s discussion in *Odhavji*:

[23] ... First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

**90**  To summarize, in order for the plaintiff to make out a claim of misfeasance in public office based on Category B, the plaintiff must prove both that Minister Polak engaged in deliberate and unlawful conduct in her capacity as Minister of the Environment, and that she was aware that her conduct was unlawful and that it was likely to harm the plaintiff. The parties disagree on the kind of knowledge to be pled: the defendants argued in their application pleadings and in oral submissions that the plaintiff falls short by not pleading "how Minister Polak knew that cancelling the permit was unlawful" (NOA, para. 20). In response to a demand for particulars, the plaintiff stated that this was asking for evidence.

**91**  On its face, the fact of cancellation itself is not "unlawful" in that the Minister obviously held the authority to cancel.

**92**  During the hearing before me, plaintiff's counsel acknowledged that Minister Polak had the authority to make the decision to cancel the permit. This authority is obvious and found within the *Environmental Management Act*, s. 18:

**Suspension or cancellation of permits and approvals**

18 (1) Subject to this section, the minister or a director, by notice served on the holder of a permit or approval, may

1. suspend the permit or approval for any period, or
2. cancel the permit or approval.

...

1. The minister may exercise the authority under subsection (1) in any of the following circumstances:

...

1. a holder of a permit or an approval fails to comply with the terms of the permit or approval ...

**93**  In the Minister's February 23, 2017 letter to the plaintiff, she expressly relied on this section in cancelling the permit. The letter provided reasons which included the plaintiff's failure to provide updated security, as well as a pattern of non-compliance.

**94**  As I understand it, there is no real dispute between the parties that Minister Polak's decision to cancel the permit was deliberate, or even that she knew that it would likely harm the plaintiff. The question is whether her decision to cancel the permit was "unlawful." In oral submissions, the defendants stressed as well that the plaintiff had not pled material facts as to the Minister knowing her conduct to be unlawful. This again underlines the parties' lack of agreement over requisite state of mind.

**95**  It is useful to quote from *Odhavji* in order to better understand what is meant by "unlawful":

[28] ... The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of "bad faith" or "dishonesty". In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

**96**  The court in *Odhavji* considered state of mind with respect to the intent to harm. The court struck the plaintiffs' pleading that the defendant "ought to have known" that harm would ensue because the tort of misfeasance requires "subjective awareness" that meets at least recklessness or wilful blindness (*Odhavji*, para. 38).

**97**  *Odhavji* adopted the reasoning in *Three Rivers D.C. v. Bank of England (No. 31)*, [2000] 2 W.L.R. 1220 (*Odhavji*, para. 24). The *Three Rivers* test for deliberate misconduct under Category B liability was summarized recently (*Rain Coast Water Corp. v. Her Majesty the Queen in Right of the Province of British Columbia*, [*2016 BCSC 845*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JWR-WYC1-JB7K-24JB-00000-00&context=) at para. 155) as requiring:

An intentional illegal act, which involves:

1. an intentional use of statutory authority for an improper purpose; or
2. actual knowledge that an act (or omission) is beyond statutory authority; or
3. reckless indifference or willful blindness as to the lack of statutory authority for the act;

Intent to harm an individual or class of individuals which is satisfied by:

1. an actual intent to harm; or
2. actual knowledge that harm will result; or
3. reckless indifference or willful blindness to the harm that can be foreseen to result.

**98**  In *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, [*2018 BCCA 214*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SGX-98H1-JF1Y-B407-00000-00&context=), the court considered whether Greengen had sufficiently pled Category B misfeasance. The defendants there, as here, relied on *Stewart v. Clark*, [*2013 BCCA 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B25C-00000-00&context=). In *Greengen*, the court stated that there had been noted, in *Stewart*, a lack of material facts for the tort of misfeasance "related to anything other than jurisdictional and procedural fairness issue" (para. 55, referring to *Stewart* at para. 75). By contrast, the court in *Greengen* found that the plaintiff's pleadings alleged "collateral political or otherwise improper reasons" for the relevant decision and overall pled the framework of the tort with material facts, albeit imperfectly.

**99**  As the court noted in *Greengen*, "each case will depend on an analysis of the pleadings in issue" (para. 55). I observe that Cobble Hill Holdings has pled most but not all aspects of Category B misfeasance in its Legal Basis.

**100**  Regarding deliberate and unlawful conduct, Cobble Hill Holdings pleads that the Minister cancelled the permit for given reasons which the plaintiff does not accept and argues is not supported by the evidence (paras. 5(a), (b), and (c)).

**101**  The defendants specified in supplementary oral submissions that there is no unlawful reason pled within the Legal Basis. I agree that these allegations alone do not amount to unlawful conduct. An administrative decision might be vulnerable to quashing for being unreasonable or incorrect but the decision-maker is not necessarily a tortfeasor: *Canada (Attorney General) v. TeleZone Inc.*, [*2010 SCC 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1VX-00000-00&context=) at para. 29.

**102**  In the hearing before me, counsel for the plaintiff indicated that "we don't know" why the Minister cancelled the permit, but suggested that political pressure may have been one possible reason. It also appears from some other pled facts that the alleged unlawful nature of the cancellation rests in the collateral political reasons for which Cobble Hill Holdings implies, without explicitly alleging, the Minister in fact made her decision. I note that under Statement of Facts at para. 20, Cobble Hill Holdings already alleges:

Between October 22, 2013 and June 21, 2016, the Mine was being reclaimed pursuant to the Permit, which activity attracted considerable and well-publicized hostile attention from nearby land owners, activists, regional politicians and Cowichan Valley Regional District (the "CVRD"), which is the local government entity where the lands are situated.

**103**  This material fact of widespread "hostile attention" supplies an implied collateral political reason for the decision to cancel the permit. It is missing within the Legal Basis in an explicit form.

**104**  Regarding the Minister's knowledge that her conduct was unlawful: Cobble Hill Holdings imputes knowledge to the Minister of the inaccuracy of her given reasons for cancellation, but does so on what appears to be an objective standard at paras. 5(a), (b), and (c) ("when she knew or ought to have known"). However, Cobble Hill Holdings also pleads reckless indifference (5(f)) to the unlawfulness of her conduct.

**105**  I note again that the state of mind required is at a higher standard than the objective one ("ought to have known") proposed several times by the plaintiff here at 5(a), (b) and (c) (and which the court struck in *Odhavji*). But the required state of mind is also less demanding than the actual knowledge seemingly requested by the defendants in their demand for particulars. My understanding is that a plaintiff must be able to plead at least recklessness or wilful blindness for the unlawful act, which this plaintiff has done in part here, albeit only at 5(f).

**106**  Regarding the decision being made with awareness that the unlawful conduct is likely to injure the plaintiff: Cobble Hill Holdings pleads that the Minister did so when she "knew or ought to have known that it would cause injury to CHH" (para. 5(d)). As the Supreme Court of Canada did in *Odhavji*, I strike this phrase. However, the plaintiff also pleads that the Minister did so "with reckless disregard for the foreseeable damage cancelling the Permit would cause to CHH" (5(e)).

**107**  In summary, on a strict view the plaintiff's claim is currently plainly and obviously destined to fail without amendment. Cobble Hill Holdings' Legal Basis challenges the Minister's given reasons for cancelling the permit, but it does not plead at its Legal Basis an "improper" unlawful reason for cancelling the permit (the "actual reason," in the words of the plaintiffs in *Greengen*). As the pleading currently stands it invites the inference that the Minister made her decision not for her given reasons (which the plaintiff contradicts) but for other reasons.

**108**  Cobble Hill Holdings has, however, pled as a material fact one collateral political reason for the permit's cancellation elsewhere in its notice of civil claim within its Statement of Facts at para. 20, and counsel for the plaintiff has raised that political reason in oral submissions. I have also noted above the incorrect pleading of a state of mind where it falls short of subjective awareness that meets at least recklessness or wilful blindness, and I have noted the appropriate pleading of "reckless disregard."

**109**  Counsel for the defendants argued against the exercise of discretion to allow amendments of pleadings. However, in these circumstances the plaintiff has essentially neglected to include a material fact within the proper subsection of its pleadings in order to make an allegation explicit, and has pled state of mind properly in part. The pleadings would suffice if amended to include in the Legal Basis a clear statement of improper reasons for the cancellation (as per *Greengen*) and to remove the low objective standard for state of mind. Since I am of the view that the pleadings' implications are clear, justice requires that I use my discretion to allow amendment to provide greater clarification in these circumstances, and I so order. This is not to grant merit to the substance of the claim itself, should it still stand in future. As the court noted in *Odhavji*, any plaintiff will still face an "uphill battle" with the tort of misfeasance in public office (para. 42).

*Abuse of process*

**110**  The court cannot predict whether or not the plaintiff will amend its pleadings or do so sufficiently on misfeasance in public office. However, in order to provide a full record, I will say that even if the claim of misfeasance in public office were sufficiently pled at this point, I would not have been persuaded by the defendants' arguments with respect to collateral attack and abuse of process.

**111**  Cobble Hill Holdings is clearly unhappy with the Minister's decision to cancel its permit, and takes the position that the decision was unlawful. However, it does not wish to pursue judicial review and instead makes a claim in tort for misfeasance in public office.

**112**  During the hearing before me, the defendants argued that Cobble Hill Holdings already had an available process and attached remedy: judicial review with its possibility of quashing the Minister's decision. The defendants say that Cobble Hill Holdings' action in misfeasance collaterally attacks the Minister's decision and is essentially a judicial review in the guise of a tort action.

**113**  This argument has some merit. The notice of civil claim uses language reminiscent of a petition for judicial review, such as where Cobble Hill Holdings pleads that "[i]n exercising authority pursuant to s. 18 of the *Environmental Management Act*, the Defendants breached their duty to conduct said authority and exercise their discretion in a judicious manner."

**114**  However, for the reasons below I am persuaded that the notice of civil claim was not simply a judicial review dressed up as a tort claim.

**115**  In my view, the decision in *Canada (Attorney General) v. TeleZone Inc.*, [*2010 SCC 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1VX-00000-00&context=), is determinative of this issue. Writing for the court, Binnie J. held that a party seeking damages as a result of a government decision need not always seek to overturn the decision through judicial review. The following excerpt at para. 19, once adjusted to context, is applicable here:

[19] If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.

**116**  I also find *TeleZone* at para. 27 apposite to the case at bar:

[27] The question must therefore be asked: What is the practical benefit to a litigant who wants compensation rather than a reversal of a government decision to undergo the *Grenier* two-court procedure? TeleZone, for example, would acquire no practical benefit from a judicial review application. Its primary complaint is for damages arising from the breach of an alleged tendering contract. It no longer seeks the benefit of the contract (or the PCS licence). It seeks compensation for substantial costs thrown away and lost profits. The Crown does not argue that the tendering contract (if it was made) was *ultra vires*, or that the alleged breach (if it occurred) was mandated by statutory authority. The argument, instead, is that TeleZone's claim constitutes a collateral attack on the ministerial order under the *Radiocommunication Act* that failed to award it a PCS licence. But in TeleZone's circumstances, judicial review of the Minister's decision would not address the claimed harm and would seem to offer little except added cost and delay.

**117**  And at para. 52: "[i]f a claimant seeks compensation, he or she cannot get it on judicial review."

**118**  I find that the reasoning in *TeleZone* above counters the defendants' argument that Cobble Hill Holdings should either solely use judicial review or pursue judicial review before making a claim in tort. As Cobble Hill Holdings argued, it seeks a different remedy; it does not wish to quash the cancellation. Cobble Hill Holdings says that it is too late for that. Rather, it seeks damages, which would not flow even from success on judicial review.

**119**  More precisely, the defendants also argue that by not pursuing judicial review, Cobble Hill Holdings thereby recognizes the validity of the cancellation decision, and this logically contradicts its claim in misfeasance that the decision was an "unlawful act." However I note that Binnie J.'s reasoning in *TeleZone* at para. 19 would encompass Cobble Hill Holdings not as recognizing the cancellation's validity but rather as being "content to let the order stand" while seeking damages for its losses without a "procedural detour." I also note that in *TeleZone* at para. 64, Binnie J. observed that one of the reasons why the federal Crown's abuse of process argument failed was that the plaintiff was clearly not seeking to avoid the consequences of the ministerial order issued against it, and "the ministerial order and the financial losses allegedly consequent on that order constitute the foundation of the damages claim." Likewise Cobble Hill Holdings is not using this action as an attempt to circumvent Minister Polak's decision. Cobble Hill Holdings can as easily argue that to the contrary, that decision forms the basis of its tort claim.

**120**  The defendants sought to distinguish *TeleZone* on the basis that it involved a contract, while the case at bar does not. In my view, to find that *TeleZone*'s holding only applied in claims for damages involving contracts would be to read *TeleZone* too narrowly. And even within *TeleZone*, the plaintiff was, in addition to founding its claim on contract and equitable principles, also claiming based on ***negligence*** (para. 79). I am therefore unpersuaded that *TeleZone* is distinguishable on these grounds.

**121**  The effect of *TeleZone* on the facts before me has been confirmed by the Court of Appeal's reasons in *Greengen*. The defendants argued in supplementary submissions that *Greengen* was a decision made *per incuriam* in so far as its three-member panel diverged in outcome from the three-member prior decision in *Stewart v. Clark*, [*2013 BCCA 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B25C-00000-00&context=). I disagree. The reasons in *Greengen* at paras. 53 to 55 clearly consider the reasons in *Stewart* and distinguish that prior decision on its facts: in *Stewart*, the court found that the pleadings in tort "raised issues of jurisdiction, limits of statutory authority, process and fairness" but raised "no issues that were distinct and separate from those that were properly the subject of judicial review" (para. 54).

**122**  In *Greengen* the court reviewed *TeleZone*'s distinction between the purposes of judicial review and a civil action in tort for Crown liability. These are "distinct and justiciable issues, some of which may overlap" (para. 41). Greengen's claim in tort was furthermore also a claim in misfeasance in public office. As in Greengen's claim, Cobble Hill Holdings' claim "touches on issues of jurisdiction and process" but also goes to the "substantive basis" for the Minister's decision (para. 57):

Specifically, Greengen alleges that the decisions were made for "collateral political or otherwise improper reasons having no relation to the merits or legality of the Project", thus rendering them "unlawful" - not for the purpose of declaring them invalid - but rather for the purpose of asserting that the decision makers engaged in deliberate and unlawful conduct. These purposes are distinct. The unlawful conduct alleged in support of a misfeasance claim is of a different character than that alleged in support of a remedy on judicial review. As the Province acknowledges, a finding of invalidity is common to both proceedings but whether that invalidity constitutes misfeasance of a public office depends on other evidence.

**123**  The court's description of Greengen's approach to the tort of misfeasance is similar to Cobble Hill Holdings' approach here. As a result, I would not agree with the defendants' abuse of process argument.

**124**  The defendants also argued that, even in the absence of collateral attack, I should exercise my inherent jurisdiction to strike the claim for abuse of process. I am not inclined to do so here.

**CONCLUSION**

**125**  In the result, I am persuaded that the pleadings should be struck as displaying no cause of action with respect to ***negligence***. I also grant leave to the plaintiff to amend its pleadings to meet the requirements of the tort of misfeasance in public office.

**126**  The parties have leave to speak to costs if they are not agreed to between the parties.

J.A. POWER J.

**End of Document**

[***Cowichan Tribes v. Canada (Attorney General), [2007] B.C.J. No. 2825***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-209S-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E.M. Myers J. (In Chambers)

Heard: December 4 and 6, 2007.

Oral judgment: December 19, 2007.

Docket: S065215

Registry: Vancouver

**[2007] B.C.J. No. 2825** | 2007 BCSC 1915 | 163 A.C.W.S. (3d) 740

Between Cowichan Tribes, Plaintiff, and Attorney General of Canada and Duncan Mall Ltd., Defendants, and The Attorney General of Canada, Third Party, and Kornfeld, Mackoff, Silber LLP, Herbert S. Silber Law Corporation and Herbert S. Silber, Third Parties

(52 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Third party procedure — Striking out or setting aside — Motions to strike third party notices allowed — The defendants issued third party notices against one another that sought to claim damages caused by negligent legal opinions given by one another's solicitors — The court found that there was insufficient proximity in each case to give rise to a duty of care — Similarly, the Crown was unable to claim indemnity under the *Negligence* Act, as such claim was the proper subject of a statement of defence to a third party notice rather than a third party claim itself.**

**Tort law — *Negligence* — Duty of care — Professional — Legal — Motions to strike third party notices allowed — The defendants issued third party notices against one another that sought to claim damages caused by negligent legal opinions given by one another's solicitors — The court found that there was insufficient proximity in each case to give rise to a duty of care — Similarly, the Crown was unable to claim indemnity under the *Negligence* Act, as such claim was the proper subject of a statement of defence to a third party notice rather than a third party claim itself.**

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| Motions to strike two third party notices -- In the first motion, the Attorney General of Canada sought to strike a third party notice issued by Duncan Mall -- The notice alleged that a Crown solicitor gave negligent legal opinions to the Mall -- In the second motion, Herbert Silber and related law corporations sought to strike a third party notice issued by the Crown -- In that notice, the Crown alleged that Silber provided negligent legal advice to the Mall, in breach of a duty of care owed to the Crown -- The Crown further sought contribution and indemnity from Silber as a joint tortfeasor under the ***Negligence*** Act -- The legal advice in question related to the Crown's obligations to the plaintiff, the Cowichan Tribes, in connection with negotiations over certain leased lands that were reserve lands surrendered by the Cowichan -- HELD: Motions allowed -- There was not sufficient proximity between the Mall and the Crown solicitor to give rise to a duty of care -- The Crown's duty was owed to the Cowichan rather than the Mall -- The Crown's solicitor owed his undivided duty to his client rather than the Mall -- The Crown did not have full freedom to look after the Mall's interests due to the nature of the transaction -- There was an issue of whether any reliance by the Mall on the solicitor's advice was reasonable -- To find otherwise would impose conflicting duties in connection with the surrendered reserve lands -- On the same basis, Silber did not owe a duty of care to the Crown in the absent of special circumstances, none of which were pleaded -- Similarly, the Crown's claim for contribution under the ***Negligence*** Act had no prospect of success -- Silber acted as agent for the Mall when he provided legal advice -- That unity of interest with his client was sufficient to allow the Crown to allege ***negligence*** its statement of defence to the Mall's third party notice, but was not the proper subject of a third party notice itself. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 19(24)(a)

Indian Act, s.18

***Negligence*** Act, *R.S.B.C. 1996, c. 333*., s. 4

**Counsel**

Counsel for the Plaintiff: M. Giltrow.

Counsel for the Defendant and Third Party the Attorney General of Canada: M. Taylor and S. Stanton.

Counsel for the Defendant and Third Party Duncan Mall Ltd.: B. Elwood.

[Editor's note: A corrigendum was released by the Court February 5, 2008. The corrections have been made to the text and the Corrigendum is appended to this document.]

**Reasons for Judgment**

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| **E.M. MYERS J. (orally)** |

**1**   I have before me motions to strike two third party notices. Both third party notices allege duties owed by lawyers to the opposing parties in a lease transaction involving surrendered Indian reserve land.

**2**  In the first motion, Canada seeks to strike Duncan Mall's third party notice. Duncan Mall's third party notice alleges that Canada's solicitor, Mr. Kurelek of the Department of Justice, gave negligent legal opinions to Duncan Mall.

**3**  In the second motion, Herbert Silber and related law corporations (I will refer to them collectively as "Silber") seek to strike Canada's third party notice. In that notice, Canada alleges that Mr. Silber provided negligent legal advice to his client, Duncan Mall, in breach of a duty of care owed to Canada. The third party notice also seeks contribution and indemnity from Silber as a joint tortfeasor under s. 4 of the ***Negligence Act***, *R.S.B.C. 1996, c. 333*. It is agreed that Mr. Silber and the related law corporations all stand on the same footing so that it is not necessary to distinguish between them.

**4**  Both motions rely on Rule 19(24)(a) of the ***Supreme Court Rules***.

**5**  This is the third set of motions I have heard and ruled on as case management judge in this case (see [*2007 BCSC 185*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S3VX-00000-00&context=)). I will therefore not repeat the background of the action in this judgment, but will only elaborate on the facts as necessary to dispose of the issues before me.

**I. DUNCAN MALL'S THIRD PARTY NOTICE AGAINST CANADA**

**6**  The following are the key paragraphs of Duncan Mall's third party notice against Canada:

1. At all material times, Duncan Mall relied on representatives of the Department of Justice for their advice in matters relating to the Crown's obligations to the Cowichan in respect of the leased lands. Representatives of the Department of Justice held themselves out to Duncan Mall as having experience, expertise and knowledge in such matters.
2. In the circumstances, a relationship of sufficient proximity existed such that the Crown, through the Department of Justice, owed a duty of care to Duncan Mall to ensure that the Crown's obligations to the Cowichan were properly discharged and that advice to Duncan Mall from the Department of Justice with respect to those obligations was accurate and reliable.
3. In or about March 28 to May 2, 2006, at or about the time that Duncan Mall and the Crown negotiated the terms of settlement in the Federal Court proceedings and entered into the 2006 Modification, Stephen Kurelek, counsel for the Department of Justice, represented to Duncan Mall or its representatives, that the Department of Justice had considered the Crown's obligations to the Cowichan and concluded that consent by the Cowichan was not required to modify the Lease so long as the Majority Locatees approved the modifications. Duncan Mall relied on that representation when it agreed to the trial dates being vacated and entered into consent dismissal of its claims against the Crown in the Federal Court proceedings.
4. In a letter dated June 19, 2006, the Department of Justice further represented to Duncan Mall that the Crown was confident that the terms of settlement agreed to between Duncan Mall and the Crown were in the best interests of the Crown, the Cowichan and the majority group of Cowichan rent recipients who urged the Crown to accept those terms.

**7**  The scope of the third party notice became an issue at the hearing. Originally, it appeared to me and to counsel for Canada that the Mall was alleging that Mr. Kurelek negligently misstated a legal conclusion to the Mall (namely that the Cowichan's consent to the lease modification was not required). Canada argued its motion on that basis. However, in the Mall's oral response to Canada's submissions, it became apparent that counsel for the Mall viewed the third party notice as also alleging negligent acts, namely that Canada owed and breached a duty of care to the Mall to take the proper steps necessary to effect a valid lease.

**8**  During the hearing I expressed the view that negligent acts were not pled, or at least not properly pled, in the third party notice. Accordingly, it was agreed that the third party notice would be taken as a plea of negligent misstatement and a claim for breach of the covenant of quiet enjoyment contained in the lease. Canada only attacks the claim of negligent misstatement.

**9**  The Mall's third party claim engages the issue of whether Mr. Kurelek owed a duty of care to the Mall with respect to the provision of legal advice. If it is plain and obvious that Mr. Kurelek did not owe the Mall this duty of care, based on the facts as alleged in the pleading (taken together with the statement of claim, which it incorporates), then that part of the third party notice must be struck.

**10**  There is a two-stage test for determining whether one party owes a duty of care to another party. First, there must be a relationship of sufficient proximity between the parties. A relationship of sufficient proximity is determined by two things: first, whether the defendant should have foreseen that his advice would be relied on; and second, whether it was reasonable for the defendant to rely on the advice. See ***Hercules Management Ltd. v. Ernst & Young***, [*[1997] 2 S.C.R. 165*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3VR-00000-00&context=) at para. 24.

**11**  If the court finds a *prima facie* duty of care exists under the first stage of analysis, then the court engages in the second stage. The second stage asks whether there are policy reasons that negate the existence of a duty of care. See ***Hercules Management*** at para. 21.

**12**  Policy matters may also be considered at the first stage of the analysis, but the policy consideration at the first stage is focussed on factors inherent in the relationship between the parties. The policy consideration at the second stage of the analysis is broader. See ***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=) at para. 30.

**13**  There are numerous cases which set out the proposition that, absent special circumstances or fraud, a lawyer acting in a commercial transaction or litigation matter only owes a duty of care to his own client and not to the opposite party. See, for example:

***Mantella v. Mantella*** [*(2006), 267 D.L.R. (4th) 532*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FCK4-G1HN-00000-00&context=), [*[2006] O.J. No. 1337*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDT1-F7ND-G4X2-00000-00&context=) (Ont. S.C.J.) (QL), esp. paras. 44 and 46.

***Geo. Cluthe Manufacturing Co. Ltd. et al. v. ZTW Properties Inc.*** [*(1995), 39 C.P.C. (3d) 322*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G4R8-00000-00&context=), [*[1995] O.J. No. 4897*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD71-JN6B-S2F0-00000-00&context=) (Ont. Div Ct.) (QL), at para. 28.

***Kamahap Enterprises Ltd. v. Chu's Central Market Ltd.*** [*(1990), 64 D.L.R. (4th) 167*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-215W-00000-00&context=), [*40 B.C.L.R. (2d) 288*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-215W-00000-00&context=) (C.A.) [***Kamahap Enterprises Ltd.*** cited to D.L.R.].

***McPhail's Equipment Co. v. Roxanne III (The)*** [*(1995), 2 B.C.L.R. (3d) 393*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M293-00000-00&context=), [*[1995] B.C.J. No. 472*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M293-00000-00&context=) (C.A.) (QL).

***Esser v. Brown***, [*2004 BCCA 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X44N-00000-00&context=), [*242 D.L.R. (4th) 112*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X44N-00000-00&context=).

***Young v. Borzoni***, [*2007 BCCA 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61VX-00000-00&context=), [*277 D.L.R. (4th) 685*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61VX-00000-00&context=).

**14**  ***Allied Finance and Investments Ltd. v. Haddow & Co.*** (1983), N.Z.L.R. 22, a case from the New Zealand Court of Appeal, is a leading case on the duty owed by counsel to an opposing party. Courts in British Columbia[**1**](#Forward_fnref_fnr-1) and Ontario frequently cite the following passage of Cooke J. in ***Allied Finance*** at 24:

Applying the principles to the present case I agree with Prichard J. that the relationship between two solicitors acting for their respective clients does not normally of itself impose a duty of care on one solicitor to the client of the other. Normally the relationship is not sufficiently proximate. Each solicitor is entitled to expect that the other party will look to his own solicitor for advice and protection. Lord Roskill says in *Junior Books*, [1982] 3 All E.R. 201 at p. 214, "The concept of proximity must always involve, at least in most cases, some degree of reliance." Lord Roskill illustrates this by citing observations in the *Hedley Byrne* case [1964] AC 465, and he attaches importance to where "the real reliance" was placed. And even if prima facie there were sufficient proximity for a duty of care, the consideration that the other party has a solicitor to protect his interests would normally negative a duty. That is to say, the second of Lord Wilberforce's questions in *Anns v. Merton London Borough Council*, [1978] AC 728, 752, would have to be answered against the duty even if the first was not.

**15**  In ***Brummer v. Frydenlund***, [*[1994] B.C.J. No. 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F956-S1F5-00000-00&context=) (S.C.) (QL), Koenigsberg J. quoted the following passage of McMullin J. from pages 34-35 of ***Allied Finance***:

It has long been held that a solicitor owes no duty to a person other than his own client. Where parties to a transaction are represented by their own solicitors a relationship of proximity or neighbourhood such as to import a duty of care from one solicitor to a client of another will rarely arise. In such cases the duty of a solicitor will be to his client alone. As Megarry V-C said in *Ross v. Caunters*, [1979] 3 All E.R. 580:

In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb properly', that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater injuries the better he will have served his client.

**16**  That is not to say that a solicitor can never owe a duty of care to the opposing party in a transaction or litigation matter. McMullin J. went on to say at page 34:

But where a special reliance is placed on the solicitor by a client of another there seems no reason why a liability in tort should not arise. But before the proximity relationship is established to make the solicitor liable there must be some degree of reliance established. The concept of proximity must always involve, at least in most cases, some degree of reliance. See the judgment of Lord Roskill in *Junior Books Ltd. v. Veitchi Co. Ltd*. at p. 214.

**17**  In ***Allied Finance***, liability was found against the defendant lawyer who acted for the supposed purchaser of a yacht. The plaintiff advanced a loan for the transaction. The plaintiff asked the defendant for an undertaking that all documents had been properly executed and that the security instrument was fully binding on the purchaser. It also required a certificate that there were no other charges on the boat. The defendant lawyer provided the requested certifications, but the boat was actually being purchased by a company related to the individual "purchaser".

**18**  The New Zealand Court of Appeal held that the relationship in ***Allied Finance*** was "a far cry" from only a "relationship between two solicitors acting for their respective clients" (to use the words of Richardson J. at 30.)

**19**  Can the same be said of the case at bar? Counsel for Duncan Mall says that it is arguable that sufficient proximity existed between Mr. Kurelek and the Mall because of the following unique facts:

1. Pursuant to s. 18 of the ***Indian Act***, [*R.S.C. 1985, c. I-5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB61-JJD0-G4F3-00000-00&context=), the Mall could not deal directly with the Cowichan; rather, the Mall had to negotiate the lease with the Crown.
2. The Crown did not have the underlying financial interest; that interest belonged to the Cowichan band and the former locatees.
3. Canada had unique access to the facts.

Duncan Mall submits that the transaction that is in issue in this litigation was therefore neither commercial nor litigious.

**20**  In my view the first two factors do not support the Mall's position. In fact, they support Canada's argument that there was no proximity. The Mall was represented by its own lawyer, Mr. Silber. Canada owed a fiduciary duty to the Cowichan.[**2**](#Forward_fnref_fnr-2) Unlike a party in a straight-forward commercial transaction, Canada did not have the full freedom to look after the Mall's interests even it wanted to. A reasonable solicitor for a lessor of surrendered reserve land would be aware of that.

**21**  And, of course, Mr. Kurelek, as Canada's solicitor, owed his undivided loyalty to his client.

**22**  Duncan Mall's third party notice states that the Mall relied on Canada's advice (paras. 7 and 8), that representatives of Canada's Department of Justice held themselves out to the Mall as having expertise (para. 8) and that a sufficient relationship of proximity existed to create a duty of care (para. 9). However, I do not think that those broad allegations assist Duncan Mall, even though a motion to strike under Rule 19(24)(a) assumes the facts set out in the pleading are correct.

**23**  First, the assertion of reliance begs the question as to whether such reliance was reasonable.

**24**  Second, the assertion of sufficient proximity merely states a legal conclusion. See ***Hercules Management*** at para. 23.

**25**  Third, the allegation of a holding-out of expertise adds little since every lawyer is assumed to know the legal area in which he is practices. It is to be assumed that both Mr. Kurelek and Mr. Silber had knowledge of the subject of the transaction.

**26**  Fourth, there is no allegation of a request from the Mall for an opinion, or a certificate, such as that which existed in the ***Allied Finance*** case.

**27**  Finally, a passage that was cited in ***Micron Construction Ltd. v. Hongkong Bank of Canada***, [*2000 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X013-00000-00&context=), (*sub nom* ***Keith Plumbing & Heating Company v. Newport City Club Ltd.***), [*184 D.L.R. (4th) 75*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X013-00000-00&context=) at para. 103, is apt to the case at bar. The passage is from an article by Professor Blom which outlines the distinction between foreseeable reliance and reasonable reliance (Joost Blom, "Economic Loss: Curbs on the Way Ahead?" (1986-87) 12 Can. Bus. L.J. 275 at 283):

In a case of negligent misstatement causing pure economic loss on a contract or other financial transaction, it is not enough that the average person would foreseeably rely on the defendant's statements. The defendant owes the plaintiff no duty of care unless a reasonably prudent and sceptical person, in the plaintiff's position, would have been led by the defendant's words or conduct to believe that he had an assurance of the defendant's taking reasonable care, equivalent in weight to the defendant's promise.

**28**  Under the circumstances of the case before me, I cannot see how it could be reasonable for the Mall to place any reliance on a legal conclusion reached by Mr. Kurelek. Nor do I see why Mr. Kurelek should have foreseen that his legal opinions or conclusions would be relied on by Duncan Mall.

**29**  I conclude that there is nothing pleaded to support a relationship of sufficient proximity such that Canada owed a duty to Duncan Mall with respect to legal advice or opinions regarding the necessity to obtain the Cowichan's consent to the lease modifications.

**30**  Even if there was such proximity to pass the first stage of the ***negligence*** analysis, there are policy reasons which, in my view, would negate a duty of care at the second stage. If I imposed on Canada the duties asserted by Duncan Mall, then Canada could potentially have conflicting duties: duties to the Mall and duties to the Indians who surrendered their reserve land. I see no good policy reason to allow for such a conflict and every reason to avoid it.

**31**  Further, to allow such a duty would inevitably open up the deliberations of the solicitors to disclosure, raising issues with respect to privilege.

**32**  Whether a duty of care might exist where the Crown is asked for and provides some sort of certification, as was the case with the defendant in ***Allied Finance***, or where the lessor of the surrendered land is not represented by its own solicitor, is something I do not have to consider; that is not this case.

**33**  As a separate line of attack, Duncan Mall relies on what have been referred to as "disappointed beneficiary cases". In those cases, testators' solicitors have been held to owe a duty of care to the testator's beneficiaries to prepare a valid will. See, for example: ***Whittingham v. Crease & Co.*** [*(1978), 88 D.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-62CF-00000-00&context=), [*[1978] 5 W.W.R. 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-62CF-00000-00&context=) (B.C.S.C.); ***Esser v. Brown***; and ***Ross v. Caunters***, [1979] 3 All E.R. 580 (Ch. Div.).

**34**  But this is not such a case. It is true, as Duncan Mall argues, that the lease confers a benefit on the Mall. But the suggestion that conferring a benefit in itself brings the case within the disappointed beneficiary principle was expressly rejected by the Court of Appeal in ***Kamahap Enterprises Ltd.*** In that case, a duty of care was asserted in somewhat similar circumstances to the case at bar. Taylor J.A. stated at 172:

Why, then, should the solicitors in this case be held to a duty of care to the party with whom their client dealt?

It cannot be because the solicitors were retained to confer a benefit on that party. This was a commercial transaction, and their retainer must have been to do the best the solicitors could for their client in dealing with that other party. Certainly they were not retained to give anything away. So *Ross v. Caunters* could not, in my view, govern in the present case. The benefit the solicitors were retained to obtain was a benefit for their client, the vendor, and any benefit they might confer on the purchaser would have been entirely fortuitous.

**35**  The case before me involved a commercial transaction in which both sides were represented. The fact that there was an added dimension of surrendered lands and Crown duties does not bring the case within the realm of the disappointed beneficiary cases.

**36**  Accordingly, I conclude that it is plain and obvious that the third party claim, insofar as it is based on the alleged breaches of duty of Mr. Kurelek, is bound to fail and should be struck. The only portion which remains is that which alleges the breach of the covenant of quiet enjoyment.

**II. CANADA'S THIRD PARTY NOTICE AGAINST SILBER**

**37**  The following are the main operative paragraphs of Canada's third party notice for the purposes of this motion:

1. Herbert S. Silber and/or Herbert S. Silber Law Corporation expressly or implicitly represented to Canada that he would competently carry out his duties of care to represent and protect Duncan Mall's legal interests.
2. Canada was entitled to rely on the representations by Herbert S. Silber and/or Herbert S. Silber Law Corporation that he would competently represent and protect Duncan Mall's legal interests and Canada did rely on his representations to its detriment.
3. Alternatively, in the circumstances a relationship of sufficient proximity existed such that Herbert S. Silber and/or Herbert S. Silber Law Corporation owed a duty of care to Canada to ensure that his obligations to Duncan Mall were properly discharged and that he competently represented and protected Duncan Mall's legal interests.
4. If Duncan Mall is liable to Cowichan Tribes for damages, interest and/or costs in this application, it would be wholly the result of Herbert S. Silber and/or Herbert S. Silber Law Corporation's breach of duty to competently represent and protect Duncan Mall's legal interests.
5. If the Third-Party Canada is liable to Duncan Mall for any damages, interest or costs owed by Duncan Mall to Cowichan Tribes, which is denied, such liability, loss and damage on the part of Canada results from Herbert S. Silber and/or Herbert S. Silber Law Corporation's negligent breach of representations and ***negligence*** in failing to adequately and properly represent Duncan Mall's legal interests and, generally come in failing to provide competent legal advice to Duncan Mall.

**38**  The third party notice relies on two bases of liability of Silber to Canada:

1. a breach of a duty of care owed by Silber to Canada to provide Duncan Mall with competent legal advice; and
2. a breach of duty owed by Silber to Duncan Mall to provide Duncan Mall with competent legal advice. If Silber breached that duty and Canada is also found liable then, it is argued, Silber and Canada will be joint tortfeasors and Canada is entitled to contribution and indemnity from Silber pursuant to s. 4 of the ***Negligence Act***.

I will deal with these in turn.

**1. Alleged Duty of Care Owed by Silber to Canada**

**39**  This duty of care asserted by Canada is somewhat different than that asserted by Duncan Mall against Canada. Duncan Mall complains of legal advice provided by an opposing counsel (Kurelek) to an opposing party (Duncan Mall). Canada complains of advice provided by an opposing counsel (Silber) to its own client (Duncan Mall).

**40**  Nevertheless, ultimately the duty which Canada alleges is one owed by Silber to Canada. Therefore, the analysis I set out above (with respect to Duncan Mall's third party claim) on determining whether a lawyer owes a duty of care to an opposing party is applicable here.

**41**  Applying this analysis, Silber cannot be held to owe a duty of care to Canada absent proof of sufficient special circumstances. Canada did not plead sufficient special factors to support such a duty. Therefore, there is no basis for Canada to allege that Silber owed a duty to Canada to competently provide legal advice to Duncan Mall.

**2. Contribution under s. 4 of the *Negligence Act***

**42**  Canada's claim for contribution and indemnity under s. 4 of the ***Negligence Act*** does not depend on a breach of duty owed to Canada. Rather, it depends on a breach of duty owed by Silber to his own client, Duncan Mall. In this plea, Canada asserts that if it is liable to Duncan Mall, Silber is also liable as a joint tortfeasor because he contributed to the Mall's loss by providing negligent advice.

**43**  In my view, this aspect of Canada's third party claim must be struck on the principle enunciated by the Court of Appeal in ***Adams v. Thompson, Berwick, Pratt & Partners et al.*** [*(1987), 15 B.C.L.R. (2d) 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FJDY-X10J-00000-00&context=), [*39 D.L.R. (4th) 314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FJDY-X10J-00000-00&context=) (C.A.) [***Adams*** cited to D.L.R.]. In ***Adams***. McLachlin J.A. (as she then was) said this at 317:

The authorities establish that where a plaintiff contracts with two separate parties, such as a contractor and an engineer, and later sues one of them, the one sued cannot claim contribution or indemnity from the other on the ground that the other failed to properly execute his duties, where the substance of the third party claim can be raised against the plaintiff by way of defence.

**44**  McLachlin J.A. reasoned that this principle applies where the third party was acting as an agent for the plaintiff, because in such a case the ***negligence*** of the third party (the agent) can be attributed to the plaintiff (the agent's principle).

**45**  Canada focuses on the following passage from the ***Adams*** case (at 319):

Generally speaking, all acts falling within the scope of an agency between the proposed third party and the plaintiff fall into the category of acts for which the plaintiff is responsible and hence are not the proper subject to third party claims. At the same time, it must be recognized that a person acting as agent to the plaintiff may undertake duties toward co-contractors and others outside the scope of his agency. To put it another way, the plaintiff's agent may, as a consequence of his relations with other contractors on the project, assume duties toward persons other than the plaintiff, for breach of which the plaintiff would not be vicariously liable. It was the possibility of such claims which led McEachern C.J.S.C. in *Quintette*, [*[1986] B.C.J. No. 2008*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JSC5-M2KH-00000-00&context=), to allow the third party claim to stand.

**46**  Canada argues that when a solicitor provides advice to a client, he or she is not acting as the client's agent. That argument was made in the ***Adams*** case. McLachlin J.A. stated at 320:

The engineers suggest that the giving of advice, however, does not fall within the definition of agency. Assuming, without deciding, that this is so, it does not assist them. The main allegation under this head is the solicitors' failure to advise the plaintiffs of their duty to mitigate their losses by selling such property as they could in the summer of 1981. But mitigation is an obligation of the plaintiff. If this claim is made out, the engineers will have a complete remedy by way of reduction of damages. There is no need for a third party claim.

Mitigation is not an issue in the present motion. Canada argues that the ***Adams*** case is of minimal weight to the case at bar because McLachlin J.A. did not reach a conclusion with respect to whether the giving of legal advice falls into the definition of agency.

**47**  However, in ***Strother v. 3464920 Canada Inc.***, [*2007 SCC 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B192-00000-00&context=), [*281 D.L.R. (4th) 640*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B192-00000-00&context=), McLachlin C.J.C. said this of the relationship between a lawyer and client (at para. 133):

A retainer between lawyer and client is essentially an agency agreement, albeit a special one attracting a duty of loyalty. The lawyer commits to doing certain things for the client. It is to this commitment that the fiduciary duty of loyalty attaches.

**48**  Although her judgment was a dissenting one, the majority did not disagree with this statement.

**49**  In my view, Canada's submission takes too narrow a view of how the ***Adams*** case should be applied. Mr. Silber participated in the negotiations and discussions which led up to the revised lease as - and only as - the Mall's solicitor. He gave legal advice to the Mall as its solicitor; certainly nothing else is alleged in the pleadings. It does not make sense to me to draw the distinction between the provision of legal advice and the participation in negotiations, one being the work of an agent and the other not. That is far too artificial a distinction.

**50**  In my view, when Mr. Silber provided the Mall with legal advice he was acting as its agent. Put another way, he had a unity of interest with his client and this is sufficient to allow Canada to allege his ***negligence*** in its statement of defence to Duncan Mall's third party notice. It is therefore not the proper subject of a third party notice.

**51**  I therefore conclude that the third party notice of Canada should be struck.

**52**  Counsel may arrange to speak to costs if that is necessary.

E.M. MYERS J.

\* \* \* \* \*

Corrigendum

Released: February 5, 2008

***Revised Judgment***

Corrigendum to the Reasons for Judgment issued advising that in paragraph 36 should read "Mr. Kurelek" instead of "Silber".

[**1**](#Backward_fnref_fnr-1) See, for example, ***Seaway Trust Co. v. Markle***[*(1991), 7 C.C.L.T. (2d) 83*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCP1-JJSF-20WH-00000-00&context=), [*[1991] O.J. No. 479*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCP1-JJSF-20WH-00000-00&context=) (Ont. C.J.) (QL).

[**2**](#Backward_fnref_fnr-2) I do not mean here to define the precise nature of that duty or how it relates to the duty owed to the former locatees. As I mentioned in one of my prior reasons, that is an issue for determination in this lawsuit.

**End of Document**

[***Currie v. Taylor, [2012] B.C.J. No. 2181***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2DF-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

T.C. Armstrong J.

Heard: April 2-5 and 10, 2012.

Judgment: October 23, 2012.

Docket: M116089

Registry: New Westminster

**[2012] B.C.J. No. 2181** | 2012 BCSC 1553

Between Jason Michael Currie, Plaintiff, and Karen Lorraine Taylor and Daniel Allan Sharp, Defendants

(184 paras.)

**Case Summary**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Motor vehicles — Liability of driver — Speed — Determination of liability for motor vehicle accident — Plaintiff was 75 per cent liable and defendant was 25 per cent liable — Plaintiff turned left on to highway, intending to travel southbound, and collided with northbound defendant — Plaintiff failed to keep proper lookout and yield right of way — Defendant was travelling at excessive speed and failed to keep proper lookout after becoming aware that plaintiff was moving away from stop line.**

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| Determination of liability for a motor vehicle accident. The plaintiff entered a highway at an intersection controlled by a stop sign. He turned left from the stop line, intending to travel southbound, and collided with the northbound defendant.  HELD: The plaintiff was 75 per cent liable for the accident and the defendant was 25 per cent liable.  The plaintiff failed to keep a proper lookout and, as a result, failed to yield the right of way to the defendant. The plaintiff was required to assess the risk of an immediate hazard when he was about to leave the stop line. The defendant was an immediate hazard at that time. The defendant was travelling at an excessive speed and failed to keep a proper lookout after becoming aware that the plaintiff was moving away from the stop line. The defendant's speed was more than one third above the posted limit. He had time to avert the accident had he been driving less aggressively. He was, or should have been, aware that his right of way was being disregarded by the plaintiff. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 174*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0H8-00000-00&context=), s. 175, s. 175(1), s. 186

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

**Counsel**

Counsel for Plaintiff: J.P. Prodor.

Counsel for Defendants: V.R.K. Orchard, Q.C., D. Claassen.

**Reasons for Judgment**

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

**Introduction**

**1**  In the early evening of June 23, 2008 the plaintiff Erin McRoy (formerly known as Jason Michael Currie) was driving a yellow and white taxi ("the Taxi") en route to the City of Vernon when he attempted to turn left onto Highway 97 at the intersection with Meadowlark Road ("the Intersection"). At the same time, the defendant Allan Sharp was driving a delivery van ("the Van") owned by the defendant Karen Lorraine Taylor northbound on Highway 97 approaching the Intersection. The Taxi crossed over a portion of Highway 97 with the intention of turning left into the southbound lane when the Van collided with the driver's side of the Taxi in the northbound left/center lane. The impact caused enormous damage to both vehicles and the plaintiff was seriously injured. The issue to be resolved in this trial is to what degree, if any, the accident was caused by the ***negligence*** of the defendant Sharp.

**Evidence**

**2**  The uncontroverted evidence is that the plaintiff had delivered a customer to an address on Pleasant Valley Road approximately 2 to 3 blocks from the Intersection. He drove to the Intersection and stopped behind the stop line. The Taxi was a bright yellow 1998 Oldsmobile; there was no evidence that the mechanical condition of either party's vehicles were a factor in the collision. The Van was a white 1997 Mazda MPV.

**3**  The posted speed limit on Highway 97 was 90 km/h at the Intersection. The weather was not a factor in the collision and there were no aspects of the road conditions that contributed to the accident.

**4**  Highway 97 at the Intersection is composed of two lanes northbound, two lanes southbound, and a single lane providing left turn access to Meadowlark Road from both directions.

**The Plaintiff**

**5**  The plaintiff was a 36 year old owner/operator with Vernon Taxi and was driving the Taxi at the time of the June 8, 2008 collision. He had owned the Taxi for one year before the accident.

**6**  The plaintiff had a class four driver's license entitling him to drive taxis and small buses. At the time of the accident he suffered from sleep apnea, schizophrenia, and diabetes. The plaintiff was taking antipsychotic medications, antidepressant medications and had a prescription for diabetes. Although the plaintiff was aware that these medications caused side effects, there was no evidence that those drugs were a factor in the collision. The plaintiff had been treated for fatigue in May 2008 but denied experiencing any fatigue on the date of the accident.

**7**  The plaintiff testified that until October 2009, he had no memory or recollection of the events relating to this accident. He described an extraordinary event when he suddenly recovered his memory of the events immediately preceding the accident. He was not entirely sure when the memory returned. He denied being told about any of the accident details before his memory retuned. He specifically denied prior knowledge of the police analysis of the accident and he denied conversations with others before recovering his memory about the details of the accident. However, at his examination for discovery he testified that his wife had read the analyst report and spoken with him about the incident before he recovered his memory. Nevertheless, he denied that his recovered memory originated from conversations with others; he insisted that he spontaneously achieved recall of the events prior to the collision.

**8**  The plaintiff testified that he was very familiar with the Intersection and with the traffic customarily found on Highway 97 in that area. He said that after dropping his last customer at a nearby trailer park he drove onto Meadowlark Road and came to a stop behind the stop line and stop sign at the Intersection.

**9**  The stop line is set back about 5.35 m from the edge of Highway 97.

**10**  He said he pulled up to the stop line at the Intersection, looked in both directions, fastened his seatbelt, and looked again to his left to check the state of oncoming traffic. He said he saw a white semitrailer truck some distance down the road in the outside lane; he thought the way was clear to commence crossing Highway 97 and complete his turn toward Vernon.

**11**  He believed he was at the stop line for about 15 seconds; he checked both directions, and being satisfied that the way was clear he began a steady acceleration from the stop line.

**12**  Initially, he said that the semitrailer was 200 yards from the Intersection when he first saw it; he subsequently adjusted that estimate to between 100 m - 200 m from him. He said when the semitrailer was 100 m away he had plenty of time to cross the road without incident. He said he travelled from the stop line at a normal pace and might have stopped his vehicle before entering into the slow lane northbound.

**13**  In cross-examination, he altered his evidence and said he saw the semitrailer truck "perhaps 50 metres away" from him at the Intersection and before the impact.

**14**  The plaintiff had intended to travel across the northbound lanes and stop in the Highway 97 left turn lane to be sure he could safely enter the southbound lane.

**15**  Although he was confident that the northbound lanes of Highway 97 were sufficiently clear to enable him to make his turn safely, it appears that he did not see the Van. As he proceeded he was not focused on traffic coming from his left and did not see the Van at any time until immediately before impact

**16**  The plaintiff believed that he saw the grill of the Van approximately a half second before he was hit. He said the nose of his car was entering into the left lane when he saw the grill of the Van right in front of him. He had a recollection of trying to accelerate. He could not explain why he did not see the Van then coming towards him. The plaintiff speculated that his vision of the Van was obscured by the semitrailer truck. I do not accept that evidence based on the reports from the other witnesses who testified at the trial.

**17**  The plaintiff's evidence must be weighed carefully because of the unusual delay in his recovered memory about the collision. It is clear that he gave some evidence at trial that conflicted with his discovery evidence. It appears obvious that he had discussions with others about the accident before he recovered his memory in 2009. He acknowledged that his wife had relayed to him parts of the traffic analysis report. He also spoke to his family and a person named Joe about the accident before his memory returned.

**18**  In the final analysis of his evidence, there is little controversy about his pre-accident actions. It is my view that his evidence about the distance between the Intersection and the semitrailer truck, which he says was between 50 m and 200 m, is quite unreliable. I do accept that he did not see the Van until immediately before impact.

**Evan Weber**

**19**  Evan Weber, a 20 year old hospitality host and bartender, was driving to work when he witnessed the accident. He drove from his home to the Intersection where he observed the plaintiff stopped at the stop sign for quite some time. He noticed the driver to be waiting, apparently looking for a break in the traffic. Mr. Weber concluded that the plaintiff missed two opportunities to begin his turn onto Highway 97.

**20**  He said that drivers intending to enter Highway 97 need to be patient because the traffic is often heavy at that location. He noted that Highway 97 has two lanes running north and two lanes south with a turning lane for each direction.

**21**  He observed that the plaintiff was doing something while waiting at the Intersection. Mr. Webber concluded that the plaintiff was either talking to someone or doing some other activity because he observed the plaintiff's face turned in one direction and observed the plaintiff's hands moving in a manner inconsistent with the intention of driving.

**22**  Mr. Webber came to a stop behind the Taxi and observed a semitrailer truck and the Van travelling northbound on Highway 97. The Van was in the fast lane and the semitrailer truck in the slow lane. Mr. Weber's view of the Van and the semitrailer truck heading toward the Intersection was clear and unobstructed.

**23**  He estimated that the vehicles were approximately ten seconds away although he could not estimate the distance when first questioned.

**24**  Mr. Webber noticed that the Taxi left the Intersection and travelled across the slow lane and the fast lane. He believed the plaintiff stopped before the Taxi had vacated the fast lane. Mr. Webber said that the front end of the Taxi was in the turning lane while the back end was still in the fast lane. He believed that the majority of plaintiff's vehicle was in the fast lane.

**25**  Mr. Webber concluded that the Taxi had sufficient time to safely cross the northbound lanes when he pulled away from the stop sign. He did not accelerate quickly across the road. Mr. Weber described him as moving casually before he stopped in the turning lane.

**26**  The semitrailer truck was travelling in the slow lane and was approximately a half car length behind the rear of the Van when the impact occurred. He said that the Van could have avoided the collision because the right lane was clear.

**27**  Mr. Weber was of the view that the plaintiff's decision to leave the Intersection was, at the time, a reasonably prudent decision and that, although it was a close call, he believed the Van could have avoided the impact.

**28**  He also said that approximately 10 to 12 seconds passed between the time the plaintiff commenced his movement into the Intersection, stopped, and the impact occurred. He gave the clear impression that the Taxi had been stopped while straddling the fast lane and turning lane for some seconds. There was no obvious reason that the Taxi could not have proceeded fully into the turning lane.

**29**  Mr. Weber acknowledged that it is common for vehicles to exceed the speed limit on Highway 97 travelling at 100 km/h and more. Speed of the oncoming traffic is uppermost in the mind of drivers entering the Intersection. It requires a great deal of attention.

**30**  He confirmed that the road is flat and straight for approximately one km south of the point of impact, that there was nothing to obscure the defendant Sharp's vision of the plaintiff, and that it was common for vehicles to exceed the speed limit on Highway 97 in the vicinity of the accident.

**31**  He noted that on the photograph marked exhibit 1, a mark where he first saw the defendant Sharp and the semitrailer. Mr. Webber did not recall whether the Van was overtaking the semitrailer.

**32**  He said he would have made the same turn if the Van had been south of the point that he marked "X" on the photograph being the point where it would have been imprudent for the Taxi to move. He said that if the Van had been within that distance he would not have made the turn.

**33**  He confirmed that there was considerable distance between the stop line and the fog line for traffic entering Highway 97 from the Intersection. He said that motorists ordinarily will creep out beyond the stop line to the fog line in an effort to gain a better vantage point of the oncoming traffic. He noted that before the Taxi pulled out, another vehicle passed through the Intersection. This may have been another semitrailer but not the semitrailer truck he saw behind the Van prior to the collision.

**Ian Tuckey**

**34**  Mr. Tuckey, 47, is a professional truck driver who was travelling on Highway 97 at the Intersection on the night of the accident. He was driving a white Kenworth tractor-trailer in the right lane of Highway 97 approaching the Intersection. Mr. Tuckey observed that the highway weigh scales were located between the two east and west bound lanes of Highway 97; the weigh scale area begins approximately one km south of the Intersection.

**35**  He estimated that the return lane from the weigh scales merges at approximately 300 m from the Intersection but this distance appears, on Exhibit 1, to be more likely 500 m (the merge point). As he neared the weigh scales, Mr. Tuckey had slowed due to the possibility he might have been required to stop at the scales but soon realized the scales were closed and he accelerated. The Van started to overtake the Tuckey semitrailer near the weigh scales and completed its pass of the semitrailer near the merge point. Mr. Tuckey was travelling at just less than 90 km/h and he accelerated up to 95 km/h by the time he passed the merge point.

**36**  From the merge point to the Intersection and the collision the defendant Sharp moved further ahead of Mr. Tuckey and the gap between them had increased to between 115 m - 175 m. Mr. Tuckey saw the Taxi stopped at the Intersection when he was 150 m - 200 m from the Intersection. He estimated that the defendant Sharp was 50 m - 100 m from the Intersection when the Taxi moved out into the roadway.

**37**  As Mr. Tuckey saw the Taxi move from the stop line at the Intersection, it appeared to him that the Van should have been moving into the right lane but that was not happening. He could not see any reason the Van did not move to the right lane. He said an accident started to appear imminent and two seconds later the collision occurred. He acknowledged that there was nothing that would have precluded the defendant Sharp from moving into the right lane and no brake lights appeared on the Van before impact.

**38**  Initially, Mr. Tuckey said he was about 250 m from the impact when the collision occurred; he subsequently revised his estimate of the distance between his vehicle and the point of the collision to 115 m. He also said that when the Taxi moved towards the highway, the Van was 50 m -100 m from the Intersection.

**39**  Where Mr. Tuckey's evidence of the gap between his truck and the intersection at the time of impact conflicts with Mr. Webber's view, I accept that Mr. Tuckey's recollection is more reliable. Mr. Tuckey's description of the events preceding the collision were more consistent with the evidence than Mr. Webber's perceptions.

**40**  Mr. Tuckey described the rate of speed of the Taxi moving from the stop line as a "brisk walk". The clear impression Mr. Tuckey relayed was that the plaintiff did not travel quickly across the highway and that there was sufficient time and opportunity for the defendant Sharp to change lanes before reaching the Intersection.

**The Defendant Sharp**

**41**  The defendant Sharp did not testify but the plaintiff read into evidence extensive portions of the defendant Sharp's evidence from his examinations for discovery.

**42**  The defendant Sharp was a 49-year-old delivery driver and was involved in the collision. On June 23, 2008 he was driving the Van on Highway 97. He said he had awakened at five o'clock in the morning on the day of the accident and at the time of the accident he was returning from his day of work. He was familiar with Highway 97 in the vicinity of the Intersection.

**43**  He described Highway 97 at the Intersection as composed of four lanes; two northbound and two southbound lanes with an additional turning lane for southbound traffic. Highway 97 at and before the Intersection is flat and straight with a speed limit of 90 km/h. He confirmed that the there was a stop sign for vehicles on Meadowlark road turning north or south.

**44**  He described the weather at the time of the accident as overcast and gray; the sun was still up, but not bright.

**45**  He saw Mr. Tuckey driving north on Highway 97 in the fast lane. He described seeing the bright yellow Taxi at the stop sign at Meadowlark.

**46**  He travelled down the highway and observed a transport truck pulling a trailer ahead of him. He passed the semitrailer truck 1 km from the Intersection.

**47**  At his examination for discovery on August 31, 2010 the defendant Sharp said:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 201 |  | Q |  | When you had come to the front of that semitrailer truck, when you were doing your pass, what was the distance from Meadowlark Road? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | A kilometer. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 202 Q |  | Was the taxi coming up to the stop line at that time? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | 203 Q | So your visibility was a kilometer? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | 205 Q | Did you keep your eye on that taxi? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 213 Q |  | How fast was that taxi, did it leave the stop line? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | It just went out slowly. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 217 |  | Q |  | And the yellow taxi just gradually pulled out in front of you - - through the slow lane, if I can use that? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 218 Q |  | Across the fast lane to the point of impact, is that what you're saying? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | 219 Q | It didn't do a jackrabbit start? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 220 Q |  | Okay. Just a normal, everyday driving from a stop sign? |  |

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

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 223 |  | Q |  | Is that safe to say? How much time passed between the time it pulled away, when I say "it", I mean the yellow taxi, from that stop sign till impact? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Oh, probably 10 seconds. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 224 Q |  | Okay. So in that 10 seconds, what evasive action did you do, if anything? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That's what I said, I just took my foot off the gas, didn't have the time to put on the brake. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 225 Q | You had 10 seconds, though, correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That was 10 seconds when I seen him leave. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 227 Q |  | So 10 seconds from impact you took your foot off the gas, is that what you're telling me? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 228 Q |  | What is your evidence, then? How many seconds from impacted you take your foot off the gas? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I seen the taxi come out, in 10 seconds, in that 10 second span, I took my foot off the gas and bang all of a sudden. |  |

**48**  The defendant Sharp's evidence is confusing. He saw the Taxi moving away from the stop line but he did not take any evasive steps during the 10 seconds the Taxi was travelling across Highway 97. He looked into his rear view mirror but he had no time to avoid the accident. He confirmed that his vehicle did not decelerate significantly when he took his foot off the brake before impact; there was no reason that he could not have gone into the right lane before reaching the Intersection.

**49**  Later in that examination for discovery the defendant Sharp was asked:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 319 |  | Q |  | Did you see the yellow taxi continually from the time it left the stop line until the point of impact? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 320 Q | Where were you looking? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I was looking straight ahead. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 325 Q |  | Okay. And you don't know, in that hundred metres you lost sight of the yellow taxi? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No, I -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 326 Q | I'm sorry, your answer? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No, I-- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 327 Q | You don't-- |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | -- didn't see the taxi from there to the impact. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 328 |  | Q |  | For the hundred metres before impact, you didn't see the taxi that was in the intersection - - |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 329 Q | -- that must've travelled into the |  |
|  |  | intersection, correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 330 Q |  | Any explanation as to why not? It was there to be seen, wasn't it? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | 331 Q | Why didn't you see it? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Because I was looking straight ahead, and I was going to look in my rear view mirror for a quick second to see if I could get over into the slow lane. |  |

...

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 360 |  | Q |  | If I understand you correctly in your evidence is that you sort of lost track of this taxi for a time period? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 361 Q |  | From the stop line until the point - virtually the point of impact, you lost sight of it? |  |

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

**50**  In this second part of his discovery the defendant Sharp provides a contradictory version of the facts in that he did not see the plaintiff cross the slow lane nor could he brake, turn or take any evasive action. He appears to have lost sight of the Taxi from the point that it left the stop line until impact. This evidence is not consistent with his statement that he watched the Van leave the stop line and move into the Intersection.

**51**  Mr. Sharp's evidence that he saw the Taxi move from the stop line and travel into the Intersection was clearly stated, albeit at odds with the second description of the event. Mr. Sharp did not testify and accordingly, I accept the evidence that he observed the Taxi over several seconds before the impact and that he watched it move away from the stop line and into the Highway. Mr. Sharp's evidence that he watched the Taxi for 10 seconds is inconsistent with the expert evidence that follows.

**Dr. Amrit Toor**

**52**  Dr. Toor was qualified to give opinion evidence in the field of mechanical engineering and accident reconstruction. He provided three written reports. His findings include the following:

1. under normal daylight conditions persons at the 50th percentile would detect and identify a hazard on the road within 1.1 s of its appearance.
2. making a decision and implementing a decision in response to a hazard takes up to 0.7 s.
3. the impact speed of the Van was estimated at 135 km/h falling within the range of 130 - 138 km/h.
4. the impact speed of the Taxi was estimated at 24 km/h within a range of 22 km/h - 26 km/h.
5. between 3.6 s - 4.2 s elapsed from the moment the plaintiff left the stop line to the point of impact.
6. when the plaintiff left the stop line the Van was 146 m from the point of impact.
7. the collision would have been avoided if the Taxi had travelled an additional 4.5 m taking about 0.6 s - 2.7 s.
8. if the Van had been delayed by 0.6 s - .0.7 s the collision would not have occurred.
9. if the Van had been travelling between 90 km/h - 110 km/h the Taxi would have cleared the Van by 8 m - 33 m.
10. a report by Sgt. Nightingale overestimated the coefficient of friction and underestimated the post impact deceleration and impact speed of the Van.

**Sergeant Nightingale**

**53**  Sgt. Nightingale is a 30 year member of the RCMP who was a qualified traffic analyst. He has been qualified to give expert evidence in accident reconstruction many times since 1994. He was in charge of the RCMP accident reconstruction division for southeast region of British Columbia.

**54**  Sgt. Nightingale's perspective on this investigation was driven by his role to investigate criminal aspects of an accident scene. He mentioned this focus when describing his analysis and conclusions as to in his assessment of the defendant Sharp's minimum speeds.

**55**  Sgt. Nightingale instructed Constable Steve Lamirante (an RCMP collision analyst at the time) to attend the accident scene on June 24, 2008. Constable Lamirante went to the Intersection and took photographs and measurements of the accident scene. On July 3, 2008, Sgt. Nightingale visited the scene and returned at a quieter time on July 6, 2008 to complete a technical survey including measurements of the Intersection and accident scene.

**56**  In Sgt. Nightingale's opinion the Van contributed 90% of the force for post impact travel of the motor vehicles.

**57**  Sgt. Nightingale's opinion included the following:

1. the pre-impact speed of the Van was 119 km/h (33.16 m/s).
2. the pre-impact speed of the Taxi was 26 km/h (7.33 m/s).
3. the average reaction time before a driver recognizes a hazard is 0.75 s and the time required to initiate a response to the hazard is 0.75 s.
4. the stopping distance after a driver has reacted when travelling at 119 km/h will require 75.76 m.
5. if travelling at a speed of 119 km/h the cumulative distance for the defendant Sharp to stop would have been 125 m. This would not likely have been sufficient to avoid the collision but would have drastically reduced the magnitude of impact.
6. if the defendant Sharp had been travelling at 90 km/h when the plaintiff became a hazard then he would have required 80.5 m to stop and the collision would not have occurred.

**Analysis**

**58**  The assessment of liability in this case engages a consideration of the parties rights of way, the *Motor Vehicle Act,* *R.S.B.C. 1996, c. 318* ("*MVA*"), the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333* and the common law.

**Right of Way**

**59**  The *MVA* sets out the statutory rights and obligations of drivers intending to enter highways from sides streets controlled by stop signs. The first task in this case is to determine which of the two vehicles possessed the right of way at the time the Taxi moved from the stop line.

**60**  Section 186 of the *MVA* places a duty on drivers to stop at stop signs:

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.

**61**  A driver intending to enter a highway from a side road is governed by s. 175 of the *MVA* after stopping in accordance with s. 186:

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.

**62**  The driver with the right of way is described as the dominant driver and the driver required to yield the right of way is called the servient driver.

**63**  Cars entering through highways from side streets are frequently faced with the prospect of collisions with vehicles on intersecting through streets when neither has yielded the right of way. The issue in these scenarios is whether the through travelling vehicle was so close to the intersection as to constitute a hazard after the other vehicle has stopped in compliance with s. 186; that is whether the oncoming vehicle is so close to the intersection that there is a risk of colliding with the vehicle emerging from the side street into its path.

**64**  The *MVA* requires drivers entering the intersection to stop at the stop line and proceed from the stop line in compliance with s. 175. The *MVA* regulates these vehicle movements but does not obviate the common law duty of every driver to exercise due care for others using the roads. It is clear that the driver emerging onto the highway has the initial responsibility to assess whether the oncoming vehicle is an immediate hazard.

**65**  The leading authorities that inform the Court on liability assessment in these kinds of collisions are: *Keen v. Stene* [*(1964), 44 D.L.R. (2d) 350*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3RS-00000-00&context=) (B.C.C.A.); *Raie v. Thorpe* (1963), 43 W.W.R. 405 (B.C.C.A.); and, *Walker v. Brownlee and Harmon,* [*[1952] 2 D.L.R. 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05P-00000-00&context=) (S.C.C.). The principles include the following:

1. a vehicle is an immediate hazard in circumstances where the oncoming driver is required to take a sudden or violent action to avoid threat of the collision if the servient driver fails to yield the right-of-way: *Raie* at 406.
2. it is the movement of the servient vehicle into the through street in the absence of an immediate hazard that gives it the right-of-way, rather than its mere presence at the stop sign; *Keen* at 360.
3. consideration is given to the interval of time elapsing to allow a careful oncoming driver to realize that the servient driver is making an entry resulting in the danger of collision; *Keen* at 360.
4. the hazard is immediate if a reasonable danger of such future collision may be apprehended at the time of the proposed entry by the servient driver; *Keen* at 364 and *Raie at* 405.
5. if the dominant driver has become aware, or should become aware that the servient driver has entered the intersection in disregard of the law, then a duty arises to take sufficient steps to avoid the accident was; *Keen* at 367.

**66**  In *Keen,* Mr. Justice Davey adopted the following definition of "immediate hazard" at 359:

[A]n approaching car is an immediate hazard if the circumstances are such as to require the driver of that car to take some sudden or violent action to avoid threat of a collision if the servient driver fails to yield the right-of-way. ...

**67**  Mr. Justice Harris (as he then was ) in *Knight v. Li*, [*2011 BCSC 184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G33M-00000-00&context=) said:

[12] Note that it is the action required of the servient driver to avoid the *threat* of collision - and not to avoid the collision itself - which is relevant to assessing whether the dominant driver constituted an immediate hazard.

**68**  The observations of Davey J.A. at 359 are pertinent to the facts of this claim:

... "Speed and distance generally determine what constitutes an immediate hazard", or as it was put by Cannon J., in *Swartz Bros. Ltd. v. Wills*, [*[1935] 3 D.L.R. 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1BS-00000-00&context=) at 279, [*[1935] S.C.R. 628*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1BS-00000-00&context=) at p. 632: "...distances must be translated into time in order to determine what are the rights of the parties."

But having said that, I must add that in most automobile collision cases estimates of time, speed and distance do not lend themselves to exact mathematical analysis, because the estimates are by their very nature uncertain [...]

In my opinion s. 165 [now s. 175], dealing with rights-of-way of drivers proceeding along through streets, and stopped at stop signs on intersecting streets, is to be applied broadly from the point of view of the motorist sitting in the driver's seat, and not meticulously by a Judge with the benefit of afterthought. The situation confronting a motorist, even one waiting at a stop sign, is not a static, but a fluid one, calling for quick appreciation and judgment. A driver waiting at a stop sign ought not to enter a through street unless it is clear that oncoming traffic does not constitute an immediate hazard. Excessive refinement of what traffic is an immediate hazard will defeat the purpose of the right-of-way regulations contained in s. 165 [now s. 175], and make them an inadequate and confusing method of regulating traffic at intersections on through streets.

**69**  It is the driver in the plaintiff's position who must yield the right of way if the Van was so close as to constitute an immediate hazard. The plaintiff was obliged to delay his entry into the Intersection if the Van was so close that there was a threat of a collision.

**70**  The defendants rely on the decision of Barrow J. in *Burgess v. Fisher*, [*2009 BCSC 1766*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24YS-00000-00&context=) and *Raie* for the proposition that the point at which the determination of whether the through travelling vehicle is an immediate hazard is the moment before the servient vehicle begins to encroach on the through vehicle's lane of travel. Barrow J. based this proposition on the discussion of a left turning vehicle under what is now s. 174 of the *MVA*. In *Raie*, the Court of Appeal said that the *punctum temoris* is not when the left turning vehicle is stopped and waiting for traffic to clear, but the moment when the turning vehicle commences the turn.

**71**  *Raie* was decided under what is currently s. 174 of the *MVA*, and involved two vehicles travelling in opposite directions on the same road. That case addresses the responsibility of the vehicle turning left in front of the oncoming vehicle. Since the decision in *Burgess*, the Court of Appeal in *Salaaan v. Abramovic*, [*2010 BCCA 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62YV-00000-00&context=) has made the distinction that s. 174 principles do not apply directly to a case involving a "T" intersection because there is no possibility of traffic approaching from the "opposite direction". The Court is focused on the application of s. 175(1):

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.

**72**  Section 186 provides that a driver must stop his vehicle at the marked stop line if there is a stop sign at an intersection.

**73**  Therefore, s. 175(1) directs that the point at which the assessment of the hazard is to be made is after the vehicle entering the highway has begun its movement from the stop line into the intersection.

**74**  Having stopped at the stop line, s. 175(1) suggests that a motorist about to enter a highway is entitled to proceed if it is determined that there is no traffic on the highway that constitutes an immediate hazard

**75**  In this case the distinction is relevant only in so far as the Taxi travelled 5.35 m from the stop line to the fog line marking the beginning of the travelled portion of Highway 97 during which time it was in Mr. Sharp's view.

**Other Duties**

**76**  If a driver becomes the dominant driver, as provided for in the *MVA*, then that person must continue to use reasonable care to avoid a reasonably foreseeable collision, notwithstanding the existence of the right-of-way. The Supreme Court of Canada in *Walker* at 461 described the duty:

... 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*.

[Emphasis added.]

**77**  The decision in *Salaam* at para. 33 restates the obligations of the dominant driver:

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

**78**  The *Salaam* decision is apposite to the analysis of this claim, in part because of the similarity in the circumstances. In *Salaam* the facts were:

[4] When the defendant was approximately 450 feet from the Intersection, he noticed the plaintiff's car approaching the stop sign on 120 Street. Its left turn signal was flashing. The plaintiff did not completely stop at the stop sign, but crept forward into the intersection. The defendant was about 350 feet away when he realized that the plaintiff's vehicle was proceeding "with hesitations" into the right-hand northbound lane of Scott Road, where she "paused", but did not stop.

**79**  The Court of Appeal recognized that s. 175 applies to circumstances where there are vehicles entering highways from side streets, as opposed to left turning vehicles facing traffic approaching from the opposite side of the intersection, which engages s. 174 of the *MVA. Salaam* was a case involving a "T" intersection collision as is the case in this action. The plaintiff in that case was turning left to go south after crossing two northbound lanes of 120th Street in Surrey; the plaintiff was struck by an oncoming vehicle.

**80**  I conclude that s. 175 required the plaintiff to assess the risk of an immediate hazard at the time he is about to leave the stop line. In this case, the duty on the through highway driver was to take notice of the vehicle entering the highway as it left the stop line and not at the time it crosses the "fog line". The plaintiff was seen by the defendant Sharp at the stop line and as he left the stop line. This is a different obligation than exists when a driver is turning left from a through street and collides with a vehicle coming from the opposite direction.

**81**  In *Salaam* the Court said at para. 18-21:

**Common Law Duty of Care**

[18] While the statutory provisions provide guidelines for assessing fault in motor vehicle accident cases, they do not, alone, provide a complete legal framework.

[19] In *Carich v. Cook* [*(1992), 90 D.L.R. (4th) 322*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61WK-00000-00&context=) at 326, [*9 B.C.A.C. 112*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61WK-00000-00&context=), this Court considered liability for an accident that occurred when a vehicle turning left on a four-lane road was in collision with a vehicle proceeding in the opposite direction, in the outside lane. While the Court was considering what is now s. 174 of the *Motor Vehicle Act* rather than s. 175, it is my view that the opinion expressed by Lambert J.A. has some relevance to this case:

The question as a driver turns left is whether there is any vehicle in any approaching lanes that constitutes an immediate hazard. If there is, the turn should not be made. If there is not, then the turn can be made and of course, care should be taken throughout the turn and as each new lane is entered to make sure that the situation as it was assessed when the turn started has not changed in the meantime. But that care is more a matter of the ordinary duty of a reasonably careful driver and not a duty, in my view, imposed specifically by s. 176 [now s. 174] which, in my view, states the situation when the turn is commenced. Once the turn is commenced both of the drivers in that situation, the one who is doing a left turn and the ones that are approaching straight ahead in a situation where a vehicle could turn in front of them, all must keep a proper look-out.

[20] To the extent that there is a need to refer to a section of the *Motor Vehicle Act* for this proposition, one can turn to s. 144, which requires drivers to drive with "due care and attention" and to have "reasonable consideration for other persons using the highway".

[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.

**82**  If the defendant Sharp is found to be the dominant driver in this case, the opinion of Groberman, J.A. will inform the court on assessing the issue of the parties' non statutory duties of care. He said at para. 25:

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

**The Defendant Sharp's Speed**

**83**  The first issue to be resolved is which driver was in the dominant position at the time the plaintiff left the stop line. It appears that neither party saw the other until immediately before the impact and neither recognized the other as presenting a hazard to continuing in their intended direction of travel.

**84**  Estimates of time, speed, and distance are vulnerable to error in the best circumstances and even more so in the prelude to, and aftermath of, a traumatic event such as this accident.

**85**  The plaintiff's memory of the incident is unreliable due to several factors, including the influence of information given to him by others prior to the date when he recovered his recollections of the incident. In addition, the velocity with which the accident happened, the catastrophic consequences to the plaintiff, some inconsistencies between his discovery evidence and testimony at trial all lead me to conclude that his report of the events may not be reliable. I did not form the view that the plaintiff was intending to mislead the Court; he seemed to be doing the best to explain his current understanding of the accident.

**86**  The defendants did not testify at trial and their evidence is derived solely from those parts of the examination for discovery the plaintiff chose to read into the record.

**87**  The engineering analysis of time, speed and distance is hoped to be more reliable than the observations of lay persons involved as participants or witnesses. However, engineering opinion evidence is heavily dependent on proof of certain facts and ranges of measurements. This explains in part challenges to the accident reconstruction analyses of Dr. Toor and Sgt. Nightingale.

**Dr. Toor and Sgt. Nightingale**

**88**  The opinion evidence of the speed of the Van occupied much time at trial. The defendant Sharp acknowledges that he was most likely exceeding the speed limit but only by a marginal amount. The defence did not call accident reconstruction opinion evidence although a report and data analysis were prepared for them and referred to in the cross-examination of Dr. Toor. The author of that report, Mr. Din, obtained data and information about the damage sustained by the vehicles which were relied upon by Dr. Toor.

**89**  The defence thoroughly cross-examined Dr. Toor and Sgt. Nightingale in an effort to challenge their conclusions regarding pre-impact speed of 119 km/h (Sgt. Nightingale) and 135 km/h (Dr. Toor) of the defendant Sharp's vehicle before the collision.

**90**  Dr. Toor acknowledged that accident reconstruction analysis is not an exact science. His principal approach relied on his linear momentum analysis with secondary reliance on damage analysis.

**91**  The defence argued that these estimates were wholly unreliable and should be rejected, or in the alternative given little weight in the assessment of the defendant Sharp's speed. The plaintiff argued that if the defendant Sharp was travelling less than 135 km/h he ought to have foreseen the danger and been able to take steps to avoid the collision. The corollary to that argument is that when the plaintiff commenced making his turn onto Highway 97, the Van was not a hazard. The plaintiff asserts that if the Van's speed had been closer to the posted speed limit, the defendant Sharp could have taken evasive measures and avoided the accident. Dr. Toor opined that if the Van had been travelling at as little as 110km/h, the Taxi would have moved through and beyond the defendant Sharp's lane of travel by 8 m.

**92**  The scientific and mathematical analyses used to establish the speed of motor vehicles prior to a collision depend on many variables and engage the professional judgment and knowledge of the expert. Dr. Toor indicated that he used both linear movement analysis and damage momentum analysis in order to estimate the defendant's speed. The damage momentum analysis was used to corroborate the linear movement analysis. In an ideal situation, Dr. Toor suggested that the results from each of these analyses would be identical.

**93**  The Taxi was equipped with an airbag control module designed to record and store data in the event of a collision via Crash Data Retrieval (CDR) software. The data was downloaded and examined by Dr. Toor. The speed change in the forward direction was recorded to have been 8.8 km/h, which significantly underestimated the collision severity.

**94**  Dr. Toor employed a secondary analysis described as "damage momentum" taking into account the direction of force, damage sustained by the vehicles and post impact displacement direction to produce a secondary conclusion. The linear momentum analysis and damage momentum analysis produces similar but not identical results.

**95**  He assessed the post impact trajectory of the Taxi and allowed for a range of possibilities in estimating the exact deceleration rate. Dr. Toor noted that this analysis can be strained to conform to the CDR results. He concluded that there was a similarity between the linear and damage momentum diagrams that provided a higher degree of confidence in the calculated speeds and corresponding results.

**96**  The defence argues that Dr. Toor's opinion is flawed and should be given little value because:

1. in analyzing the CDR from the Airbag Control Module he used a different velocity change than contained in the CDR;
2. parts were missing from the Van which affected the measurements of crushed data essential to the analysis;
3. the Taxi was unavailable for examination, which also affected the measurements for the crushed data;
4. the lack of stiffness data to accurately analyze the damage for the make and model of the Taxi, required Dr. Toor to make an estimate as to stiffness, thereby weakening his opinion;
5. Dr. Toor used a wider measure of damage for the Van than was used in the NHTSA data. He acknowledges that a narrower width would result in a lower speed;
6. There was a possibility that the plaintiff's foot may have depressed the gas pedal producing an outside force affecting his conclusion about the speed change on impact. If this scenario occurred, Dr. Toor's estimate of speed would have been less;
7. Dr. Toor relied on the assumption that all four of the Van's wheels locked up on collision and that if the lockup was restricted to the rear wheels, the Van's speed may have been 116.9 km/h on the linear momentum analysis.

**CDR Change in Velocity**

**97**  Dr. Toor said that his analysis of speeds was not dependent on the data recovered from the CDR. He said the CDR data is used to validate his findings but that his principle conclusions are derived from the linear momentum analysis.

**98**  Dr. Toor said that side collision data derived from the CDR understates the speed change in a lateral collisions. He noted that the data derived from the CDR analysis of the Taxi's speed change was 8.8 km/h. He used a speed change of 22.1 km/h because, in his view, the 8.8 km/h report understated the force of collision. He said that his approach was consistent with the evidence of the actual damage to both vehicles. He said that his experience and skill persuaded him that the change in velocity was more likely consistent with his use of 22.1 km/h.

**99**  I accept that the CDR data recovery is not determinative of Dr. Toor's opinion and operated as a collateral measure that was consistent with his other calculations. I also accept that Dr. Toor, in interpreting the CDR data, adequately explained his reliance on the speed change of the impacted vehicle was appropriate given the parameters of his analysis.

**Unavailability of the Taxi for Examination**

**100**  Dr. Toor acknowledged the fact that the plaintiff's vehicle was not available for examination deprived him of the ability to personally observe and assess the damage. Dr. Toor noted that the actual measurements of damage were taken by the defence's engineer and he incorporated that data in his crush analysis. Nevertheless, the absence of actual measurements leads to some uncertainty.

**101**  Dr. Toor was questioned about research data from Mr. Germaine, a recognized authority and researcher in the field of crash analysis. Dr. Toor acknowledged that there were possible variations resulting from the studies done by Mr. Germaine, but that he did not view the potential of lower stiffness measurements as necessarily producing a lower velocity for the subject vehicle.

**Width of Damage**

**102**  Dr. Toor responded to questions about the width of the Van and the distortion of his conclusions arising from that discrepancy based on the NHSTA data. Dr. Toor denied that the affect of the NHSTA study using narrower vehicles undermined his conclusion. He said that his conclusions would not change as long as they were consistent with his physical observations of the damage. Although a narrower width would result in a lower speed estimate, that conclusion arises only if it was consistent with the physical observations.

**Outside Forces**

**103**  Dr. Toor also agreed that the path of the Taxi after impact suggested the existence of some force other than the Van striking the plaintiff. He agreed, for example, that the plaintiff may have accelerated after impact, which would have been the type of external force changing the trajectory of his car. If the plaintiff's accelerator had been depressed, then the analysis of speed would be overstated.

**104**  No evidence was obtained from the plaintiff to suggest that his foot had been on the gas pedal or depressed the gas pedal following the collision. While the defendant speculates that this was a possibility that would have reduced Dr. Toor's estimate of the defendant Sharp's calculated speed before impact, Dr. Toor did not have any evidence to support the suggestion. The indication of another force affecting the movement of the Taxi was not sufficiently clear that I should reduce the weight to be given to Dr. Toor's conclusion.

**Two Wheel Lockup vs. Four Wheel Lockup**

**105**  The defence argued that Dr. Toor's assumptions relied on the proposition that all four tires on the Van locked up. The wind crush data produced an estimate of the Van at 134.1 km/h in the mid-linear momentum analysis. He argued that if one assumed that the rear wheels were not locked up the same analysis might produce speeds of 116.9 km/h to 121 km/h. Dr. Toor acknowledged that a difference in the estimated speed would occur if the assumption of full lockup did not occur. However, Dr. Toor did not agree that the evidence disclosed that only two wheels had locked up. He said he took into consideration the possibility that the front right tire was deflated.

**106**  Sgt. Nightingale opined that the defendant Sharp's speed was a minimum of 119 km/h and acknowledged using a coefficient of friction of 0.74 rather than 0.625 used by Dr. Toor. Sgt. Nightingale relied on his own measurements to in calculating the appropriate co-efficient of friction but acknowledged that if he had used the same coefficient of friction used by Dr. Toor, his estimate of the Van's speed at the time of impact would have been 20% higher. He also acknowledged that he did not have pre-impact physical data from the vehicles and confirmed that ABS brakes do not generally make tire marks - thus further undermining his opinion.

**107**  I observed that Dr. Toor used a conservative coefficient of friction in his analysis of speeds based on a paper by C.H. Warner. His use of a lower coefficient of friction produced an estimate for the defendant Sharp's speed greater than estimated by Sgt. Nightingale because the physical evidence indicated that defendant Sharp was decelerating for a greater distance (13 m) than used by Sgt Nightingale; he believed this discrepancy resulted in Sgt. Nightingale underestimating the speed of the Van.

**108**  The defence argued that if the Van had not been braking post impact, as assumed by Sgt. Nightingale, his estimate of pre-impact speed would be lower. The defendant testified that he did not manage to apply the brakes of his vehicle before impact and Mr. Tuckey did not see illuminated brake lights on the Van before impact.

**109**  There is a significant variation in the expert's opinions as to the defendant Sharp's pre-impact speed that arises from the assumptions and data used to form their opinions. I accept that both experts were careful and candid in their analyses and that Sgt. Nightingale speed estimate represented a minimum rate based on conservative estimates.

**110**  Dr. Toor commented that the RCMP report was not cross referenced with his other analysis involving damage and crush considerations; he said that the results of his analysis correspond with two additional methods of analysis which gives a higher degree of assurance that the Van speed was between 130 km/h and 138 km/h. Both opinions are helpful in assessing the defendant Sharp's speed but neither are determinative.

**Other Evidence of Speed**

**111**  Speed is an important feature in the evidence because it influences the analysis of whether the Van was an immediate hazard at the time the plaintiff moved off the stop line. In my view the observations of Mr. Tuckey are most helpful in resolving the uncertainty relating to the defendant Sharp's pre-accident speed. Mr. Tuckey's estimates appeared honest and carefully calculated, notwithstanding the fact that there were variances between his pre-trial statements, his evidence in chief, and in cross-examination.

**112**  To assist in the determination of the Van's speed leading up to the collision, I have considered the evidence of Mr. Tuckey, including his estimates of speed and distance in the space between the return lane from the weigh scale and the Intersection.

**113**  Mr. Tuckey said that the defendant Sharp completed passing his semitrailer at the point where the return lane from the weigh scale merged with Highway 97, which according to Exhibit 2 is approximately 500 m from the Intersection.

**114**  Mr. Tuckey testified that the distance between his semitrailer and the Van, after the defendant Sharp passed the semitrailer, grew to between 115 m - 175 m. I have concluded that the defendant Sharp's speed exceeded Mr. Tuckey's speed over this distance and that his vehicle travelled between 115 m - 175 m beyond the Tuckey truck by the time of impact with the Taxi.

**115**  Under cross examination, Mr. Tuckey estimated that the Van was only 50 m from the Intersection when the Taxi pulled away from the stop line. That estimate cannot be correct given the uncontroverted evidence that the Taxi travelled in the range of 3.6 s - 4.2 s from the stop line to the point of impact. Furthermore, at a minimum speed of 95 km/h, the Van would have travelled between a minimum of 97.6 m - 124 m from the beginning of the Van's movement across the highway to the point of impact. In addition, the defendant Sharp testified at his examination for discovery that he observed the Taxi moving for 10 s before impact; he also said he did not see the Taxi on the roadway until immediately before the collision.

**116**  Mr. Tuckey was referred to his written statement to the Calgary police signed July 9, 2008 in which he confirmed that the Van had passed him near the weigh scale and did not return to the slow lane.

**117**  I accept that the Van finished passing Mr. Tuckey at about the point of re-entry to the highway from the weigh station, approximately 500 m from the Intersection. I have concluded that Mr. Tuckey had slowed before the weigh scale to about 85 km/h and when the Van passed him, Mr. Tuckey's speed had returned to 95 km/h, expanding the gap between the semitrailer and the Van in the range of 115 m - 175 m at the point of impact with the Taxi.

**118**  In summary:

1. The minimum increase in the gap between Mr. Tuckey's vehicle and the Van at the time of impact was 115 m;
2. The Van travelled 500 m from the weigh scale merge point to the collision in the same time that the Tuckey vehicle travelled a maximum 385 m (500 m minus 115 m) by the time of impact with the Taxi;
3. To create the gap between the vehicles, the Van moved faster than the Tuckey vehicle by at least 115 m over 500 m;
4. The speed of the Tuckey vehicle was 95 km/h and would have travelled 385 m in 14.58 s;
5. The Van travelled an additional 115 m (a total of 500 m) in the same 14.58 s. Travelling 500 m in 14.58 s results in a speed of 123 km/h. If the gap between the Van and the Tuckey truck was 150 m at impact, then the Van would have been travelling at 136 km/h at the point of impact.

**119**  It does not appear that the defendant Sharp was able to slow his vehicle by some measure before impact; Mr. Tuckey's estimated that at impact his truck was approximately as little as 115 m from the collision. These estimates of distance and speed provide some confirmation of the opinions given by Dr. Toor and Sgt. Nightingale in estimating the defendant Sharp's pre-impact speed exceeded the posted limit.

**120**  There is no perfect mechanism for determining the actual speed of the Van at impact with the Taxi. I am required to decide that fact on the balance of probabilities. The reliability of opinions estimating the speeds of vehicles based on complex calculations and assumed facts are, admittedly subject to a range of possibilities. Where there has been a loss of physical evidence, limited data, and estimates, the results can vary widely. I observed that Dr. Toor used three different analyses to support his conclusions. Although he acknowledged uncertainties and several assumptions, he achieved some consistency in the results derived from the linear movement analysis, damage analysis and review of the CDR data. I appreciate that the estimates provided by the experts reflect an effort to reach a principled and well reasoned scientific analysis. The uncertainties illustrated the assumptions used by Dr. Toor and Sgt. Nightingale cast doubt as to the accuracy of their opinions; however, their evidence gives me considerable assurance that the speed of the Van was significantly more than 95 km/h and possibly as much as 135 km/h.

**121**  The range of estimates of the defendant Sharp's speed at the point of impact are:

1. between 85 km/h (defendant Sharp testified at the examination for discovery that he was travelling 85 km/h)
2. between 123 km/h and 136 km/h (based on Mr. Tuckey's evidence, that he was moving at 95 km/h)
3. 135 km/h suggested by Dr. Toor
4. 119 km/h estimated by Sgt. Nightingale

**122**  I have attached significant weight to the opinions of Dr. Toor and Sgt. Nightingale coupled with the estimates of Mr. Tuckey and the distances disclosed in the photographic evidence. Although I do not accept the narrow opinions provided by either expert, their analyses are helpful in reaching a conclusion. I have made allowances for the uncertainties and some of the data incorporated in Dr. Toor's analysis in finding that his estimate likely exceeded the defendant Sharp's actual speed. The evidence satisfies me that the defendant Sharp's pre-accident speed was between 123 km/h and 136 km/h. Taking into account all this evidence, I consider the defendant Sharp's most likely pre-impact speed was 123 km/h.

**123**  I accept Dr. Toor's opinion that between 3.6 - 4.2 s elapsed from the time the Taxi left the stop line and the collision happened. Sgt. Nightingale testified that 2.27 s likely elapsed between the time the Taxi left the stop line and reached the fog line on the west side of Highway 97.

**124**  If the defendant Sharp had travelled at 90 km/h, he would have travelled between 90 m - 105 m after the plaintiff left the stop line. At 123 km/h the defendant Sharp would have travelled between 123 m - 144 m before impact.

**125**  Dr. Toor's opinion that a motorist will detect and identify a hazard on the road within 1.1 s of its appearance, and a further 0.7 s will be required to implement a decision in response to the hazard is greater than Sgt. Nightingale's estimate of the perception response time of 1.5 s. Accordingly, the defendant Sharp would have travelled 61.5 m during the perception response time mentioned by Dr. Toor and 51.2 m based on Sgt. Nightingale's use of the lower estimate. Based on Sgt. Nightingale's opinion, I have concluded that skidding to a stop while travelling at 123 km/h would require an additional 80.46 m; the total distance required to stop the Van would have been 142 m (based on Dr. Toor's estimate) and 132.7 m (based on the Nightingale estimates).

**Hazard**

**126**  The defendant Sharp observed the plaintiff had stopped at the stop line for several seconds (he estimated 10 s) as he approached the Intersection. The plaintiff proceeded for 3.6 s - 4.2 s to the point of impact. At 123 km/h the defendant Sharp was travelling at 34.16 m/s and would have travelled approximately 126 m during the plaintiff's travel to the point of impact.

**127**  Section 175 of the *MVA* describes the obligation of a driver who has, at first, stopped in compliance with s .186. Section 186 provides that a driver must stop his vehicle at the marked stop line if there is a stop sign at an intersection. Having stopped at the stop line, s. 175 suggests that a motorist about to enter a highway is entitled to proceed if it is determined that there is no traffic on the highway that constitutes an immediate hazard. I conclude that s. 175 required the plaintiff to assess the risk of an immediate hazard at the time he is about to leave the stop line. In this case, the duty on the through highway driver was to take notice of the vehicle entering the highway as it left the stop line and not at the time it crosses the "fog line". The plaintiff was seen by the defendant Sharp at the stop line and after he left the stop line. This is a different obligation than exists when a driver is turning left from a through street and collides with a vehicle coming from the opposite direction.

**128**  The defendant Sharp, travelling 33 km/h over the posted limit, would have reduced the time available to take evasive action or stop and would not have collided with the plaintiff in any event. It seems to me that the defendant Sharp, having seen the plaintiff start before he left the stop line and after, neglected to keep a proper lookout for the emergency that was developing in front of him.

**129**  Although Dr. Toor suggested that the Taxi might not have become a visible hazard to the defendant Sharp, I am satisfied on the evidence that the defendant Sharp was aware that the plaintiff was proceeding on to the highway from the moment he left the stop line. At that point, the defendant Sharp was, or ought to have been, aware that the plaintiff was proceeding in disregard of the defendant Sharp's right of away.

**130**  The plaintiff was not entitled to leave the stop line and enter the Intersection unless there was no risk of a collision with through traffic. Any doubt about safety of a vehicle moving into an intersection in the face of oncoming vehicle on the through road is to be resolved in favor of the driver in the defendant's position.

**131**  Neither the defendant Sharp nor Mr. Tuckey had any difficulty in identifying the bright yellow Taxi as it was stopped on Meadowlark Road. The defendant Sharp's discovery evidence was equivocal as to what he saw before impact. He first testified that he saw the Taxi leaving the stop line and followed it across his path, but then he indicated he had not seen the Taxi after it left the stop line. At that juncture he ought to have been aware the plaintiff might cross over into his lane.

**132**  In the absence of evidence from the defendant Sharp on the point, it is more difficult to assess his appreciation of the hazard presented by the plaintiff. It was clear to me that the plaintiff did not see the Van until he saw the grill "milliseconds" before impact.

**133**  The plaintiff was obligated to ensure that he did not start his turn when the Van was so close that some sudden action would be necessary to avoid the threat of a collision. The plaintiff did not see the Van and accordingly could not have formed the opinion that the Van was, or was not, a potential hazard or that it was safe to enter Highway 97.

**134**  I must still consider whether, in fact, the defendant Sharp was so close to the Intersection to require the plaintiff to yield the right-of-way. The plaintiff relies on several decisions from this Court in arguing that the plaintiff was the dominant driver and entitled to the right-of-way.

**135**  The facts in *Johel v. Insurance Corporation of British Columbia*, [*2012 BCSC 166*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1S0-00000-00&context=) are distinguishable from this case where the Court found that an unidentified driver on the roadway had overtaken another vehicle. In *Johel,* the vehicle was not a hazard at the time the plaintiff entered the highway because it had been overtaking another vehicle when unsafe to do so.

**136**  In *Leask v. Nat Mann Lease*, [*[1986] B.C.J. No. 2092*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JSC5-M2P3-00000-00&context=) (S.C.), the wet road conditions contributed to the defendant's failure to stop in time to avoid the collision. It is clear that the trial judge concluded that when the plaintiff entered the through road, the defendant was not so close as to constitute an immediate hazard. In my view, that is not the evidence in this case.

**137**  In *Kamoschinski v. Hein*, [*[1989] B.C.J. No. 909*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-FJDY-X1KK-00000-00&context=) (Co. Ct.) the defendant was travelling 40% over the speed limit and was a considerable distance away from the intersection when the plaintiff turned into the road. In *Kamoschinski*, the plaintiff had observed the defendant driver as the defendant was accelerating. The Court concluded that at the time just before proceeding into the intersection, the defendant's vehicle was not so close as to constitute an immediate hazard under the prevailing conditions. The Court noted that the plaintiff was entitled to assume that the defendant's vehicle was travelling within the speed limit and that it was unlikely the defendant would not accelerate as it neared the intersection. The Court concluded that there was no reasonable apprehension of danger as the plaintiff driver entered the intersection and therefore the defendant was not an immediate hazard.

**138**  These facts are not apposite to this case where the plaintiff did not see the Van or make any judgment about the immediacy of the hazard it might pose for him. There is evidence that the defendant Sharp was accelerating, but it was well known that vehicles regularly exceeded the speed limit in this location.

**139**  In *Rollins v. Lovely,* [*2007 BCSC 1752*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21X8-00000-00&context=), Dickson J. concluded that the through driver was distracted while looking at his cell phone and did not break or skid before impact. The Court noted that when a driver concludes reasonably that there is no immediate hazard posed by oncoming traffic and commences to cross a multilane road, they must still keep a proper lookout as each lane is crossed.

**140**  Justice Dickson stated that if an approaching car does not present an immediate hazard when the manoeuvre is commenced, but later creates one by unreasonable conduct such as speeding, the approaching driver will be held responsible for the ensuing collision: See *Devidi v. Filatow*, [*1998 CanLII 6405*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S2HX-00000-00&context=) (B.C.S.C.).

**141**  The defence relies on *Godrich v. Holden,* [*[1993] B.C.J. No. 2119*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B10V-00000-00&context=), [*1993 CanLII 778*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B10V-00000-00&context=) (B.C.S.C.) to support the proposition that even where the driver on the through highway sees a vehicle stopped at a stop sign, it is reasonable for that person to expect that the driver would not break the law and therefore a through driver is not negligent in failing to anticipate that the merging driver would cross in front. Nevertheless, in *Cooper v. Garrett,* [*2009 BCSC 35*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0WX-00000-00&context=), Madam Justice Loo confirmed that a motorist exceeding the speed limit in this type of intersection collision will be found negligent if the speed prevented the driver from taking reasonable measures to avoid the collision.

**142**  If the defendant Sharp's speed was 123 km/h, he would have been between 123 m - 143 m away from the Intersection when the plaintiff commenced crossing the highway. The defendant Sharp would have required 142 m to perceive the hazard, respond to the hazard and stop his vehicle. It seems to me that the defendant Sharp was an immediate hazard at or about the time the plaintiff left the stop line.

**143**  The defence rely on *Cooper* as support for the principle that travelling over the speed limit will only constitute ***negligence*** if the driver's speed prevented him from taking reasonable measures to avoid the collision.

**144**  The defence also cite *Burgess,* as well as *Twining v. Huang,* [*[1999] B.C.J. No. 2174*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1J4-00000-00&context=), [*1999 CanLII 1810*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1J4-00000-00&context=) (B.C.S.C.), *Alferez v. Wong*, [*[1994] B.C.J. No. 3319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JCJ5-24RN-00000-00&context=) (B.C.S.C.) as cases involving similar facts in which the Court has assessed liability at 100% against the driver entering the highway.

**145**  In my view, the defendant Sharp was the dominant driver when the plaintiff began to cross Highway 97 and the plaintiff remained the servient driver throughout. When Mr. Currie began his turn from the stop line it is clear that absent a sudden or violent action by Mr. Sharp, there was a reasonable danger or risk of collision from the moment he left the stop line. The plaintiff's ***negligence*** caused or contributed to the accident, which would not have happened if he had kept a proper lookout and deferred to the defendant Sharp's right of way.

**Contributory *Negligence***

**146**  The defendant Sharp was driving in excess of the speed limit as he approached the Intersection, but this fact, alone, does not determine that he was in breach of his duty of care to the plaintiff.

**147**  The defendant Sharp observed the plaintiff at the Intersection leaving the stop line. Why he did not continue to concern himself with the fact that the plaintiff was not surrendering the right-of-way is something of a mystery. Having seen the plaintiff at the stop line in the obviously bright yellow Taxi and observing him leave the stop line, the defendant Sharp failed to act reasonably.

**148**  Mr. Tuckey stated that he could not see any reason why the Van could not have moved over into his lane and avoid the collision, or brought his vehicle to a stop. The defendant Sharp said he had checked his rear view mirror immediately before impact. Mr. Tuckey believed there was time and space for him to change lanes before the Intersection.

**149**  Mr. Sharp was or should have been aware that the plaintiff was proceeding into the Intersection in breach of his right of way. The defendant Sharp had the time and the opportunity to avert the collision if he had been driving less aggressively.

**150**  It is clear that if the defendant Sharp's speed had been as little as 110 km/h, the plaintiff would have cleared the Intersection without incident. Although speed, in itself, is not necessarily a breach of the standard of care I have concluded that the defendant Sharp's speed was more than one third higher than the posted limit and his speed that interfered with his ability to take evasive steps. He would have had more time to react to the hazard and could have avoided the accident by steering and/or braking. In the circumstances he could otherwise have performed those manoeuvres which a reasonably careful and skilled driver might have taken. I have concluded that his lack of attention to the Taxi after it left the stop line, coupled with his excessive and unsafe speed, were a breach of his duty of care to the plaintiff.

**151**  This case is distinguishable from *Burgess*. In that case, the defendant entered the highway when his view of traffic was obstructed. Barrow J. said that the defendant was obliged to remain at the stop sign unless he could determine that the approaching traffic did not pose an immediate hazard. The plaintiff reacted prudently as soon as she saw the vehicle crossing in front of her. In this case, there was no obstruction of the roadway to the plaintiff and the defendant Sharp did not react to the plaintiff moving in front of him as soon as he should have. The defendant saw the Taxi move from stopped position, and paid no attention until the collision was imminent.

**152**  Similarly, in *Rackstraw v. Robertson,* [*2011 BCSC 947*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22KP-00000-00&context=) there was no evidence to establish that *the speed of* the defendant's vehicle prevented him from avoiding the accident. The plaintiff had no opportunity to see the defendant until it entered the highway and was unable to take steps to avoid the collision. In that case, the plaintiff had breached his duty by failing to stop at the stop sign, failing to keep a proper lookout and failing to yield to the Robertson vehicle as it entered the highway, all while driving with frosted windows that were not transparent.

**153**  In *Rackstraw,* the Court also indicated that it is only where drivers complied with s. 175(1) that the servient position moves to the driver in the position of the through travelling vehicle.

**154**  In *Salaam,* the Court of Appeal assessed the plaintiff's fault at 75%. The defendant's fault was assessed at 25% for the following reason:

[29] The question in this case is whether the defendant exercised reasonable care in approaching the intersection. When he was 350 feet away, the plaintiff's vehicle started crossing the road and entered into his lane of travel. A reasonable driver would have been put on notice that the plaintiff was not obeying the rules of the road and posed a hazard. A reasonable driver would have exercised increased caution, paid close attention to the plaintiff's vehicle and prepared to stop or to give it a wide berth. Instead, the defendant insisted on his right of way. A mere 100 feet from the intersection, when the plaintiff's vehicle was fully in his lane of travel and still proceeding forward, the defendant changed lanes in an attempt to drive around her. Until the last moment, he maintained his speed. In the best case scenario, if the plaintiff had seen the defendant's vehicle and stopped abruptly, the collision would have been avoided by mere inches. Instead, the plaintiff continued forward, and the defendant's vehicle struck the middle of the plaintiff's vehicle. In the circumstances, the defendant's ***negligence*** contributed to the accident.

**155**  In the circumstances of this case it is hard to imagine why the defendant Sharp, already alerted to the presence of the Taxi at the stop line, and seeing it begin to move without regard for his right of way, did not give more attention to the Taxi and take some measures to avoid the developing risk of a collision as the Taxi moved forward. The defendant Sharp reported looking to his right to see if he could change lanes but was faced with the Taxi in front of him before being able to turn into the right lane.

**156**  In *Salaam* the Court of Appeal said:

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

**157**  The Court then addressed the issue of duty of care:

[34] In applying the "immediate hazard" test in order to determine ***negligence***, the trial judge erred in law. Applying the correct legal test to the defendant's conduct (*i.e.*, the test enunciated in *Walker v. Brownlee*), the defendant had a duty to take care when he approached the plaintiff's car in the intersection, having had ample warning that she was not following the rules of the road. A reasonable driver would not have insisted on right of way, and certainly would not have driven aggressively through the intersection, aiming to pass within inches of the plaintiff's moving vehicle.

**158**  Although I have concluded that the defendant Sharp was in the dominant position he was nevertheless aware of the plaintiff moving from the stop line for several seconds before impact. The plaintiff entered the highway from the stop line, past the fog line, across the right lane, and into the fast lane before seeing the defendant Sharp.

**159**  The defendant Sharp observed the Taxi when he was about 1/2 km or 1 km from the Intersection. He did not see the Taxi come to a complete stop, but observed the vehicle continually. The defendant Sharp was able to judge the Taxi's speed; it moved slowly from the stop line and gradually pulled out into the slow lane across the fast lane to the point of impact.

**160**  During the time the defendant Sharp was aware of the Taxi, he took no evasive action, and did not apply his brakes or sound his horn. There was no reliable explanation why the defendant Sharp could not have made an effort to enter the slow lane and avoid the collision.

**161**  It was difficult to comprehend why the defendant Sharp did not take some evasive or defensive steps during the time he saw the plaintiff moving from the stop line. There were no visual obstructions affecting his view of the Taxi. He seems to have seen the Taxi from over 300 m from the Intersection; this is not a case where the defendant was prevented from seeing the plaintiff as a hazard until the instant before the collision.

**162**  The defendant Sharp argued that the assessment of the plaintiff as a hazard could not occur until the plaintiff had crossed the fog line; this may be germane to the right of way issue. The issue of Mr. Sharp's perception of the Taxi before it crossed the fog line is important to the assessment of his ***negligence*** notwithstanding he acquired the right of way. In this case the defendant Sharp did not testify and did not explain why he did not respond or to take steps to avoid the collision or lessen the impact and I am left to resolve the issue with only the confusing answers given to questions on his examination for discovery.

**163**  There was no evidence that the defendant Sharp was relying on his right of way as set out in s. 186 of the *MVA* in continuing toward the Intersection while the Taxi started crossing the highway.

**164**  The defendant Sharp might have been aware that the plaintiff was a hazard for as many as 4 seconds before impact. It is difficult to imagine what the he was thinking during the time the he was proceeding toward the Intersection at the same time the plaintiff was moving into the Highway.

**165**  Mr. Weber said that he perceived that it was safe to cross the Intersection at the time the plaintiff crossed the stop line. Mr. Weber had a clear view of the semitrailer and the Van. This is some evidence to support the plaintiff's claim that when he left the stop line the Van did not appear to be a hazard.

**166**  Mr. Tuckey believed that the defendant Sharp had time and opportunity to change lanes and avoid the collision.

**167**  It may be that the defendant Sharp's speed, almost 30 km/h over the posted limit contributed to the misapprehension of Mr. Weber about the safety of the plaintiff commencing the crossing.

**168**  The question I must answer is whether a reasonable driver in the defendant Sharp's position would have been put on notice that the plaintiff was not obeying the rules of the road and ignoring the defendant's right of way with insufficient time to take steps to avoid the collision.

**169**  In my view, the plaintiff was not keeping an adequate lookout or paying sufficient attention to the roadway as he proceeded from the stop line. The defendant Sharp had the Taxi in view for some time before it crossed the fog line; he failed to appreciate that a collision was likely to occur unless he took some evasive action.

**170**  I conclude that defendant Sharp was not keeping a proper lookout and that due to his speed and inattention to the unfolding situation clearly visible in front of him, he deprived himself of the chance to take steps to avoid the collision or to reduce the severity of the impact. Although the Van was the dominant vehicle, the evidence satisfies me that the defendant Sharp should have recognized that the Taxi had failed to yield the right of way in sufficient time to take measures to avoid the collision. The engineering evidence is that the plaintiff's vehicle was moving from the stop line for as many as 4.2 s before impact and not 10 s as suggested by the defendant Sharp.

**171**  The experts opined that to detect and identify a hazard and implement a decision in response to the hazard would take approximately 1.5 s to 1.8 s; Sgt. Nightingale estimated this interval at 1.5 s. These estimates are averages and do not specifically describe the circumstances facing the parties; it is an estimate based on scientific research presenting a range of possibilities. However, it is likely that the defendant Sharp had between 2.1 s. and 2.7 s. form the first movement of the Taxi to take evasive measures. He did not keep a proper look out in the circumstances of this case.

**Conclusion**

**172**  This is not a case where there is any evidence that the defendant believed that the plaintiff was respecting his right of way and would not move from the stop line into his path of travel. Similarly, this is not a case where the plaintiff is able to say that he misjudged the speed of the defendant (although he may very well have done so) or could otherwise explain why he traveled onto Highway 97 when the defendant was coming so quickly towards the intersection.

**173**  The evidence demonstrates that but for the defendant Sharp's excessive speed toward the intersection, he should have been able to take reasonable measures to avoid the accident. He could have braked and/or changed direction in sufficient time to avoid the collision or significantly lessen the impact.

**174**  In my view, a reasonable driver in the defendant Sharp's position would have been put on notice that the plaintiff posed a hazard and should have exercised caution, and taken steps to avoid the risk that was developing in front of him. He was aware that the plaintiff was entering the Intersection from 3.6 - 4.2 seconds before impact; he had up to 2.1 s and 2.7 s after detecting the danger and deciding on his response to avoid the collision. Instead, the defendant Sharp continued without reducing his speed and deprived himself of the opportunity to take available evasive measures.

**175**  I also find fault with the defendant Sharp for failing to keep a proper look-out after he became aware that the Taxi was moving from the stop line when he was 123 m - 143 m metres away. His failure to maintain a proper look-out is another reason why he did not respond to the Taxi's movement in a timely way. His ***negligence*** contributed to the accident.

**176**  The plaintiff's ***negligence*** is composed of his failure to keep a proper lookout and observe the presence of the defendant Sharp and, as a result of that error, he failed to yield the right-of-way to the defendant and caused this collision.

**Apportionment of Fault**

**177**  Where, as here, the fault of two or more persons combine to cause a loss, liability will be apportioned. Apportionment is governed by the ***Negligence*** *Act*. The relevant provisions are set out below:

s. 1 Apportionment of liability for damages

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

s. 4 Liability and right of contribution

1. If damage or loss has been caused by the fault of 2 or more persons, the Court must determine the degree to which each person was at fault.

...

s. 6 Questions of fact

In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

**178**  The determination of fault depends on the extent of blameworthiness, that is, the degree to which each party is at fault, and not the degree to which each party's fault has caused the loss. The Court assesses degrees of fault not degrees of causation.

**179**  In *Alberta Wheat Pool v. Northwest Pile*, [*2000 BCCA 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=), Finch, J.A. (as he then was), explained the test at paras. 45-46:

In my view, the test to be applied here is that expressed by Lambert, J.A. in *Cempel*, *supra*, and the Court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each.

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

**180**  In *Aberdeen v. Township of Langley, Zanatta, Cassels,* [*2007 BCSC 993*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XT-00000-00&context=); reversed in part in *Aberdeen v. Zanatta*, [*2008 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RY-00000-00&context=), Groves J. enumerated factors that can be used in assessing relative degrees of fault under the ***Negligence*** *Act*. At para. 62 he endorsed the factors in assessing relative degrees of fault set out by the Alberta Court of Appeal in *Heller v. Martens*, [*2002 ABCA 122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JYYX-63KP-00000-00&context=) as follows:

1. The nature of the duty owed by the tortfeasor to the injured person ...
2. The number of acts of fault or ***negligence*** committed by a person at fault ...
3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose ***negligence*** comes as a result of the initial fault ...
4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy ... Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis ...
5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy ...

[Authorities omitted]

**181**  Groves J. added the following at para. 63:

1. the gravity of the risk created;
2. the extent of the opportunity to avoid or prevent the accident or the damage;
3. whether the conduct in question was deliberate, or unusual or unexpected; and
4. the knowledge one person had or should have had of the conduct of another person at fault.

**182**  I have considered the comparative blameworthiness and the relative degree by which each driver departed from the standard of care expected of them in the circumstances. The various factors I have considered are the nature of the departure from that standard of care, the magnitude, and the gravity of the risk each of them created.

**183**  In my view the plaintiff was obliged to yield the right-of-way and failed to do so, likely because he did not see the Van which was clearly visible. The defendant Sharp travelled at a speed more than one third above the limit and failed to take any timely measures to avoid the collision. The defendant Sharp also failed to keep a proper lookout and that, combined with his speed, deprived him of the opportunity to avoid the collision. In the end, when he realised that the Taxi was moving in front of him he looked to the right to attempt a lane change but was travelling too fast to be able to change lanes. I conclude that the plaintiff was more blameworthy. I apportion the liability for this collision 75% to the plaintiff and 25% to the defendants.

**184**  The parties will be at liberty to make submissions as to costs. Unless the parties wish to make oral submissions, the plaintiff is to make written submissions, if necessary, within 30 days of this judgment and the respondent shall provide written submissions within 30 days of receiving the plaintiff's submissions.

T.C. ARMSTRONG J.

**End of Document**

[***FFS HK Ltd. v. P.T. 25 (The), [2011] B.C.J. No. 1981***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62HF-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C.A. Wedge J.

Heard: September 7, 2011.

Judgment: October 21, 2011.

Docket: S070952

Registry: Vancouver

**[2011] B.C.J. No. 1981** | 2011 BCSC 1418

Admiralty Action In Rem against The Ship "P.T. 25" and In Personam Between FFS HK Ltd., Plaintiff, and The Owners and All Other Interested in the Ship "P.T. 25", The "P.T. 25", West Coast Fuel Transport Ltd. and I.C.S. Petroleum Ltd., Defendants

(76 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Particular orders — Special orders — For reprehensible or inefficient conduct — Application by plaintiff for award of special costs allowed — Parties were ships anchored in harbour — Heavy fuel oil spilled from plaintiff's ship while bunkered to defendant's fuel barge — Plaintiff was strictly liable for remediation cost and brought action against defendant seeking recourse — Defendant found equally liable after ten-day trial — Plaintiff awarded special costs due to defendant's reprehensible conduct in advancing defence based on unreliable concocted employee statement and advancing baseless claim of privilege in respect of statement — Plaintiff entitled to full recovery of costs rather than based on apportioned liability — *Negligence* Act, s. 3(1).**

**Maritime and admiralty law — Admiralty jurisdiction and practice — Pleadings and procedure — Judgments and orders — Costs — Application by plaintiff for award of special costs allowed — Parties were ships anchored in harbour — Heavy fuel oil spilled from plaintiff's ship while bunkered to defendant's fuel barge — Plaintiff was strictly liable for remediation cost and brought action against defendant seeking recourse — Defendant found equally liable after ten-day trial — Plaintiff awarded special costs due to defendant's reprehensible conduct in advancing defence based on unreliable concocted employee statement and advancing baseless claim of privilege in respect of statement — Plaintiff entitled to full recovery of costs rather than based on apportioned liability — *Negligence* Act, s. 3(1).**

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| Application by the plaintiff, FFS HK Limited, for an order of special costs payable by the defendant, the PT 25. The parties were ships anchored in Vancouver Harbour. A ten-day trial apportioned liability equally between the parties for a large spill of heavy fuel oil from the plaintiff's ship. The spill occurred during a bunkering operation between the plaintiff's ship and the defendant's fuel barge. Under the Marine Liability Act, the plaintiff was strictly liable for the $1 million remediation cost and was entitled to bring an action seeking recourse from the defendant. The plaintiff admitted ***negligence*** on the part of its crew, but sought recovery of its damages on the basis of ***negligence*** by the defendant's barge crew. The defendant denied any ***negligence***. The trial judge found that the parties were equally at fault for the spill and thus equally liable for damages. The plaintiff sought special costs and determination of whether it was entitled to recovery of all of its costs, or apportionment of its costs based on the apportionment of liability.  HELD: Application allowed.  The defendant's conduct was reprehensible and deserving of an award of special costs against them. The defendant ought to have known that its best theory of the case was fundamentally unsound. An expert defence witness prepared elaborate reports based on a concocted statement of events by Randall, an employee of the defendant, which compelled the plaintiff's expert to be present throughout the trial to prepare an expensive rebuttal opinion. The defendant ought to have properly assessed its case following Randall's examination for discovery and concluded it could not reasonably continue to deny liability on the basis of either version of the events offered by Randall. The defendant compounded their reprehensible conduct by maintaining a baseless claim of privilege over Randall's statement until midway through the discovery process. The award of special costs was based on full recovery rather than the apportionment of liability, as the plaintiff was substantially successful in the litigation, taking the reasonable position that the defendants were at least equally liable for the spill. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 14-1(7)

Marine Liability Act, [*S.C. 2001, c. 6*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB21-F57G-S222-00000-00&context=),

***Negligence*** Act, [*RSBC 1996, CHAPTER 333, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B068-00000-00&context=)(1)

**Counsel**

Counsel for the Plaintiff: M. Sachs.

Counsel for the Defendants: P.G. Bernard, Q.C., D.S. Jarrett.

**Reasons for Judgment**

**(Costs)**

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| **C.A. WEDGE J.** |

**I. INTRODUCTION**

**1**  Following a ten-day trial, I issued written reasons apportioning liability between the plaintiff and the defendants for a large spill of heavy fuel oil from the plaintiff's ship, the *Andre*, anchored in Vancouver Harbour (see: [*2010 BCSC 1675*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4FN-00000-00&context=)). The spill occurred on July 4, 2006, during a bunkering operation between the plaintiff's ship and the defendants' fuel barge.

**2**  The plaintiff was responsible for the spill's $1 million remediation cost under the strict liability provisions of the *Marine Liability Act,* [*S.C. 2001, c. 6*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB21-F57G-S222-00000-00&context=) (now repealed). The plaintiff was entitled under the legislation to bring an action seeking recourse against the defendant barge owners for some of the remediation costs.

**3**  The plaintiff admitted ***negligence*** on the part of the ship's crew, but sought recovery of some of its damages from the defendants. The defendants denied any ***negligence*** on the part of the barge crew.

**4**  I concluded that the parties were equally at fault in the spill, and, accordingly, equally liable for the damages.

***Issues***

**5**  Following the judgment, the plaintiff applied for certain costs orders against the defendants. The plaintiff's application gives rise to the following issues:

1. Whether an award of special costs against the defendants is warranted;
2. If special costs are not ordered, whether the plaintiff is entitled to either an award of double costs in light of settlement offers made before trial, or costs at Scale C rather than the normal Scale B costs;
3. Whether the plaintiff should be awarded 50% of its costs, including disbursements, in proportion to the finding on apportionment of liability, or an amount greater than 50%.

**6**  I have concluded the following:

1. Special costs against the defendants are warranted in this case;
2. Due to the nature and conduct of the litigation, the plaintiff should be awarded 100% of its costs and disbursements.

**7**  In light of my award of special costs against the defendants, I have not addressed the issue of double costs or the scale of costs.

**II. SPECIAL COSTS**

***A. The Legal Parameters***

**8**  In *College of New Caledonia v. Kraft Construction Company Ltd.,* [*2011 BCCA 172*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S1KP-00000-00&context=), the Court of Appeal set out a concise summary of conduct attracting special costs, and the role of the trial judge in awarding such costs, at paras. 27-30:

[27] In *Garcia* [*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=), [*45 B.C.A.C. 222*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63HG-00000-00&context=)] this Court confirmed that special costs "are the costs that used to be called solicitor and client costs". They are determined on the same principles as were applied to an award of solicitor and client costs (*Leung v. Leung* [*(1993), 77 B.C.L.R. (2d) 314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F5T5-M236-00000-00&context=), at page 315). Special costs will be awarded if the conduct of a party was scandalous, outrageous or reprehensible.

[28] In *Garcia*, this Court adopted the comments of Chief Justice Esson in Leung that reprehensible conduct "can include ... milder forms of misconduct. It means simply 'deserving of reproof or rebuke'".

[29] As noted by the chambers judge, special costs will not be awarded simply because a party advances an unmeritorious claim. In *Garcia*, this Court expressed the proposition as follow: "... the fact that an action or an appeal 'has little merit' is not in itself a reason for awarding special costs ... Something more is required". In the present case, the judge quoted the relevant passages from Garcia and Hung, [*[2003] B.C.J. No. 499*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S23K-00000-00&context=), and observed that, "[i]t is not sufficient ... that the allegations were wrong".

[30] I agree with the submissions of the respondents that this case presents no point of general significance to the practice because the analytical framework was established by this Court in Garcia. It is left to trial judges to determine whether conduct is worthy of rebuke. Whether this is so, is case specific. In part, that is illustrated by the College's position in this case. It contends the judge erred by awarding special costs because the College pursued a hopeless claim. In deciding whether the judge did so, this Court would not be providing guidance as to what constitutes conduct worthy of rebuke. It merely would be considering whether the alleged factual matrix is based on nothing more than the weakness of the College's claim, a question of fact.

**9**  The Court in *College of New Caledonia* went on to uphold the award of special costs because the trial judge concluded that while the College's claim was indeed weak, there were additional aspects of the factual matrix which, when considered as a whole, warranted special costs. Those additional factors included the failure of the College to pursue its claim until the contractual limitation period had expired, and waiting 11 months after commencing the action before serving the defendant although that was permissible under the Rules.

**10**  Most decisions involving special costs awards are not particularly helpful because they are fact driven. However, *Concord Industrial Services Ltd. v. 371773 B.C. Ltd.*, [*2002 BCSC 900*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2PM-00000-00&context=), is instructive. Special costs were ordered where a party displayed "reckless indifference" by failing to acknowledge early on that its claim was manifestly deficient. The Court held at para. 27 that the plaintiff's failure to come to terms with that manifest deficiency at an early stage of the proceedings constituted "the sort of reckless indifference to the legitimate interests of the defendant as is envisioned by the authorities which cite reprehensible conduct as a basis for awarding special costs".

**11**  I also find instructive the comment of Hall J.A. in *Catalyst Paper Corporation v. Companhia de Navegaço Norsul,* [*2009 BCCA 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0XG-00000-00&context=) at para. 16 concerning the function of costs in the litigation process:

[16] It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements.

***B. Application of the Law to the Circumstances of this Case***

**12**  At trial, the plaintiff acknowledged ***negligence*** on the part of the ship's crew in two respects. First, a member of crew inadvertently left open the valves to one of the fuel oil tanks, and second, the crew failed to monitor that tank during bunkering. However, the plaintiff alleged that the bargeman in charge of the fuelling barge, the *P.T. 25,* was also negligent in two respects. First, the bargeman transferred the oil to the ship at a rate much higher than the transfer rate agreed between the vessels, and second, the bargeman failed to monitor the amount of oil going across to the ship.

**13**  I concluded that the bargeman was negligent in both respects as alleged. I concluded further that his ***negligence*** was a significant cause of the spill.

**14**  It was apparent from the *Oil Transfer Checklist* signed by the Chief Engineer and Mr. Randell before the bunkering began that the barge was to transfer oil to the No. 1 port and starboard tanks of the ship at a rate of 150 metric tonnes per hour. At that rate the ship was to receive approximately 315 metric tonnes of oil before the crew initiated a changeover to other of the ship's tanks. The ship's crew calculated that filling the No. 1 tanks would take slightly more than two hours if loaded at that rate.

**15**  It was uncontroverted that the total capacity of the No. 1 tanks was 385 metric tonnes. It was also uncontroverted that the bargeman transferred approximately 473 metric tonnes of oil to the ship in slightly over two hours. In short, the bargeman could not possibly have maintained the agreed transfer rate throughout the bunkering.

**16**  The fuelling barge controls the transfer rate and is fitted with a flow meter. The flow meter allows immediate and accurate readings of the transfer rate as the oil passes from barge to ship. Because the bargeman pumped the oil at a much greater rate than was expected, the crew of the *Andre* was not alerted to the fact that it had left the valve of the receiving tank open.

**17**  Immediately following the spill, which occurred on July 4, 2006, Transport Canada (Marine) sent a Pollution Prevention Officer, Khushru Irani, to the site of the accident. Mr. Irani spoke only briefly with Mr. Randell that day. He scheduled a meeting with Mr. Randell for the following week, at which time he conducted a detailed interview concerning Mr. Randell's involvement in the events leading to the spill.

**18**  Mr. Randell steadfastly asserted throughout the interview with Transport Canada that he had transferred oil to the No. 1 tanks of the ship at the agreed rate of 150 metric tonnes as stipulated in the *Oil Transfer Checklist*. At the conclusion of the interview, Mr. Randell told Mr. Irani that he was working on a typewritten statement that he would provide Transport Canada when it was completed. However, Transport Canada never received the statement.

**19**  The defendants did not provide the plaintiff with any version of events other than that given by Mr. Randell to Transport Canada until Mr. Randell was examined for discovery a few months before the trial in October 2010 by plaintiff's counsel.

**20**  In the course the discovery, Mr. Randell agreed that he had told Mr. Irani he conducted the bunkering in accordance with the *Checklist.* When pressed about the accuracy of the statement, defendants' counsel interrupted the discovery to produce a typewritten statement allegedly completed by Mr. Randell the evening of July 4, 2006, the same day as the spill. Mr. Randell's typewritten statement, signed and dated July 4, 2006, describes quite a different version of events. In it, Mr. Randell asserted that he initially maintained a transfer rate of 150 metric tonnes per hour, but that he was directed by the Chief Engineer to increase the rate to 225 metric tonnes at approximately 9:50 a.m., an hour into the bunkering process.

**21**  The defendants' position was that Mr. Randell's typewritten statement purportedly completed on July 4, 2006 had been prepared at the direction of their legal counsel and was accordingly privileged. They apparently decided to waive their asserted privilege when Mr. Randell began experiencing difficulty with the questions put to him in the examination for discovery concerning the version of events he had given to Transport Canada.

**22**  Across the top of the front page of Mr. Randell's typewritten statement, and again at the end of it, were the handwritten, bolded words "PRIVILEGED: PREPARED FOR BERNARD & PARTNERS". However, it became clear at trial that there was no basis for the defendants' claim of privilege. Mr. Randell testified in cross-examination at trial that he prepared the July 4, 2006 statement on his own initiative the evening of the spill in order (in his own words) "to sort out in my mind what happened". He drafted the statement on his computer at home, and left it there for some time. Mr. Randell said that a week or so after the spill, someone from the management ranks of the defendants told him he should put in writing his recollection of the events. In response to this request, Mr. Randell then gave his typewritten statement to the defendants.

**23**  Mr. Randell testified unequivocally at trial that he did not prepare the statement at the request of either the defendants or legal counsel. No one from the management ranks of the defendants testified as to how, or when, the statement came into their possession. Further, neither the defendants nor their legal counsel disclose any basis for the claim of privilege that was asserted over the statement.

**24**  Mr. Randell also testified at trial that he could not explain why he told Transport Canada that he had maintained a rate of 150 metric tonnes per hour throughout the bunkering. At trial, he was adamant that he increased the rate to 225 at about 9:50 a.m., and that he was not aware which tanks were being filled.

**25**  At trial, Mr. Randell could not explain why he told Mr. Irani that he knew he was loading the No. 1 tanks first in order. At trial, he said he did not know which tanks were being loaded at the outset of the bunkering, although the *Oil Transfer Checklist* stipulated that the No. 1 tanks were to be loaded first.

**26**  A third scenario emerged from Mr. Randell's testimony. At both the examination for discovery and at trial, when pressed on the point, Mr. Randell conceded that he may have increased the rate to 225 much earlier than 9:50 a.m. (That scenario would come closer to explaining how the barge managed to transfer 473 metric tonnes of oil to the ship in the space of two hours.)

**27**  The defendants urged the Court to accept Mr. Randell's statement purportedly prepared on the evening of the spill, and not the statement he gave to Transport Canada. The defendants argued that the former was the accurate account of events because, as Mr. Randell asserted, he had prepared it of his own volition immediately after the spill and before his conduct became the subject of scrutiny by the authorities. That, of course, begs the question of how the defendants could have reasonably believed they were entitled to assert privilege over it the statement.

**28**  I concluded that Mr. Randell had concocted the version of events described in his typewritten statement at some point in time after his interview with Mr. Irani. Had Mr. Randell completed his typewritten statement immediately after the spill, he surely would have brought it to the interview with Mr. Irani and advanced that account of events. It was my view that he prepared the statement some time after the interview because he realized as a result of Mr. Irani's questions that a central issue was the exact rate at which he had transferred the oil to the ship. Mr. Randell most likely realized, upon reflection, that he could not have transferred the amount of oil that was in fact transferred to the *Andre* if he had maintained a rate of 150 metric tonnes per hour for the two hours preceding the spill. Further, Mr. Randell likely realized the effect of having acknowledged that the No. 1 tanks were being loaded first was that he must also have known the tanks did not have the capacity to hold the amount of oil he transferred during the bunkering.

**29**  The defendants clearly made the decision shortly after the spill to advance Mr. Randell's typewritten statement as the true version of events. No one from the ranks of management of the corporate defendants testified at trial. As a result, they gave no explanation as to why they accepted one version of events offered by Mr. Randell over the other, or, for that matter, why they accepted either version of events he offered. That is particularly troubling when it was obvious first, that Mr. Randell had been untruthful on at least one occasion, and second, that on the application of basic mathematics neither version of events was plausible. Further, in light of the obvious questions raised by the timing of the preparation of the statement, and the stark inconsistencies between it and the statement given to Transport Canada, it was incumbent on the defendants to call evidence from someone in its management ranks to testify as to when Mr. Randell provided the statement to them, and why they accepted it as true.

**30**  The absence of any such evidence left the inference that the defendants likely advanced Mr. Randell's typewritten statement as the true scenario because it was at least somewhat more plausible that the version of events Mr. Randell gave to Transport Canada.

**31**  The only facts the defendants provided to its experts as the basis for their opinions were those contained in Mr. Randell's typewritten statement.

**32**  This was not a case in which the defendants could be taken to have placed reasonable but misplaced reliance on Mr. Randell's statement. They had in their possession the interview of Mr. Randell by Transport Canada, which Mr. Randell had endorsed as an accurate account of the interview. Yet the defendants gave their experts only the version of events that they viewed as the more exculpatory without providing any reasonable basis for having done so. The two versions of events were irreconcilable, and there was no basis to conclude that one statement was more reliable than the other.

**33**  Mr. Randell's only explanation for the various conflicts in his versions of events was that he feared he would lose his job as a result of the spill. However, that rationale for lying to Transport Canada could provide no comfort to the defendants, since both versions of events were obviously designed to shift blame entirely to the crew of the ship. Mr. Randell's motive ought to have been manifest to the defendants.

**34**  The costs and court time consumed by the defendants' expert evidence was considerable. The defendants' expert in marine engineering prepared elaborate graphs based on variations of the timing and flow rates contained in the suspect statement of Mr. Randell. The plaintiff's marine engineering expert was compelled to address these various scenarios. Moreover, the defendants' expert continued to advance new graphs based on a spectrum of scenarios right up to the time of his testimony at trial, which compelled the plaintiff's expert to be present throughout the trial and to prepare an extensive rebuttal opinion.

**35**  The defendants ought to have known soon after the spill that they could not rely on Mr. Randell to provide a truthful account of his actions as bargeman on the day of the spill. The defendants ought to have made a proper assessment of their case following Mr. Randell's examination for discovery, if not much sooner. In light of Mr. Randell's evidence on discovery, the defendants could not reasonably continue to deny liability on the basis of either version of events offered by their employee.

**36**  This is not a case of an employee whose credibility was successfully challenged at trial. This is a case of defendants who adopted an employee's version of events they must have known to be manifestly unreliable, and advanced it as the centrepiece of their defence to the exclusion of any other version of events. They did so at great cost to the plaintiff.

**37**  The defendants compounded their reprehensible conduct by maintaining a baseless claim of privilege over the statement until mid-way through Mr. Randell's examination for discovery, when it became clear that Mr. Randell was having difficulty with the questioning by plaintiff's counsel.

**38**  Counsel for the defendants argued that his clients were entitled, in his words, to "put their best foot forward". I do not disagree with that proposition in the circumstances of most cases. In this case, I reject that argument because the defendants knew or ought to have known that their best foot was fundamentally unsound and incapable of supporting their theory of the case.

**39**  In the circumstances, I am satisfied the defendants' conduct was reprehensible and is deserving of award of special costs against them.

**III. PROPORTION OF COSTS AND DISBURSEMENTS**

**40**  The second issue is whether the plaintiff should be awarded 50% of its costs and disbursements in proportion to the finding on apportionment of liability, as argued by the defendants, or 100% of its costs, as argued by the plaintiff.

**41**  The defendants submitted that the plaintiff should recover only 50% of its costs because costs in this case should be apportioned pursuant to s. 3(1) of the ***Negligence*** *Act,* *R.S.B.C. 1996, c. 333*. Section 3(1) states as follows:

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.

**42**  The plaintiff argued in response that this case involves a maritime claim and accordingly falls within Canadian maritime law. It was decided under the *Marine Liability Act,* which contains no provision equivalent to s. 3(1) of the ***Negligence*** *Act.* The plaintiff further submitted that in any event, there is a broad discretion under s. 3(1) to vary the *prima facie* rule where its application would work an injustice to one of the parties.

***Discussion***

**43**  There is a uniform body of federal law known as Canadian maritime law which excludes the application of provincial laws. It is well-settled, for example, that the awarding of interest following a trial is within that body of maritime law: *MacMillan Bloedel Ltd. v. Youell* [*(1993), 79 B.C.L.R. (2d) 326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M3H2-00000-00&context=) p (C.A.).

**44**  The authorities state that any provincial law which might apply to the core of the federal maritime law would likely be sterilized under the doctrine of interjurisdictional immunity. ***Negligence*** lives inside the core of maritime law: *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=); *Whitbread v. Walley,* [*[1990] 3 S.C.R. 1273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-601K-00000-00&context=).

**45**  *Ordon Estate* is summarized as follows by Peter W. Hogg in the *Constitutional Law of Canada,* 5th ed, vol 1, loose-leaf (consulted on 6 October 2011), (Toronto: Carswell, 2007) at 22-22:

In *Ordon Estate v. Grail* (1998), two boating accidents that resulted in death and injury gave rise to four ***negligence*** actions. Although the accidents concerned pleasure boats in lakes in Ontario, because the accidents occurred in navigable waters, there was no doubt that the governing law was the federal maritime law. However, the plaintiffs in the actions attempted to rely on several Ontario statutes, which permitted ***negligence*** claims to be brought by siblings of a deceased or injured victim, which permitted the recovery of damages for the loss of guidance, care and companionship of a deceased or injured victim, and which permitted apportionment of damages in cases of contributory ***negligence*** (rather than barring the plaintiff's action). The causes of action were unavailable under federal maritime law. The Supreme Court of Canada held that none of the Ontario statues could apply to a maritime ***negligence*** case, and the statues should be read down to exclude maritime ***negligence*** cases. The Court said that the application of any provincial statute that "would have the effect of regulating indirectly an issue of maritime ***negligence*** law" would be "an intrusion upon the unassailable core of federal maritime law" and would therefore be "constitutionally impermissible" [*Orden 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=) at para. 85]. The reason for this broad doctrine of interjurisdictional immunity was the need for uniformity across Canada of maritime law, which would be impaired by the application in provincial waters of provincial statutes.

**46**  A consistent view was expressed in the unanimous judgment of the Court in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.,* [*[1997] 3 S.C.R. 1210*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WX-00000-00&context=) at 1259-60:

Policy considerations support the conclusion that marine law governs the plaintiffs' tort claim. Application of provincial laws to maritime torts would undercut the uniformity of maritime law. The plaintiff BVHB argues that uniformity is only necessary with respect to matters of navigation and shipping, such as navigational rules or items that are the subject of international conventions. I do not agree. There is nothing in the jurisprudence of this Court to suggest that the concept of uniformity should be so limited. This Court has stated that "Canadian maritime law", not merely "Canadian maritime law related to navigation and shipping", must be uniform. BVHB argues that uniformity can be achieved through the application of provincial contributory ***negligence*** legislation as all provinces have apportionment provisions in the statutes. However, there are important differences between the various provincial statutes. These differences might lead over time to non-uniformity and uncertainty. Difficulty might also arise as to what province's law applies in some situations. [Emphasis added.]

**47**  The Supreme Court confirmed more recently that the core of federal maritime law is protected by interjurisdictional immunity: *British Columbia (Attorney General) v. Lafarge Canada Inc.,* [*2007 SCC 23*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B191-00000-00&context=), [*[2007] 2 S.C.R. 86*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B191-00000-00&context=).

**48**  Based on the foregoing, I conclude that s. 3(1) of the ***Negligence*** *Act* does not apply in this case.

**49**  Although the ***Negligence*** *Act* is not applicable, the Court has broad discretion in awarding costs so long as the discretion is exercised judicially and only for a reason connected to the litigation: *Swanson v. British Columbia Packers Ltd.* [*(1984), 53 B.C.L.R. 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2GB-00000-00&context=) (S.C.).

**50**  In any event, s. 3(1) also provides broad discretion to vary the *prima facie* rule ("Unless the court otherwise directs. ..."). Those words vest in the Court a discretion to depart from the general rule where an apportionment of costs would lead to an unjust result: *Rimmer v. Township of Langley*, [*2007 BCSC 340*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S46S-00000-00&context=); *Sayers v. Fediuk* [*(1992), 77 B.C.L.R. (2d) 117*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4GK-M2GF-00000-00&context=) (S.C.).

**51**  The general rule is often varied when, as in the present case, there is one plaintiff and one defendant (or one set of corporate defendants), and the defendant has suffered no damage. In *Moore v. Dhillon* [*(1993), 85 B.C.L.R. (2d) 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B172-00000-00&context=) (C.A.) the Court said the following at para. 13:

[13] While the s. 3 *prima facie* rule may work well in cases where liability is divided between defendants only, and where there are cross-claims between plaintiff and defendant, there is potential for injustice when the prima facie rule is applied without exercise of discretion in cases, such as this, where division of fault is as between a successful personal injury plaintiff and a defendant who has suffered no injury or damage, or who has already been fully compensated for any injury or damage suffered.

**52**  As was observed by Madam Justice Sinclair Prowse in *Logeman v. Rossa,* [*2006 BCSC 692*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B22B-00000-00&context=) at para. 75, the cases illustrate that when determining whether application of the general rule would be unjust, "most, if not all, aspects of the nature and conduct of the litigation may be considered". Sinclair Prowse J. went on to say:

For example, the Courts have looked at whether the plaintiff was forced to go to trial in order to obtain recovery; the costs of getting to trial, as well as the difficulty and length of the trial; whether, if costs are apportioned according to liability, the costs recovery available to the plaintiff will bear any reasonable relationship to his/her costs in obtaining the results achieved; the positions taken by the parties at trial, in particular whether the positions taken were appropriate and reasonable in the circumstances; whether the defendant made any settlement offers; and the ultimate results of the trial, asking whether the plaintiff achieved substantial success that would effectively be defeated if the costs were awarded pursuant to s. 3.

**53**  In *Logeman v. Rossa,* the plaintiff was awarded 100% of her costs although she was found to be 35% contributorily negligent for her injuries on the basis that the defendants had been "blatantly untruthful" on the pivotal issue of how the plaintiff's eye injury had occurred. That untruthfulness had an adverse effect on the nature and the conduct of the litigation. The complete denial of any involvement by the defendants or knowledge of the circumstances in which the injury occurred made settlement impossible and made it more difficult for the plaintiff to pursue her claims. The defendants' untruthfulness "complicated rather than clarified the issues" (at para. 80).

**54**  In the present case, the plaintiff was substantially successful in the litigation. It accepted fault for the spill and took the reasonable position that the defendants were at least 50% at fault. Approximately a week before the trial, and again two days before, the plaintiff made a settlement offer in accordance with the Rules of Court of equal liability for the spill, which the defendants refused.

**55**  The positions take by the defendants throughout the litigation were both unreasonable and inappropriate for reasons I have earlier described. In this case, a costs recovery based on proportionate liability would not bear a reasonable relationship to the cost in obtaining the results achieved, nor would it reflect the success achieved by the plaintiff.

**56**  For these reasons, I have concluded the plaintiff is entitled to 100% of its costs and disbursements.

*Reasonableness of Plaintiff's Disbursements*

**57**  The plaintiff has asked the Court for directions pursuant to Rule 14-1(7) concerning the reasonableness of certain disbursements it incurred in the course of the litigation. The plaintiff does so because it has been placed on notice by the defendants that they intend to challenge these disbursements before the Registrar.

**58**  Rule 14-1(7) provides as follows:

1. If the court has made an order for costs,
2. any party may, at any time before a registrar issues a certificate under subrule (27), apply for directions to the judge or master who made the order for costs,
3. the judge or master may direct that any item of costs, including any item of disbursements, be allowed or disallowed, and
4. the registrar is bound by any direction given by the judge or master.

**59**  The defendants dispute the amounts of two of the plaintiff's disbursements. The first is the account of Ken Shortall, the marine engineering expert retained by the plaintiff. The second is the cost incurred by the plaintiff for the video deposition of a witness who testified from China.

***A. The Account of Ken Shortall***

**60**  I will deal first with the account of the marine engineering expert. Mr. Shortall lives and works in the United Kingdom. He is an expert in the international standards and practice governing bunkering operations in such ports as Rotterdam and Singapore. He was qualified to testify concerning the majority of the issues arising at trial, including the reasonable expectations a ship's chief engineer has of the bargeman during a barge to ship bunkering operation.

**61**  The defendants submitted that Mr. Shortall's account is excessive as it relates to the amount of time spent on the litigation as well as his travel and accommodation expenses. According to the defendants, the plaintiff could have reduced its expert costs considerably by obtaining an expert from the United States rather than England.

**62**  I am of the view that retaining Mr. Shortall was both necessary and proper in the circumstances, and that his account reasonably reflects the extensive amount of work he performed both before the trial, in drafting comprehensive reports, and during the trial.

**63**  The plaintiff was not required to seek out an American expert. It became clear at trial that regulation of bunkering operations in the United States differs considerably from that in Canadian waters. The Canadian approach resembles more closely the international practices and regulations. The *International Safety Guide for Oil Tankers and Terminals* ("ISGOTT") contains a *Bunkering Safety Checklist* that is similar in many respects to the *Oil Transfer Checklist* governing bunkering in Port Metro Vancouver. Mr. Shortall, with his international experience, was well-qualified to speak to a spectrum of issues arising in the trial, such as the significance of the *Oil Transfer Checklist* to the bargeman respecting the sequence of loading the tanks, the available capacity of the tanks, and the flow rate at which the tanks were to be loaded.

**64**  Mr. Shortall was also qualified to speak to the shared responsibilities of the ship's crew and the barge crew in a bunkering operation. His evidence was particularly helpful on the issue of the reasonable expectations of the ship's crew as they related to the actions of the bargeman. I accepted Mr. Shortall's opinion concerning the standards governing the barge crew in preference to the evidence given by the defendants' expert, an experienced bargeman from the Puget Sound area in Washington State. I concluded in my written reasons that the evidence of the defendants' expert did not apply to Port Metro Vancouver in several important respects.

**65**  There can be little doubt that Mr. Shortall's attendance was required throughout the ten-day trial. The defendants sought to introduce additional expert evidence up to the last day of trial. The defendants' marine engineering expert prepared elaborate graphs based on various hypothetical scenarios in an attempt to defend the manner in which Mr. Randell conducted the bunkering. The graphs were designed to demonstrate that it was possible to transfer the amount of oil transferred from the barge to the ship within the parameters described in the typewritten statement of Mr. Randell. Mr. Shortall was required to deal with those graphs, as well as various iterations of the graphs advanced by the defendants as the trial progressed.

**66**  The defendants vigorously attacked (unsuccessfully) Mr. Shortall's expertise and qualifications, which significantly increased the time spent by Mr. Shortall in evidence.

**67**  The defendants offered no evidence to establish that the hourly rates charged by Mr. Shortall were greater than those of similar experts. Mr. Shortall's travel and accommodation expenses simply reflected the time involved in travelling to Vancouver from England and staying in a downtown Vancouver hotel during the trial.

***B. The Cost of the Video Deposition***

**68**  The plaintiff was required to obtain the evidence of a witness, Wang Fujin, by video deposition. Mr. Wang was the Second Assistant Engineer of the *Andre* at the material time. He was assigned primary responsibility for the bunkering operation by the Chief Engineer.

**69**  Mr. Wang now lives in Shanghai. At the time of trial, he was no longer employed by the plaintiff. He was enrolled in courses in Shanghai to obtain his chief engineer's licence and could not travel to Vancouver to give his evidence.

**70**  The defendants argued that there were less expensive means of obtaining Mr. Wang's evidence than video deposition; they suggested the evidence could have been obtained by "Skype" over the internet rather than by video. They also argued that it was not necessary to retain legal counsel in Shanghai to attend the examination with Mr. Wang.

**71**  I do not accept the defendants' arguments. Mr. Wang was a key witness of fact for the plaintiff. He was the crew member assigned the hands-on responsibility for the bunkering. It is unreasonable to suggest that the plaintiff was obligated to rely on a cheaper and less failsafe method of obtaining Mr. Wang's evidence.

**72**  I am also satisfied that it was reasonable to have legal counsel in attendance. Mr. Wang's first language is not English. He was required to refer to many exhibits in the course of his examination. Legal counsel assisted in the orderly conduct of the examination by ensuring that Mr. Wang understood the questions asked and by referring him to the correct documents.

**73**  In summary, I am satisfied that the expenses incurred by the plaintiff for both the marine engineering expert and Mr. Wang's video deposition were necessarily and properly incurred. Accordingly, I direct that those expenses be allowed by the registrar.

**74**  The defendants initially objected to the invoice of Marc Warner, whose report was submitted by the plaintiff to demonstrate that the regulatory environment in Washington State differed from Port Metro Vancouver. However, the defendants advised me that they no longer object to the reasonableness of that disbursement.

**IV. SUMMARY OF CONCLUSIONS**

**75**  My conclusions are as follows:

1. The plaintiff is entitled to an award of special costs;
2. The award of special costs will be based on the full recovery (100%) by the plaintiff of its costs and disbursements;
3. The registrar is directed to allow the disbursements as described above.

**76**  The plaintiff is entitled to the costs of this application.

C.A. WEDGE J.

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[***Hayes (Guardian ad litem of) v. Brown, [2001] B.C.J. No. 1463***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23Y5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Hood J.

Heard: November 6 - 17 and 22 - 24, 2000.

Judgment: July 16, 2001.

Vancouver Registry No. C982938

**[2001] B.C.J. No. 1463** | 2001 BCSC 1047 | 106 A.C.W.S. (3d) 929 | [2001] B.C.T.C. 1047

Between Douglas Charles Hayes, by his Guardian ad litem Sharon Hayes, plaintiff, and Dr. Robert I.G. Brown, Dr. Mark A. Henderson, Dr. Peter J. MacDonald and the Fraser-Burrard Hospital Society as operators of the Royal Columbian Hospital, defendants

(354 paras.)

**Case Summary**

**Medicine — Nurses — *Negligence*, patient care — Standard of care — Causation — Causal connection.**

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| Action by Hayes for damages against the Royal Columbian Hospital for medical malpractice. Hayes was a 51-year-old insurance coach who experienced chest pains. He attended at the Hospital's emergency department on April 23, 1997. He was found to have suffered a serious heart attack. The Hospital conducted a trial of a new combination of thrombolytic or clot-buster drugs. Hayes consented to participate in this trial. The risk of this treatment was that he could have bleeding anywhere in his body, which included his brain. The risks of a stroke in the form of an intra-cranial hemorrhage were identical with the standard and trial medications. Hayes was transferred to the critical care unit at 3:15 pm. Upon his arrival, a nurse named Petryk performed a complete assessment of his vital and neurological signs. They were all normal, even though Hayes complained about a severe headache. Headaches were not related to intra-cranial hemorrhages. They were induced by nitro-glycerine. It was normal for them to persist after this medication was stopped. Hayes did not exhibit any symptoms of a hemorrhage, such as weakness in the limbs. Petryk took Hayes's vital signs at 4:18 p.m. At the same time she did an informal neurological assessment. She assessed his ability to open his eyes, move and speak. She did not test his arms or legs for strength. Hayes was examined by a nurse or a cardiologist at 15 to 20 minute intervals between 5:00 and 7:05 p.m. At 7:20, a lab technician told Petryk that he saw Hayes with his head slumped to the left. By 8:30 p.m., Hayes was unconscious. He was operated upon at 9:25 p.m. Hayes's stroke left him with a permanent neurological dysfunction. He was unemployable. Hayes claimed that Petryk was negligent. The Hospital Nursing Protocol required neurological signs to be taken once an hour for the first four hours after the administration of thrombolytic medication. Hayes claimed that Petryk was negligent because she only conducted informal neurological assessments.  HELD: Action dismissed.  Petryk acted in conformity with the standard of practice expected of a prudent and diligent nurse in the care of a thrombolytic patient in the critical care unit. Her conduct also conformed to the standard of care required of her by the Hospital's protocol. If Petryk was negligent in the manner that she assessed Hayes' hand and foot strengths, Hayes failed to establish, on a balance of probabilities, that such conduct caused or contributed to the cause of the hemorrhaging and the resulting injuries. The onset of the stroke would not have been detected if Hayes's foot and hand strength had been formally assessed on an hourly basis. Once the intra-cranial bleeding began, Hayes's neurological deficits were inevitable because of the very rapid accumulation of blood within the brain area in which the hemorrhage occurred. Nothing that Petryk or another nurse did or did not do could be associated with the stroke. Any damages that could have been attributed to Petryk's ***negligence*** would have been only nominal. |

**Counsel**

N. Smith and L. Macdonnel, for the plaintiff. C.L. Woods and A. Sayn-Wittgenstin, for the defendants.

[Quicklaw note: A Corrigendum was released by the Court July 18, 2001. The correction has been made to the text and the Corrigendum has been appended to this document.]

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| **HOOD J.** |

INTRODUCTION

**1**  This is a tragic case of a man who entered the Defendant Hospital on April 23, 1997, suffering from acute anterior myocardial infarction, a very serious heart attack; and who, while in the Hospital's care, suffered a stroke which resulted in brain injury, which has left him with permanent neurological dysfunction, unemployable and requiring the assistance of others with aspects of his day-to-day activities. Mr. Hayes brings action, through his wife, Sharon Hayes, as his Guardian Ad Litem, against the Defendant Hospital for substantial damages.

**2**  The narrow issue is whether the hospital's servant, Nurse S. Petryk, was negligent in her care of this man, and thereby caused or contributed to the stroke, or to its extent, and the resulting injuries.

**3**  The issue of damages is also hotly disputed. The Defendant Hospital says that even if its nurse was negligent, and causation can be established, any damages awarded should be nominal, because the injuries suffered by Mr. Hayes were inevitable, and would have been suffered by him whether or not Nurse Petryk was guilty of some ***negligence*** which contributed to his injuries.

**4**  It will be seen that the case turns in the main on which expert evidence I choose to accept and whether I accept the evidence of Nurse Petryk, and that of her co-worker, Nurse Mowat. This includes the very nature of intra-cranial hemorrhaging in this case.

**5**  Initially Mr. Hayes brought action as well against three of the doctors who were involved in his care while in the Defendant Hospital. However, prior to trial, he consented to an Order dismissing the action against each of these doctors, as if the case was tried on its merits, and in addition, executed a full Release of all liability in favour of each doctor.

**6**  The allegations against Dr. Brown, the attending Cardiologist, were that he failed to properly treat Mr. Hayes while he was in the CCU, including failing to respond appropriately to Mr. Hayes' complaint of headache, nausea and vomiting, the same claim now made against Nurse Petryk. The allegations against Dr. Henderson, a Cardiologist and the principal investigator of the ASSENT I trial, included allegations that he was negligent in allowing the Consent Form to exist in the form that it did. Finally, the allegations against Dr. MacDonald, the attending Emergency physician, who actually obtained Mr. Hayes' consent, were that he was negligent in his failure to obtain properly informed consent from the Plaintiff. A similar consent claim remains against the Defendant Hospital.

**7**  The action against the Defendant Hospital for damages for the alleged ***negligence*** of its employee/nurse remains. The onus, of course, is on Mr. Hayes to make out his case on a balance of probabilities.

THE DECISION

**8**  I believe it to be appropriate, in the circumstances of this case, that I state generally my decision at this time; rather than leaving those who are most interested in it to read what will be a lengthy, and perhaps at times repetitive Judgment, before knowing what my decision is.

**9**  I have concluded, having carefully considered the whole of the evidence before me, that Mr. Hayes has failed to prove, on a balance of probabilities, that Nurse Petryk was negligent, or in breach of any duty of care owed to him, in her care of him, or that if she was guilty of ***negligence***, such ***negligence*** caused or contributed to the cause of his stroke and attending injuries. I am further of the view that once the stroke began, the injuries he suffered were inevitable.

**10**  In light of my decision on liability, it is not necessary to consider all the other issues about to be stated, or the evidence pertaining to them, although I may touch on them. And submissions on a number of them were in fact deferred.

**11**  Counsel have agreed as to the points not in issue, and the points at issue, between the parties as follows:

Points Not In Issue

1. Mr. Hayes suffered an acute anterior myocardial infarction.
2. The standard of care as at 1997 and currently for treatment of acute myocardial infarction in patients present with the history and symptoms of Mr. Hayes was for the patient to be given thrombolytic therapy.
3. If Mr. Hayes had not consented to received TNK, he would have received TPA.
4. Mr. Hayes received the lowest study dose of TNK of 30 mg.
5. The ASSENT I trial was an appropriate drug trial for the hospital to be involved in.
6. The standard of care exercised by the emergency nurses is not at issue.
7. The plaintiff makes no allegations of ***negligence*** against Dr. MacDonald, Dr. Brown or Dr. Henderson, who have been released from this action by consent.
8. The hospital is not vicariously liable for the acts or omissions of Dr. Macdonald, Dr. Brown or Dr. Henderson.
9. The plaintiff has suffered severe irreversible brain damage as a result of his intra-cranial hemorrhage.
10. The plaintiff is not employable.
11. The plaintiff will require some level of assisted care.
12. The plaintiff has suffered income loss, both past and future.

Points In Issue

1. Did the nursing staff of Royal Columbian Hospital breach the standard of care expected of reasonable nurses in their care of Mr. Hayes on the CCU?
2. If so, did that breach of the standard of care cause or contribute to Mr. Hayes' injuries?
3. If a breach of the standard of care and causation is established, what injuries sustained by Mr. Hayes are attributable to the ***negligence*** of the hospital employees versus what injuries would have been sustained in any event?
4. Can the Court make an apportionment between tortious causes of Mr. Hayes' injuries?
5. What, if any, damages is the plaintiff entitled to from the hospital?
6. Whether the hospital owes an independent duty of care to Mr. Hayes to inform him of the risks associated with the TNK treatment administered by Dr. MacDonald.
7. Is the informed consent form signed by Mr. Hayes an appropriate consent form?
8. If not, were its deficiencies cured by the conversation which took place between the treating physician, Dr. Macdonald, and Mr. Hayes?
9. Given that Mr. Hayes would have received TPA if he had not agreed to receive TNK, would there have been any difference outcome?

THE FACTS

A Brief Historical Review

**12**  I will here set out briefly a chronology of times and events, and some of the facts as I find them to be.

**13**  On April 23, 1997, Mr. Hayes, a 51 year old insurance coach, started experiencing the onset of chest pains at approximately 10:10 a.m. He presented at the Defendant Hospital's Emergency department at 12:46 hours and was assessed by the Emergency Nurse at 13:00 hours. At that time he complained of weakness and chest pains radiating into his back. However, he scored a 15/15 on a Glasgow Coma Scale Assessment, and was found to be alert and oriented.

**14**  At 13:35 hours he was assessed by an Emergency Physician, Dr. P.J. MacDonald, who examined him and diagnosed that he was suffering from acute anterior myocardial infarction, which was a significant or serious heart attack. Dr. MacDonald then referred Mr. Hayes to a Cardiologist, Dr. R. Brown.

**15**  At that time the ASSENT I trial was being conducted in the Hospital. It was a drug trial examining the safety of three different dosages of a thrombolytic medication (a clot-buster) known as TNK. I am satisfied that Dr. MacDonald followed his usual practice; that he discussed with Mr. Hayes the fact that the Hospital was enrolling patients in the ASSENT I trial of TNK, and asked whether Mr. Hayes would be willing to participate in the trial by receiving TNK instead of the standard thrombolytic agent generally used, TPA. He explained to Mr. Hayes the risks associated with thrombolytic therapy, including the risks of bleeds anywhere in the body, including the brain. He also indicated to Mr. Hayes that if he did not agree to participate in the study he would recommend that he receive the standard form of thrombolytic agent, TPA. TNK is a form of TPA.

**16**  The evidence is that the risk of intra-cranial hemorrhage with TNK versus TPA is identical. These drugs are referred to as "clot-busters". Their purpose is to break up the clot in the patient's coronary artery, which has caused the heart attack.

**17**  The evidence is that an hour or so later, Mr. Hayes agreed to participate in the ASSENT I trial, and signed a consent form which accompanied the ASSENT I protocol. The consent form specifically explains that with clot dissolving medicines there was a 0.7% risk of suffering bleeding into the brain which would lead to permanent disability or death; a very low risk. It is specifically pointed out that the rate of bleeding into the brain with TNK versus TPA was not known at that time. The fact that participation in the study was voluntary was also emphasised, as was the fact that his treating physician would explain alternatives to participating in the study.

**18**  On arriving at the Emergency department, Mr. Hayes was noted to be very ill, weak and faint. He was given nitro-glycerine at 13:22 hours because of heavy chest pain. At 13:30 hours he was given ASA, which is Aspirin, which is an anti-platelet. He was nauseous and vomited at 13:40 hours, and ASA was re-administered. Nausea and vomiting often occur after a heart attack. They often occur as well after nitro-glycerine infusion.

**19**  He was given Morphine at 13:50 hours. At 14:06 hours a further infusion of nitro-glycerine was started intravenously. Nitro-glycerine dilates the arteries and blood vessels everywhere in the body, including the head. Nitro-glycerine infusion often causes patients to have severe, persistent and long-lasting headaches.

**20**  At 14:10 hours a Heparin infusion was started. This is an anti-coagulant. Its purpose is to prevent further clotting in the patient's blood vessels.

**21**  At 14:20 hours 30Mg. of TNK was administered to Mr. Hayes by Dr. MacDonald. This was the lowest study dosage. At 14:49 hours the nitro-glycerine infusion was increased. At 14:55 hours Mr. Hayes received more Morphine for the chest pains. At 15:10 hours he was transferred to the CCU, which is referred to as the Critical Care Unit or the Coronary Care Unit, and arrived at 15:14 hours.

**22**  On his arriving at the CCU, a veteran CCU nurse, S. Petryk, performed a complete assessment of his vital signs and his neurological signs. They were all found to be normal. For example, a Glasgow Coma Scale Assessment was 15/15; and Mr. Hayes was found to have strong arm and leg movements bi-laterally. I observe here that this was so, notwithstanding the fact that he was complaining about a severe headache at the time, and had complained about the headache earlier when he was in the Emergency department. The significance of this is that the headaches were not related to a stroke condition, that is intra-cranial hemorrhaging; for had they been, the symptoms of intra-cranial hemorrhaging, including weakness in the limbs, would have been present; and subsequent evidence, including the lack of such symptoms and the views of the doctors as to the headaches, verified that during this time intra-cranial hemorrhaging had not occurred.

**23**  Shortly thereafter Mr. Hayes was examined by the Internist in the area, Dr. Oyler. He did not express any concern about Mr. Hayes in his History and Progress Notes, nor did he express any concern to Nurse Petryk. When she told him about Mr. Hayes' severe headache he issued an order to discontinue the nitro-glycerine if the headache persisted. Again, I note the significance of this, but will not continue to do so when similar evidence relating to nausea, as well as headaches, is referred to.

**24**  At 15:20 hours Mr. Hayes was given Tylenol plain. At 16:10 hours Nurse Mowat answered his bell, and found him to be nauseated and vomiting. The amount of fluid was small, 50 ccs. It did not contain any blood. When Nurse Mowat told Dr. Oyler about the nausea and vomiting, he issued an order that Mr. Hayes be given Maxeran, which is an Anti-Emedic.

**25**  I will relate here briefly events which occurred from 16:18 hours to shortly before 19:30 hours, some of which are in dispute. Mr. Smith, for Mr. Hayes, does not accept any evidence of Nurse Petryk or Nurse Mowat as to their conduct and observations during this period of time, which is not recorded in the Clinical Record or elsewhere. Mr. Smith challenges the credibility of the two nurses, as does, in effect, Mr. Hayes' Expert Neurologist, Dr. D.A. Cameron.

**26**  While I will have more to say about this in due course, I will note here that I am unable to agree with these submissions or opinions on the question of the credibility of the two nurses. I found them both to be forthright and honest witnesses, and I accept their evidence, including their evidence as to what they did and observed during the period referred to, and regardless of the fact that they did not record in the Hospital records all of what they did and observed when they assessed Mr. Hayes. It will also be seen that I have difficulties with Dr. Cameron's expert evidence. I will continue to outline what occurred at the designated times, and I will then review the evidence of both nurses.

**27**  At 16:18 hours Nurse Petryk took Mr. Hayes' vital signs. By vital signs I mean his blood pressure, his heart rate, and respiratory information. I am satisfied that she obtained this information at this time, and at later times, directly from Mr. Hayes, rather than from a monitor; that in order for her to obtain the information Mr. Hayes had to move about in the bed. He had to give her his arm in order to have his blood pressure and heart rate taken, and he had to sit up in order for her to listen to his lungs and to do deep breathing.

**28**  I am also satisfied that on these occasions she did in fact conduct what I would call, for comparison purposes, an informal neurological assessment of Mr. Hayes in the manner she described when giving evidence. By informal I mean that while she effectively conducted the formal assessments she was to make pertaining to eye opening, best verbal response, best motor response, and ability to move, she did not conduct a formal assessment or testing of both arms and legs for strength. This is formally done by the nurse having the patient grip her hands with both of his hands so that the strength administrated in both hands can be compared, and having the patient push his feet or toes forward, against her resisting hands, so that she can test and compare leg strength.

**29**  What she did to test the strength of Mr. Hayes' arms and legs informally, after the initial assessment at 15:14 hours, was to observe his general movements in the bed, which would involve the use of his arms and legs, in light of other observations, for example, that his eyes were open, that he was oriented, obeyed directions and so on; what might be described as tell-tale signs to a veteran CCU Nurse. I will have more to say about this in a moment.

**30**  At 16:18 hours Nurse Petryk assessed Mr. Hayes' vital signs, including listening to his chest, and found them to be stable. She also assessed his neurological signs. She observed that he opened his eyes spontaneously, that he moved strongly in the bed, and was alert and oriented. His only complaint to her was with regard to his headache. She concluded at that time that he was neurologically stable.

**31**  At 17:01 hours Nurse Petryk again assessed Mr. Hayes' vital signs and found them to be normal. She observed that he was alert, oriented, talking, obeying commands, and moving well in the bed. She concluded that he was neurologically stable.

**32**  She next assessed Mr. Hayes' vital signs and neurological signs at 17:16 hours, when she decided to discontinue the nitro-glycerine infusion because of his continuing complaints of headache. Again she found his vital signs to be normal, and that he was neurologically stable.

**33**  At 17:30 hours Dr. Brown came in to see Mr. Hayes and examined him. When she told him about Mr. Hayes' continuing headaches Dr. Brown told her to discontinue the nitro-glycerine. She told him that this had already been done. After concluding his examination of Mr. Hayes, Dr. Brown did not voice any concerns about his condition, either in his written Report, or to Nurse Petryk. Dr. Brown found Mr. Hayes to be "fine".

**34**  Nurse Petryk next examined Mr. Hayes' vital signs and neurological signs, at 17:57 hours. Again, she found his vital signs to be normal, and that he was neurologically stable. Her observations were that he had no heart pain, was breathing well, was alert, oriented, and moving fine.

**35**  The next recorded event occurred around 18:20 hours. The note in the Nurses' Notes reads: "bile emises, Anti-Emedic given". It is the note of Nurse Steve Smith. Nurse Petryk was on her break from 18:05 to 18:30. On her return Nurse Smith told her in effect that while Mr. Hayes was in his care, he had vomited 75 ccs. of bile emises, a small amount, and that he had given him Gravol. He also told her that he had helped Mr. Hayes stand beside his bed in order to void, and that he had voided 100 ccs. of urine.

**36**  Another important event which occurred around 18:20 hours involved Nurse Mowat. At that time she observed Mr. Hayes standing by the edge of his bed, just completing or having completed voiding. She went to him and observed that his ability to stand was good; that he was holding a plastic basin into which he had voided, by the handle. She measured the output at 100 ccs. of urine. There was no blood in the urine.

**37**  Nurse Mowat also described how Mr. Hayes got back into bed on his own, and then pushed himself up to a sitting position at the head of the bed with his hands and arms, while she held or guided the heart monitor cable and I.V. tubes. He was talking, and was alert and oriented. In her opinion his neurological status was good and unchanged, although he complained of headache and nausea. I observe here that Nurse Petryk recorded the 75 ccs. of bile and the 100 ccs. of urine, on the flow sheet.

**38**  At 18:45 Nurse Petryk went in to assess Mr. Hayes after her break. Mr. Hayes was awake. He denied discomfort in his chest. He still had a headache. His nausea was gone. He rolled over to his left side from his right. He was alert, oriented and moving well. His vital signs were normal. He indicated that he would try to get some sleep as his family were coming to see him.

**39**  At 19:05 hours Nurse Petryk attended Mr. Hayes in order to zero his I.V.s prior to the change of shift. Her findings are recorded. Mr. Hayes looked over at her and asked her what she was doing and she explained. His condition appeared to be the same to her as on previous occasions. I am satisfied that if the stroke, that is the intra-cranial hemorrhaging, was underway at that time, changes in Mr. Hayes' clinical status surely would have been noted. I am also satisfied that the intra-cranial hemorrhaging did not commence until some time after 19:05 hours.

**40**  Between 19:05 and shortly before 19:30 hours Nurse Petryk and Nurse Mowat were in the Nurses' Station preparing their reports to the shift of nurses who would replace them. It is not clear whether they were still preparing their reports or were giving them, when a lab technician came into the station and indicated that there was something wrong with Mr. Hayes. Nurse Petryk with Nurse Mowat immediately attended in Mr. Hayes' room. She observed him in his sitting position with his head slumped down to the left. He was responsive, but his speech was garbled and hard to understand. She checked his pupils and determined that they were equal and reactive. Nurse Mowat checked his hand grips and found that he still had them on both sides; a significant finding.

**41**  An assessment was subsequently carried out by Nurse Petryk's replacement, Nurse Kirkham, at 19:30 hours. She found Mr. Hayes to be very drowsy, but responsive to verbal command. His left side hand grip was absent, and he was unable to move his left toes. Dr. Brown attended and assessed Mr. Hayes. The Heparin infusion was discontinued, and arrangements were made for a CAT Scan. By 20:30 hours Mr. Hayes was completely unconscious, with dilated right pupil. He was taken to the operating room at 21:25 hours, and the hemorrhage, which was still in liquid form, was removed.

**42**  I turn now to the evidence of Nurse Petryk.

EVIDENCE OF NURSE PETRYK

**43**  Nurse Petryk is a veteran, and a very experienced, Critical Care Unit nurse. She has worked in a coronary care unit for approximately 26 years, and she continues to do so in the Defendant Hospital. Her evidence is as follows:

**44**  She first became involved in the care of Mr. Hayes when he was brought up to her Unit from the Emergency ward at 15:14 hours on April 23, 1997. She was told by an Emergency nurse that he had suffered an acute anterior heart attack, and about the treatment he was receiving. He was receiving nitro-glycerine intravenously to control his heart pain and Heparin to prevent further clotting. He was also receiving Aspirin.

**45**  Nurse Petryk was also told that Mr. Hayes had received an injection of TNK, a drug which she described as a clot-buster, which hopefully would break up the clot in Mr. Hayes' coronary artery. The research nurse from Cardiology told her that Mr. Hayes had agreed to participate in the ASSENT I study of TNK, and how it worked. Over the years she had taken care of patients who were undergoing thrombolytic therapy through the use of a standard drug or agent, TPA. She was told to treat Mr. Hayes the same as she would treat a patient receiving TPA by infusion. TNK is received by a single injection while TPA is received intravenously over a period of time. The risks attendant on receiving both drugs were the same. The attending nurse had to watch for bleeding from any orifice, for example, a nose, and watch for signs of cerebral bleeding as well.

**46**  The signs to look for, she said, are nausea, headache, intractable vomiting, high blood pressure, confusion, blurred vision, dizziness, slurred speech, numbness of an extremity and difficulty moving in bed.

**47**  She was given the Emergency Nursing Assessment Record which she viewed. It contains a history of how the patient was feeling before he came to the hospital, what his complaints were and the assessment then made. She noted at the time he was complaining of weakness and terrible chest pain going through to his back, but denied nausea or vomiting at the time. He was very, very anxious, which she said was normal.

**48**  On Mr. Hayes' arrival she did a complete assessment of him, including a neurological assessment. The face page of the Patient Data Base Sheet was filled in by Nurse K. Mowat, who was assisting her at the time. She found Mr. Hayes to be neurologically stable. She observed the following: he looked very ill, but was oriented and talked about such matters as politics. He obeyed commands. His pupils were equal in reaction, or normal. His cardio-vascular pattern was consistent. He denied discomfort in his arm or chest. He was very, very pale, because the heart attack had really affected him physically. He sat up for her to listen to his chest. He denied any muscular-skeleton problems, and none were observed.

**49**  At this time she noted that he was very anxious, but did not know why this fact was not "checked off", referring to the Patient Data Base Sheet. She also noted that she had forgotten to mention under the topic "Neurological" in the Patient Data Base sheet, that Mr. Hayes did complain about severe headache. However, it is noted that she did refer to the complaint of severe headache in the Nurse's Notes for 15:14 hours, which Notes are made up at about the same time.

**50**  She was not concerned about his complaint of headache. A good majority of patients receiving nitro-glycerine have headache, and it is not unusual. She gave him some regular Tylenol for the headache.

**51**  Nurse Petryk was asked about her initial neurological assessment of Mr. Hayes, and the methods of performing the assessment. It will be seen that the Defendant Hospital requires that patients who undergo thrombolytic therapy be checked every hour for four hours from the time they receive the thrombolytic agent. The requirement is set out in the Hospital's Protocol which is entitled "Nursing Critical Care, Medication Administration". It is implicit in the document that the patient's vital signs (blood pressure, heart rate and respiratory) and neurological signs (as per Glasgow Coma scale) are to be checked.

**52**  A document entitled "Clinical Record" sets out five areas of concerns, with space to check off her findings on each assessment. The areas are: Pupils, Eye Opening, Best Verbal Response, Best Motor Response, and, under the topic "Glasgow Coma Score", Ability To Move, and reference is made specifically to both arms and legs. Nurse Petryk checked off these items on her first assessment at 15:14 hours, but not during subsequent assessments. It will be seen that Counsel for Mr. Hayes strongly emphases these lack of recordings as evidence of ***negligence***; that they gave rise to suspicions of lack of care on the part of the Hospital.

**53**  Nurse Petryk said, in effect, that when the patient's eyes are open it is not necessary for her to check his pupils. If they are closed she will call him by name and so on to get him to open his eyes. But here Mr. Hayes was always awake. As for his Best Verbal Response, she found him to be oriented. For example, he knew that he was in the Royal Columbian Hospital, that he had had a heart attack, who he was, and additionally, he talked a lot about politics. As for his best motor response, he had no problem moving around in the bed, and obeyed her directions. She also had him squeeze her hands with his hands, and press against her hands with his feet, "to see if the strength was there". Everything was normal.

**54**  She was asked whether, aside from the motor strength testing she referred to, if there were other ways to assess the patient, and she said that there were. She is a senior nurse who has looked after many patients in the Critical Care Unit. She observes the patient and assesses him as she walks into the room. Are his eyes open, is he talking coherently without confusion, does he respond and do things that he is asked to do. He has to roll over on his back, using his arms and legs to do so, so that she can take his blood pressure. He has to give her his arm to do it. And his ability to move in the bed is a good indication of strength.

**55**  She was asked about the physical layout of the Critical Care Unit. There are four rooms along one wall, and two along the other. All walls are glass, and each patient can be seen from the Nursing Station. Mr. Hayes' bed was six or seven feet from the Nursing Station. When a patient comes in he is given a call light, which is tied to the side of the bed. He is told to use it if he has any problem whatsoever. He is also oriented to the Unit, the bathroom, when the doctor will come, shift changes, visitors and so on.

**56**  Nurse Petryk was asked about the Tylenol she gave Mr. Hayes for his headache. She said that she doubted that it would help him because normally plain Tylenol is not effective; while a couple of Tylenol 3s might have helped him, they did not have any.

**57**  Nurse Petryk was asked about the nitro-glycerine drip. She said that it dilutes all of the arteries in the body, including the head, and causes terrible headaches. It does not bother some people, but the majority get headaches.

**58**  She attributed Mr. Hayes' illness to the fact of the insult to his body of the heart attack. He looked sick and weak, but he did not act the way he looked. He was quite talkative. There were two monitors attached to him, with one displayed in his room and the other in the Nurses' Station. There were five leads attached to his chest, and connected to electrodes, which showed the electrical activity of his heart. The system included an alarm which would have been activated if the heart was beating too fast or too slow or irregularly. It is a safety feature because "we can't be at the monitor all the time".

**59**  She estimates that her original assessment of Mr. Hayes, after his arrival at 15:14 hours, took approximately 45 minutes. Nurse Mowat did the first page of the Assessment. After it was completed she went to the Nurses' Station, and recorded the 15:14 hours entries in the Nurses Notes, reviewed all of the orders, and put the cardiac monitor strip on the notes at 15:47 hours.

**60**  At the time she had one other patient to look after in addition to Mr. Hayes. He was a young man who was seriously ill and was dying. She also had to deal with his wife and their children. She gave up another patient when Mr. Hayes was admitted. She believes that there may have been five nurses on staff, and that they were pretty busy at the material time. She was usually in one of the patient's rooms.

**61**  She was referred to the second entry in the Nurses' Notes opposite the time, 16:10 hours. It was made by Nurse Mowat. She had noted that Mr. Hayes was nauseated and vomiting at the time. Nurse Petryk said that this was not a real concern. He had already vomited in the Emergency department before he received the TNK. Nausea and vomiting often occur after a heart attack. Nurse Mowat gave him a medication to ease the vomiting. She also recorded on the 24 Hour Flow Sheet what Nurse Mowat had told her; namely that at 16:00 hours Mr. Hayes had vomited a small amount of bile, 50 ml. of a green fluid, which did not contain any blood.

**62**  This was the first time that he had vomited in the Critical Care Unit. The vomiting did not constitute intractable vomiting, which is almost continuous vomiting and heaving. Here the vomiting occurred twice, two hours apart. She observed that Mr. Hayes had also been given TNK and some morphine, and that both of these drugs can also cause nausea.

**63**  Nurse Petryk said that she was aware of the Nursing Protocol for post thrombolytic therapy patients. This document, which is dated July 1995, and refers to the use of TPA, is in evidence. It stipulates the assessment of various factors, every hour, for a period of four hours, after the administration of the thrombolytic agent. Thereafter assessments are to be every four hours.

**64**  The assessments to be done are set out as follows:

1. Vital signs (BP - HR - RESP)
2. Neuro signs (as per Glasgow Coma Scale)
3. Reperfusion arrhythmias
4. Skin and extremities for ecchymosis, swelling and bleeding
5. Invasive puncture site (S) for bleeding
6. Abdominal and/or low back pain: which can indicate retro-peritoneal bleeding
7. Numbness in lower extremities

**65**  Nurse Petryk said that after completing her first assessment after Mr. Hayes arrived, as described above, she went into his room thereafter and conducted the required assessments, although she did not perform some of the Protocol tests, and did not record the results in the Clinical Record. She said that she would do his blood pressure, which remained unchanged, and have him move over in the bed. His eyes were always open and his speech was always coherent, and he was helpful. She always felt that he was neurologically stable, although he still had a headache. She had no concerns about his neurological status, because nausea, vomiting and headache are common to heart attack victims and to patients receiving nitro. She said that in her opinion there had to be some other, or a new, change in the patient, in order for her to think that anything else was going on.

**66**  She was referred again to the Clinical Record, and asked what occurred during her assessment at 16:18 hours, her second assessment. She said that she took his vital signs at that time, but omitted to chart them, i.e., that his eyes were open, he was oriented, obeyed orders and directions and so on. She said that she should have filled in the Clinical Record, and could have. However, because she was observing Mr. Hayes closely, and looking after the other patient, she neglected to check off the assessment information. She also acknowledged that she did not do a formal check of the strength of his hands and feet. However, she observed that his movement in bed was very strong, and, as well, that he did not mention having any problems.

**67**  I observe here that Dr. Keyes, the defence expert, confirmed the gist of her evidence; that if Mr. Hayes had undergone a change in the level of his consciousness when Nurse Petryk was observing and assessing him, she would have noted it; and that if he had developed a left-sided weakness or sensory change, without a change of consciousness, Mr. Hayes would have told her about it, just as he had told her about his other symptoms or problems.

**68**  Nurse Petryk had told the resident in the area, Dr. Oyler, about Mr. Hayes' complaint of serious headache. Dr. Oyler did not express concern about the headache. Rather, he gave her an order to discontinue the nitro-glycerine if the headache persisted.

**69**  17:01 hours was the approximate time of the third of the four required hourly checks of Mr. Hayes' neurological signs or symptoms. At that time she found his blood pressure to be unchanged. His pulse was the same, and the nitro-glycerine was reduced to one-half. At the same time she assessed him for alertness. His eyes were open, he was orientated, talking to her, obeying requests and moving well in bed.

**70**  Fifteen minutes later, at 17:16 hours, she again checked his vital signs. This was when she turned the nitro-glycerine off, and she says she was wondering at that time if perhaps his blood pressure would go up because nitro-glycerine dilates arteries and veins and lowers blood pressure. Again, she found his vital signs to be stable, and that he was neurologically intact.

**71**  At that time Mr. Hayes was waiting for his wife to come from Ottawa. He had not really rested and was anxious. He still had the headache, but had no further cardiac pain. He never indicated to her that his headache was getting any worse, and there was no indication from his blood pressure that he had increased cranial pressure, like a bleed. She said that generally if a patient has a bleed in his head, his blood pressure goes sky-high, and there is intractable vomiting. Neither had occurred.

**72**  Dr. Brown came in to see Mr. Hayes around 17:30. She cannot recall whether he examined him at that time. She did recall telling him about Mr. Hayes' severe headache. She said that Dr. Brown told her to turn off the nitro-glycerine. She told him that it had already been done.

**73**  I pause here to note that Dr. Brown did examine Mr. Hayes, and his Consultation Report dated April 23, 1997, to Dr. Manual G. Marcos is in evidence. Nurse Petryk said that she also told Dr. Brown about Mr. Hayes' nausea, and Dr. Brown gave her an order for Maxeran, which she said was much better than Gravol to deal with his nausea. Finally, she said that Dr. Brown did not express any concerns to her about Mr. Hayes' condition.

**74**  Nurse Petryk was referred again to the Clinical Record, and the notation for 17:57 hours, which was the approximate time for the last assessment. She again assessed Mr. Hayes. His blood pressure was still stable. She listened to his heart, and her findings were unchanged. His eyes were open and he was talking to her. He sat up for her in the bed so that she could listen to her lungs on deep breathing. He moved strongly in the bed according to her. Again, she was of the opinion that he was neurologically stable. He had no heart pain, his breathing was good, he was oriented and moving fine.

**75**  The next chart note in the Nurses' Notes is for 18:20 hours or so. The notation reads: "Bile emesis Anti-Emetic given". It is common ground that the notation was made by another nurse, Steve Smith. She said that Nurse Smith told her that he had stood Mr. Hayes up besides his bed so that he could void. This evidence was objected to, on the basis that there was nothing in the chart to support it, that is, that he was standing up on his own. The objection was withdrawn when Counsel for the Defendant Hospital stated that what Nurse Smith told Nurse Petryk was not being tendered for the truth of the statement, but that what she was told factored into how she cared for Mr. Hayes. And I will note that Nurse Mowat gave evidence that she saw Mr. Hayes standing by the edge of his bed at this time.

**76**  Nurse Petryk said that she asked Nurse Smith how Mr. Hayes had done, and she was told that he had been fine. She was told that Mr. Hayes had vomited 75 ml. of bio-emesis, and that he had given him Gravol for it. He also told her that he had voided 100 ml. of urine. These results were recorded by her in the 24-hour Flow Sheet. She said that she was not concerned by the fact that Mr. Hayes had vomited again, because he had done so earlier, and Maxeran had seemed to helped him.

**77**  The next notation in the Nurses' Notes is for 18:45 where it is stated "denies discomfort (chest). Monitor RSB (50's). Still complains of headache. Will try to sleep. Nausea gone for now." She said that she had gone in to Mr. Hayes' room to assess him after her break. At that time he was awake and was not complaining of any pain, but still had a headache. The nausea was gone. The monitor pattern was stable. She encouraged him to try and sleep. He had not done so thus far. He rolled over to his left side to rest. He knew that his family was coming in to see him. He was oriented, moving well in bed, and asking questions. He was coherent and had no problems turning over, according to Nurse Petryk.

**78**  Nurse Petryk next recalled being in Mr. Hayes' room at 19:05, which was getting near the end of her shift. She went into the room to zero the IV machines, so that the next shift could count the fluid received on their shift. She said that while she was doing this Mr. Hayes looked over at her and asked her what she was doing. She explained to him what she was doing. He seemed fine, but she believes that he still had his headache. He appeared to be the same as on previous occasions.

**79**  Nurse Petryk was asked whether there were any other things that might not "get on the chart". She said that from time to time Mr. Hayes would lose his lead from the monitor, and she would have to go in and re-connect him. On those occasions he was awake, coherent and chatting with her and neurologically stable. This would have occurred at least three times in her shift. She said "we don't chart every time we go into a patient's room". She also said that it was common for leads to come off because the springs do not hold them as well, or because the patient lies on the cord.

**80**  What happened next occurred when she was in the nursing station, giving a report to Nurse Kirkham, who was coming on duty, and who would take over the care of Mr. Hayes. At that point in time the lab technician came into the station and said that there was something terribly wrong with Mr. Hayes. She and Nurse Kirkham ran into Mr. Hayes' room. She observed that his head was slumped down to the left and that his speech was garbled and hard to understand. Mr. Hayes' pupils were checked and found to be equal in sensitivity to light. She immediately reported to Dr. Brown that Mr. Hayes had had a stroke, and Dr. Brown attended to Mr. Hayes.

**81**  Nurse Petryk said that in all her years of experience she has never had a patient suffer this kind of bleed after thrombolytic therapy. She remembers so much about the case because it was the only intra-cranial bleed which happened on her shift, and it was a terrible experience.

**82**  On cross-examination Nurse Petryk said that she believed that the lab person came into the Nurses' Station around 19:20. She agreed that within "those few minutes" Mr. Hayes went from being completely normal to the very traumatic changes described. She would not accept the possibility that what the lab person noted was a step in his detoriation which had been going on for some time, and which she had failed to pick up. She said: "No, I don't believe that at all".

**83**  She acknowledged as well that at the time she was aware of the risk of intra-cranial hemorrhage to a patient on thrombolytic therapy; that while it was a rare occurrence, it was life threatening when it occurred. So the possibility of it occurring could not be ignored.

**84**  Nurse Petryk agreed that the long list of signs and symptoms she gave would not necessarily be seen in one patient at one time. When it was suggested that a patient may have one or two of them, she said that she felt the patient would have to have at least raised blood pressure and intractable vomiting.

**85**  She also agreed that it was important to know what the cause of the headache was, because while one cause is benign, the other is fatal. When it was put to her that the life threatening possibility had to be ruled out, she pointed out that she had reported the headache to both doctors. She also agreed that the way to rule out intra-cranial bleeding as a cause is to be sure that the headache is not accompanied by any other sign or symptom of neurological involvement; and it never was.

**86**  She agreed that since the Emergency Reports do not record a complaint about headache, and since Mr. Hayes complained about headache in the CCU, the headache must have been of recent origin. This is misleading, because in fact there is evidence that Mr. Hayes was complaining of headache when he was in the Emergency ward. And I will state here that I am satisfied on the evidence that the nausea and headache complained off by Mr. Hayes while in the Critical Care Unit were not due to intra-cranial hemorrhage or bleeding. They were not associated with any change in Mr. Hayes' neurological status, which would indicate intra-cranial bleeding had occurred, or was occurring. In fact no intra-cranial bleeding occurred until well after 19:05 hours.

**87**  Nurse Petryk's initial assessment of Mr. Hayes included comparing the strength of his hand grips and feet push, to see if any weakness were noted. A similar test was made by Nurse Kirkham around 19:30 hours. At that time his left hand grip was found to be absent. She agreed that a difference in hand grip was an important finding because it could be a sign of intra-cranial bleeding. However, she noted that when she had seen Mr. Hayes he had no problem sitting up, or using his arms and legs and had no problem with motor strength. She also emphasised that if Mr. Hayes had weakness in his hand he would have told her, like he told her about his headache.

**88**  The witness was cross-examined in some detail about what she would expect if on testing Mr. Hayes' hand grip she discovered one was weaker than the other. This, of course, is a situation which she never experienced. She did not agree that she could pick up "subtle differences" in his grips. She would not agree that weakness of grip caused by intra-cranial bleeding might show up before any obvious signs of change in consciousness.

**89**  It was put to Nurse Petryk that she had no idea what the status of Mr. Hayes' left hand grip was prior to 19:30 hours, because she had never specifically tested it. She said that she did in fact know, because as a nurse with over 30 years of experience, she could tell what his condition was by observing his movements in the bed. She noted that he was always alert, and that he told her of any problems that he had. She noted that at 19:05 hours she asked him how he was and he said that he was fine.

**90**  It was put to her that Mr. Hayes may have had a weakness in his left hand grip and not appreciated how important it was. Her reply was that it would have happened so quickly that he would have known how important it was. She emphasized that Mr. Hayes was an intelligent person, and that in her opinion he would have called her if he was experiencing any weakness in his hand. He would have known that it was not normal, and he would have called her immediately.

**91**  She would not agree that it was her practice to wait for a patient to complain to her. She said that she was in his room every 15 minutes or so when she observed him moving in the bed. If there was any change in his vital signs it would have been noticeable when he moved. She acknowledged that these movements were not recorded, and that she was testifying from memory of events which occurred three years ago. I will observe here that I have concluded that Nurse Petryk did not observe any neurological changes in Mr. Hayes when she informally assessed him, and that he made no complaints of such changes, simply because they did not exist, and did not arise until shortly before 19:20 hours when the intra-cranial hemorrhaging began.

**92**  It was put to her also that prior to 19:30 she had no idea that Mr. Hayes had any problem with his left foot, he made no complaint about it and she never tested it. She would not agree, maintaining that her assessments of Mr. Hayes, as an experienced nurse, having watched him frequently for a period of some five hours, were good.

**93**  She knew that she was required to follow the protocol, and do the baseline assessments, every hour. It was put to her that she substituted her own method of assessment for what the Protocol required. She said that she had a lot of good nursing years behind her, and did not think that there was anything wrong with her assessment approach. She felt that her informal assessment was fine, noting that when she assessed Mr. Hayes he was always strong, and that he had in fact stood up to void at about 18:20 hours, and that Nurse Steve Smith had told her that Mr. Hayes was fine.

**94**  She acknowledged also that she knew that TNK was an experimental drug, and that the purpose of the test was to assess its safety. When it was put to her that she knew that its risk had not yet been established, she said that she knew that there was some degree of risk, and that it was a blind study. She had also been told by the research nurse that the risk was the same as with the standard agents, and that she should treat it just like a standard agent.

**95**  She was asked why she did not follow the Protocol when she knew that it was a safety trial. She said that she was frequently assessing Mr. Hayes, and that there was no change in his condition up to 19:05, the last time she saw him. She did not think that she had to specifically check every item in the Protocol. She was quite busy between the two patients. She felt that she assessed Mr. Hayes accurately, and that he would have told her if he had had any problems with a hand or foot. She could have checked the Protocol items off. She simply did not have time to do so because she was so busy. She denied having let her guard drop a bit because of the low risk involved, and the fact that she had never experienced intra-cranial bleeding before.

**96**  Before turning to Nurse Mowat's evidence, I observe that in a given case it may be fatal to a defendant nurse attempting to clear her skirts of ***negligence***, if she did not perform and record her actions and findings as required by her hospital employer. However, this is not so in the present case. I am satisfied that in the circumstances of this case, Nurse Petryk's combined formal and informal assessments were effectively equivalent to the Protocol requirements; that they would have revealed, or she would have observed, neurological changes or signs almost immediately the intra-cranial hemorrhaging began.

**97**  Further, while she did not scrupulously follow the Hospital's Protocol, both with regard to how to assess the patient and to record her findings, in my view her failure to do so, if constituting ***negligence***, did not cause or contribute to the cause of the intra-cranial bleeding, or its devastating results, which I am satisfied began very shortly before 19:20 hours on that fateful evening. Hence, even if some of her evidence was fabricated, as suggested by Mr. Smith, the Plaintiff cannot succeed, and I will have more to say about this in due course. Finally, I found Nurse Petryk to be a honest and believable witness and I accept her evidence.

EVIDENCE OF NURSE MOWAT

**98**  Nurse Mowat is a Registered Nurse, having graduated in Moncton, New Brunswick in 1994. She did one year of floor nursing then entered Critical Care training in an Intensive Care Unit, again in Moncton. She came to the Defendant Hospital in September 1996, and worked in the Coronary Care Unit for almost three years. She then went to Halifax where she worked in the Coronary Care Unit in Queen Elizabeth II Hospital, which is a Tertiary Care Centre. Her unit receives all acute cases from the Maritimes, the sickest patients requiring the highest level of care.

**99**  She recalls Mr. Hayes and being involved in his care. She was working 12 hour shifts then, from 7:00 a.m. to 7:00 p.m. At the time she had her own two patients to care for, as did Nurse Petryk. However, it was a team effort and each assisted the other with her patients. They both would admit a patient, as they did Mr. Hayes. Each would cover for the other nurse when she was on her break, and at times they would answer call bells from the other's patient. She recalled helping admit Mr. Hayes, and putting the heart monitor on him.

**100**  The 16:10 hours entry in the Nurses' Notes is her entry. When asked how she had come to care for Mr. Hayes at that time, she said that he had rung his bell and that she had responded. He told her that he was nauseated, and he had vomited a small amount into a basin, which he held on his own. There was 50 cc. of fluid, which was a very small amount. Nurse Petryk recorded this on the Reporting Sheet.

**101**  Nurse Mowat said that she told Dr. Oyler that Mr. Hayes was nauseated and had vomited, and he gave her an order for Maxeran, an anti-emedic, which helped relieve the symptoms of nausea and vomiting. The order is recorded in the Intensive Care Unit's 24-hour Flow Sheet under the medications schedule.

**102**  She said that Mr. Hayes had no other complaints at that time, that is, other than nausea and vomiting. She was not concerned about this, because nausea and vomiting are common when a person has had a heart attack. She said that at the time his neurological status was good.

**103**  She next saw Mr. Hayes at 18:20 hours, just prior to the shift change. He had just finished voiding, and she entered the room to help settle him back into bed. At the time that she entered his room he was standing at the edge of the bed. His ability to stand was good, as was his balance. He was standing like a normal person without difficulty. He was holding a blue plastic basin by its handle, in which he had voided. She measured the output at 100 cc. of urine. There was no blood in the urine.

**104**  She was asked what assistance she gave Mr. Hayes at this time. She said that she put the head of the bed down, and he then sat near the top of the bed and swung his legs onto the bed, on his own. He then pushed himself up to the sit-up position with his hands and arms, again on his own. He was sitting comfortably when she put the side of the bed up. She said "I would have covered him up, given him his bell, and told him to call me if he had any other problems".

**105**  The only assistance that she gave Mr. Hayes was to hold the heart monitor cable, and the I.V. tubes, to make sure that he did not trip over them; while he sat on the bed, lifted his legs onto the bed, and then pushed himself with his hands and feet up to the sitting position. At the time she did not have any concerns about his motor strengths, and he made no complaints to her in that regard. His only complaints to her was that he still had his headache and he was still nauseated. She was not concerned about the headache because it was a common side effect of the nitro-glycerine. She did not expect the headache to have resolved at that time, because they last for a few hours after the nitro-glycerine is stopped. She concluded that his neurological status was good at the time on the basis of her observations of him, particularly the way he was talking and moving about. She had no concerns about his condition when she last saw him at 18:20 hours.

**106**  Her next involvement was during the shift change. She was present when the lab person came in to the Nurses' Station and said that Mr. Hayes did not look well and that they should take a look at him. She and Nurse Petryk went into his room immediately. She observed that Mr. Hayes was leaning or drooping to the left. His facial expression was drooping to the left as well, and his speech was slurred. They notified Dr. Brown right away, and they then checked his neurological signs. She checked his hand grips and found that he still had them on both sides. She could not recall checking anything else. She said that at 19:30 the nurse who was coming on to replace Nurse Petryk came into the room and did her own neurological assessment. At that time she found that Mr. Hayes' hand grip on the left was absent. She reiterated that Mr. Hayes' hand grips were present when she tested him.

**107**  I observe here that there are some differences between the evidence of Nurse Petryk and Nurse Mowat as to who was present and when. Nurse Petryk said that she and Nurse Kirkham rushed in to attend to Mr. Hayes after the lab technician spoke to them. Nurse Mowat said that she accompanied Nurse Petryk into Mr. Hayes' room. I do not think that this difference matters. I am satisfied that Nurse Mowat did attend Mr. Hayes with Nurse Petryk, and that she checked his hand grip strength; that Nurse Petryk checked his pupils. The evidence is that Nurse Kirkham did her own assessment at 19:30 hours.

**108**  Nurse Mowat said that while she was caring for Mr. Hayes there was nothing about him that would have led her to suspect that he was suffering from intra-cranial hemorrhaging. When asked why she remembered things three years later she said that cerebral bleeds are rare, serious and sudden; "something you can't forget". Finally, she said that in the Critical Care Unit in which she now works the nurses are not required to do hourly checks on post-thrombolytic therapy patients.

**109**  On cross-examination Nurse Mowat acknowledged that a neurological assessment is a very important part of patient care; that it is important to see if there are any changes over time. She added that there are different ways to do the assessment. She agreed that she did not note her findings on the Hospital charts. She said that it was not her responsibility. It was the responsibility of the primary nurse, and she, Nurse Petryk, was there.

**110**  She agreed that when she saw Mr. Hayes he was drowsy, as later described by Nurse Kirkham. The only difference was with regard to Mr. Hayes' left hand strength. She just remembered checking his hand grips, and that Mr. Hayes was trying to talk.

**111**  She, like Nurse Petryk, in effect said that she could assess Mr. Hayes by observing him, the way he was talking and moving, and standing by the bed and so on. It was not necessary to do the formal checks stipulated in the Protocol.

**112**  Nurse Mowat cannot recall whether she saw Mr. Hayes getting out of bed at about 18:20 hours. She was asked whether she was saying that he had not been assisted. She said that she could not remember how he got out of bed, to stand and void. It was possible that there was another nurse, a male nurse, around at the time. She did not recall any assistance from Nurse Smith while she was in the room.

**113**  She has a habit of saying "he would have done" or "I would have done", when she means that he did do something or that she did something. She explained that her first language is French, and that in giving such evidence she was not making assumptions as a result of her usual practice. She was saying what she saw, not what she assumed happened. She still has a recollection of some details, although the incident occurred three years earlier.

**114**  She believes that when the lab person came in she was preparing to give a report to the nurse who was replacing her. She had no responsibility to give a report to Nurse Petryk's replacement, Nurse Kirkham. She is sure that Nurse Kirkham was not present when she and Nurse Petryk went in Mr. Hayes' room, after the lab technician told them of her discovery. I will say here also that I found Nurse Mowat to be an honest and believable witness. As in the case of Nurse Petryk, her cross-examination did not reveal any negligent conduct on her part or on Nurse Petryk's part which caused or contributed to the cause of Mr. Hayes' intra-cranial hemorrhaging. It is also interesting to note that in the Critical Care Unit in the Hospital where she works in Halifax, the nurses are not required to do hourly checks on post-thrombolytic therapy patients.

EVIDENCE OF CATHERINE COUKELL

**115**  Ms. Coukell is Mr. and Mrs. Hayes' daughter. She was telephoned at work and advised that Mr. Hayes was in the Cardiac Care Unit.

**116**  She went to the Hospital to see him. He seemed very alert, talkative and "appeared with it". He told her that he had agreed to participate in the drug trial. He asked her to make some telephone calls and she did, telephoning her mother and some other persons. She believes that this was just after 2:00 p.m.

**117**  She then returned to her father's room. A friend came to visit her father. Shortly thereafter the nurse asked them to leave. About this time he started complaining about a severe headache. She was there when he was taken to the Coronary Care Unit. She was there when he became nauseated. He was very tired. Shortly after this his Pastor arrived. They were in the room for 15-20 minutes when they were asked to leave. Her father was not feeling well and they wanted him to rest. She did not return to his room. Her evidence was brief and she was not cross-examined.

EVIDENCE OF MR. D. GOODE

**118**  He has known Mr. Hayes for about 15 years. They worked together in a number of capacities at Mutual Life of Canada. He was working on April 23, 1997, and saw Mr. Hayes that morning. He was subsequently telephoned and told that Mr. Hayes had had a heart attack. He went to see him at the Royal Columbian Hospital around 1:00 p.m. He found Mr. Hayes in a curtained off area in the Emergency ward.

**119**  The witness said that he spoke to Mr. Hayes and asked him how he was; that he "seemed at peace - I felt". They had a brief prayer together, and talked about matters being in God's hands.

**120**  He could vaguely remember Mr. Hayes being concerned about where his wife was. The witness spoke to Mr. Hayes' daughter and then telephoned Mr. Hayes' office to try and find out where Mrs. Hayes was. She was then on her way home from Ottawa.

**121**  He was asked how Mr. Hayes was doing. He said that he was restful in bed, and that there were nurses in the area. When asked again how he was, he said: "he did indicate that he was having very severe headache a number of times. This stuck in my mind". He wanted to get a hold of his Pastor. He was asked again, did Mr. Hayes say anything other than that he was having headaches. He said: "he seemed again at peace". All of this occurred while Mr. Hayes was in the Emergency ward. The witness said that it was hard to get a handle on time, but he believes that he was there for about one hour. He recalls other people being in the room, but this is unclear to him.

EVIDENCE OF MR. G.M. BATMAN

**122**  Mr. Batman has known Mr. Hayes for some time. He considers him to be a personal friend. They had "campaigned together". His evidence was very brief. He said that he visited Mr. Hayes in the hospital from 4:30 p.m. to 4:45 p.m. He was in the Intensive Care Unit. When he arrived Mr. Hayes appeared to be sleeping on his side, in the fetal position. He woke him up. He was not depressed, but seemed to be lethargic. He was very tired. He did not express that he was in pain. He said that he took his hand and Mr. Hayes gave him a very gentle squeeze. He noted that usually Mr. Hayes shook his hand with authority.

**123**  He was asked whether Mr. Hayes was alert at the time. He said that he was awake, but not to the extent of the previous day. He said that Mr. Hayes was "not with it" and withdrawn. Although he talked to him, he did not move a lot. His speech was slower, quieter. He was there about five minutes. Mr. Hayes may have asked him about how the campaign was going. He had not intended to be there any longer. There was no nurse in attendance.

**124**  On cross-examination he agreed that when he arrived he spoke to a nurse and was directed to Mr. Hayes. Mr. Hayes knew who he was "when I aroused him".

**125**  He took Mr. Hayes' hand in his. It was his right hand. He probably asked Mr. Hayes how he was.

**126**  He did not recall Mr. Hayes saying that he was tired. However, he certainly appeared that way. He could not recall whether he asked any other questions of Mr. Hayes. He said that it was normal that he would have asked him how he was doing. Mr. Hayes said nothing with regard to his condition. He left the room, thanked the male nurse, and left.

**127**  I turn now to the evidence of the two nursing experts, Nurse T.A. Werry and Nurse M. MacKay, on the duty of care.

EVIDENCE OF NURSE T.A. WERRY

**128**  Nurse Werry was called on behalf of the Plaintiff to give expert evidence as to coronary or cardiac care nursing, and was qualified to do so. She has been a full time Registered Nurse in the Cardiac Care Unit at St. Paul's Hospital since 1991. In December of 1997 she assumed the position of Clinical Nurse Leader in the Coronary Care Unit in St. Paul's Hospital. In 1999 she became a Clinical Nurse Educator at St. Paul's Hospital, which involves orientation of new staff in the Clinical Care Unit. Her roles include the care of patients in the Cardiac Care Unit, and the care of patients who have been given thrombolytic therapy.

**129**  In her Report she provides her opinion on the standard of nursing care Mr. Hayes received in the Defendant Hospital. She identified the standard of care as that contained in the Hospital's Protocol on Thrombolytic Therapy in the Acute Myocardial Infarction. She expressed the opinion that the standards of nursing practise were not met, in that neurological assessments were not carried out every hour for four hours as was required by the Protocol. She expressed the opinion that the nurses involved did not meet the Standard of Nursing Practise as set out by the Registered Nurses Association of British Columbia in that the nurses did not follow the Hospital's Protocol for neurological examination, and did not record any neurological vital signs (after the 15:14 hour recordings) for a period of three hours and sixteen minutes. In this regard she states in her Report: "this leads me to assume that the nurse(s) failed to perform the neurological vital signs". And she concludes:

It is my opinion that if absent hand grips and inability to move toes as identified at 19:30 would, if present earlier, would have been detected by a proper neurological examination and would have required the nurse to immediately inform the treating physician. (My emphasis).

I will observe here that I am satisfied on the evidence before me that if those symptoms were present when Nurse Petryk conducted her informal assessment, it is equally probable that she would have detected them at that time.

**130**  Nurse Werry was asked to define the use of her words "a complete and thorough neurological assessment" used in her Report. Her answer in effect outlined the test contained at the top of the Clinical Record Form. She said that it involved testing under the Glasgow Coma Scale, which has three parts; ability to open eyes, best verbal response and best motor response. She said:

In addition, I would also consider hand grips, hand strength and leg strength, and mobility and, in addition, pupillary responses to light, a light shined into the pupils to look for proper constriction.

**131**  With regard to the hand grips she said that she asks the patient to grasp her fingers with both hands, release and grasp again; this allows her to compare the strength bi-laterally and pick up on any subtle differences in motor strength in the arms, which would indicate an untoward, or adverse, neurological event. When testing the patient's leg strength she places her hands at the bottom of their feet and asks them to push against her hands. Again both legs are done at the same time to allow comparisons in motor strength.

**132**  Nurse Werry also emphasised in her Report that complaints of headache, nausea and vomiting should be treated as "an increased index of suspicion" in all patients who have received thrombolytic therapy. She said:

I would look at an on-going headache or nausea and vomiting as a potential clue or cue that there may be a neurological event occurring. (My emphasis).

She said that by "more vigilant" she meant that she would ensure "that I have done a complete and thorough neurological assessment..."

**133**  I pause here to note that I am satisfied, and that I have found, that as opined by the doctors and Nurse Petryk, the headache, nausea and vomiting experienced by Mr. Hayes had nothing to do with the intra-cranial hemorrhaging which first occurred or began shortly before 19:20 hours. Had they been associated with intra-cranial hemorrhaging the tell-tale symptoms of this terrible process would have been quickly evident, and long before 19:20 hours. The lack of such symptoms until shortly before 19:20 hours is telling, and Nurse Werry's increased index of suspicion is academic. In the case at Bar, her complete and thorough neurological assessment would not have discovered any neurological defects or changes associated with the headaches, nausea and vomiting referred to. Further, the considered opinions of those who were present at the time, that these matters were not associated with intra-cranial hemorrhaging, were proven to be correct.

**134**  Nurse Werry would not agree with Nurse MacKay's opinion that seeing the patient move about in his bed is an acceptable substitute for the formal neurological assessment she described, referring to the hand and leg testing. When asked why not she said:

By not actually having the patient perform the hand grips, subtle but important differences could have been missed; that also goes for the leg strength and pupillary response. (My emphasis).

**135**  I observe here that in the final analysis this is really the only point on which the two nursing experts differ. Nurse MacKay, like Nurse Petryk and Nurse Mowat, says that by observing what the patient can physically do, i.e., roll over in bed, stand by the bedside, and so on, the nurse has the same information she would obtain by having the patient do the formal hand/foot test. Nurse Werry, on the other hand, says that subtle differences, if present, could be missed.

**136**  I observe here that given the speed with which intra-cranial hemorrhaging progresses, I find it difficult to understand how there could be subtle differences without the presence of the more obvious signs or symptoms of the hemorrhaging. In any event, the subtle differences postulated never came into existence until about 19:20 hours.

**137**  It is interesting to note that Nurse Werry was never told about or given the evidence of the attending nurses, about what they actually observed or did during their care of Mr. Hayes. And the major factor involved in the formation of her opinion, was her understanding that after 15:14 hours no further neurological vital signs or assessments were done. This was not the case. She was asked to form her opinion based on the Hospital Charts, and she had before her the Charts, the Hospital's Protocol and the RNABC Nursing Practise Standards to which she referred. However, she agreed that it was important to know what the nursing staff actually did and observed prior to forming her opinion as to the standard of care exercised.

**138**  Nurse Werry agreed that while providing nursing care to a patient, an experienced nurse can gain valuable information about a patient's neurological condition. For example, if the patient's eyes are opens when she walks into the room, he is opening his eyes spontaneously. If the patient is talking lucidly and describing his symptoms and responding to her questions, she is able to make an assessment about his mental status, that he is oriented. If a patient is able to sit up in bed on command and roll over on command, then he is obeying commands. When all these findings are put together the patient's score on the Glasgow Coma Scale would be 15/15.

**139**  She would not agree that a patient's ability to hold a glass urinal in his hand would give as good an estimate of grip strength as a formal hand grip test, because she could not identify if there were any subtle differences. She did agree that if a patient was able to stand without difficulty, that fact would not support a finding that he was unable to move his toes. She also agreed that experiencing symptoms, such as an inability to hold on to anything, or numbness in his foot when he stands, or an inability to move his toes, was something that the patient would report.

**140**  It is interesting to note that Nurse Werry's protocol, that is, the St. Paul's Hospital Protocol, is much less stringent than the Royal Columbian Hospital Protocol, in that after thrombolytic therapy, it only requires vital signs to be monitored every four hours, as opposed to every hour. Specifically, the St. Paul's Hospital Protocol provides:

1. Monitor V/S and neurological status Q15 minutes x 2 upon initiation of infusion, then Q1H during infusion. Following infusion, monitor V/S Q4H and PRN if no other intervening procedures or conditions exist. (My emphasis).

When asked whether the expression "monitor V/S Q4H and PRN" included neuro-vital signs, she said "it is not implicit in this document. I would, but thats my practise". When asked to explain the initials "PRN" the witness said that she was not sure what it stood for, adding:

It means if there are any other untoward - any signs or symptoms of instability or neurological compromise we would be expected according to the Protocol to do a neurological and vital sign assessment.

**141**  Nurse Werry was also referred to the directions to the nurse in the case of acute neurological changes under the topic of "Major Bleeding" in the St. Paul's Protocol, as follows:

If acute changes in neurological status occur deemed not to be due to sedation or analgesia she should check Glasgow Coma Scale, motor strength and VS and notify MD stat. (My emphasis).

She acknowledged that the sort of changes expected, or referred to in the clause were pretty acute changes; also that as in the case of the Defendant Hospital, at St. Paul's Hospital the physician's orders to the nurses only require monitoring every four hours.

EVIDENCE OF NURSE MacKAY

**142**  Nurse MacKay was called as an expert witness on behalf of the defence and her written Report dated February 21, 2000, is in evidence. Like Nurse Werry, she is employed at the St. Paul's Hospital. She is a Clinical Nurse Specialist in cardiology and interventional cardiology at the Heart Centre of St. Paul's Hospital. She has been a nurse for 22 years and, like Nurse Werry is highly qualified.

**143**  She holds a Masters Science Degree in nursing, and National Certification in Critical Care from the Canadian Nurses Association. She is an Adjunct Professor of Nursing at the University of British Columbia, and is actively engaged in professional and scholarly activities related to cardiac nursing. She has taught all aspects of nursing management of thrombolytic therapy throughout the Province. She has taught nurses how to monitor patients who have received the therapy. She has some authorship of the St. Paul's Hospital Protocol.

**144**  Nurse MacKay was qualified as an expert in nursing standards of practise in British Columbia, and in particular the standard of practice expected of coronary care nurses. And her qualifications were accepted by Counsel for the Plaintiff.

**145**  It appears from her Report that unlike Nurse Werry, she was told what the Defendant Hospital's nurses did and observed during the material time. She observes in her Report that the Defendant Hospital's protocol for management of patients receiving thrombolytic therapy includes

Monitoring vital signs (to include blood pressure (BP); heart rate (HR); respiratory rates; Glasgow Coma Scale; cardiac rhythm; skin, puncture sites and extremities for signs of bleeding; abdominal and/or back pain; and numbness in lower extremities)every one (1) hour once the administration is complete.

**146**  She also points out in her Report that the ASSENT I study protocol contained Physician's Orders for use in the ASSENT I trial, which directed that vital signs be monitored every four hours after receipt of TNK; that the standing Physicians' Orders at Royal Columbian Hospital that direct care for myocardio infarction patients also calls for monitoring of vital signs every four hours. However, the nursing protocol for post-thrombolytic therapy patients at the Royal Columbia Hospital called for vital signs assessments every hour for the first four hours after thrombolytic therapy. She points out as well that there were therefore inconsistencies in the guidelines that Nurse Petryk had available to her, or was required to follow, and that it would have been prudent for her to follow the more cautious monitoring regime, i.e. an assessment every hour for the first four hours. She indicates that in her view that is exactly what was done by Nurse Petryk.

**147**  In her Report, Nurse MacKay reviews the Clinical Records and Nurse Petryk's conduct in the care of Mr. Hayes. She emphasises that the narrative notes reflect that Nurse Petryk engaged in dialogue with Mr. Hayes every time she assessed him, which was every hour, or more frequently; that Mr. Hayes remained alert and oriented during the four and a quarter hours he was under Nurse Petryk's care. She obviously is of the view that Nurse Petryk was assessing Mr. Hayes' level of consciousness indirectly, and perhaps directly as well. And she observes that the ability of Mr. Hayes to move "could also be made informally", as she observed him moving about in and beside the bed, without the need for specific commands which might test that ability.

**148**  Nurse MacKay expresses her opinion that Nurse Petryk adequately assessed Mr. Hayes' level of consciousness at least every hour. She also found that it was reasonable for Nurse Petryk to attribute Mr. Hayes' headache to the nitro-glycerine infusion, since it is a common side effect of nitro-glycerine; and notes that the fact that Mr. Hayes had the headache and had vomited was communicated to the doctors. Nurse MacKay also expresses some concerns with the fact that the headache did not subside with discontinuation of the nitro-glycerine infusion, but adds "since the patient's level of consciousness apparently remained unchanged, I conclude that Nurse Petryk met the standard for nursing care of a patient receiving thrombolytic agent".

**149**  On direct examination, Nurse MacKay was advised in some detail of the evidence of Nurse Mowat to the effect that she found Mr. Hayes standing on his own at the side of his bed after he had voided, that he was standing without difficulty, that he got back into bed on his own and then pushed himself into a sitting position using his hands and arms and so on.

**150**  She was then asked does that factual assumption change her opinion in any way. Her answer was: "It makes me more convinced that the patient's neurological status was intact at that time." She was then asked to explain her statement, to which I referred earlier, that in fact Nurse Petryk followed the more cautious regime, namely assessment every hour for four hours. She said:

The chart, the documentation that I reviewed, showed that she had in fact taken the patient's heart rate, blood pressure and respiratory rate every hour, and that she was in there assessing the patient every hour, interacting with him, providing care for him.

There were many, many entries related to dialogue that they had, which would -- which would be a form of -- which indicated that she had made some assessment of his level of consciousness. And so I believe she was monitoring him every hour.

**151**  She said that from a nursing perspective the first sign she is expecting with a post-thrombolytic intra-cranial hemorrhage is a decrease in the patient's level of consciousness. She indicated that the narrative notes of Nurse Petryk reflect that she engaged in dialogue with the patient every time she assessed him which was at least every hour or more frequently. And she notes in her Report the fact that Mr. Hayes engaged in conversation about the presence of chest pains, nausea and headache every hour would imply that he was alert and oriented, although this is not explicitly stated in the narrative notes. She says in her Report:

It is reasonable to assume that Nurse Petryk was assessing the patient's level of consciousness in an indirect way (by observing eye opening, assessing his ability to answer questions, engage in normal conversation, and carry out requests) each time she checked on him, if not in a direct, formal way, i.e., by asking him test questions about person, place and time, and by asking him to obey specific, isolated verbal commands. Observations of ability to move could also be made informally, as she observed him moving about in and beside the bed, without the need for specific commands which might test that ability.

**152**  Nurse MacKay was asked what other signs she would expect, or be looking for, in addition to a decreased level of consciousness. She said that they were nausea and vomiting, decreased motor strength and widening pulse pressure; that is, the difference between the systolic or top number and the diastolic number. She also said that she would expect any pupillary changes to occur later in the process of the hemorrhaging, but not at the beginning. These changes occur as a result of pressure on the optic nerve, and is a much later sign.

**153**  She was then asked to describe and relate the purpose of the Glasgow Coma Scale. She said that it is only one part of a neurological assessment, but a very important part. She described it as a tool that is designed to detect changes in the level of consciousness that has three components, eye opening, best verbal response and best motor response.

**154**  She said that typically if the patient's eyes are open there is no need to ask him to open his eyes. Likewise for verbal responses, the nurse can elicit a verbal response from a conscious patient by simply talking to him in most cases. And likewise with motor responses, if the patient is moving all four limbs spontaneously, there is no need to go any further. That is the Glasgow Coma Scale she says.

**155**  Nurse MacKay was asked what a nurse could gain in terms of observation of the movement of the patient. She said:

Observing the patient's ability to roll over in bed or stand at the bedside, or whatever they are able to do, gives you exactly the same information as if you were to ask them to lift their leg or wiggle their toes, or lift their arm. It gives you an indication of their motor-ability to move, which is what the Glasgow Coma Scales asks you to assess. (My emphasis).

It is clear from Nurse MacKay's evidence that in her opinion Nurse Petryk performed proper neurological assessments of Mr. Hayes' physical strength pursuant to the Hospital's Protocol each hour; that Nurse Petryk's informal assessments of his hand and foot strengths were an acceptable substitute for the formal neurological assessment requirements. In this regard I observe that Nurse Petryk's method of assessment was the same as the methods outlined in the Protocol, save for the testing of hand and feet strength.

**156**  Finally, she was asked to explain her statement in the penultimate paragraph of her Report commencing with the fact that it was concerning that the headache did not subside with discontinuation of the nitro-glycerine infusion. She said that it was her experience that it can take an hour or two for a nitro-glycerine headache to stop after the nitro-glycerine was discontinued, and it is important that the patient's level of consciousness remains unchanged, because such a change might suggest that the patient's headache was due to something other than the nitro-glycerine infusion. Since there was no change in the level of consciousness the nurse would have no reason to suspect that the cause of the headache was something other than nitro-glycerine.

**157**  It was suggested to Nurse MacKay in cross-examination that even without a change of consciousness a headache may indicate intra-cranial bleeding. She said that that was not her experience, "but I suppose its possible."

**158**  She was next asked whether she agreed with a statement in a leading authority in her field, that the importance in change in motor activity, whether it is as subtle as an inability to wiggle toes, or as profound as abnormal posturing, cannot be understated. Her answer was:

My understanding and my reading of the literature has been that examination of motor strength and equality of motor strength is often subject to subjectivity, if I can use that, and as such, may not be as reliable as changes in level of consciousness. (My emphasis).

When the question was put again she said: "I suppose so."

**159**  She did not agree that checking muscle strength or motor ability is always done against resistance and requires bi-lateral comparison. She said that while formal assessment requires all of these things, a less formal assessment can be conducted without providing resistance to the patient.

**160**  Nurse MacKay agreed that the reason a Hospital issues nursing protocols is to see that all the nurses are aware of the standard of nursing care that is expected. And that it is to ensure as well consistency of patient care. She also agreed that where a Hospital specifically directs something to be done by protocol, or something to be done a certain way, it is effectively saying that this matter is not to be left to the individual experience or judgment of the different nurses who might be seeing the patient at different times.

**161**  With regard to the Defendant Hospital's requirement of an assessment every hour, the following exchange took place:

1. Now, the Royal Columbian Protocol requires neuro-vital signs every hour.
2. Yes.
3. And you agree that although there are some conflicting instructions elsewhere in the order sheets, that the one hour Protocol is what the nurses should follow?
4. Yes.
5. O.k. And the conflicting instructions, which are elsewhere, say, I believe, four hours or PRN.
6. Thats correct.

She agreed also that because an order says "four hours or PRN" it does not necessarily mean that the neuro-vital signs will only be done every four hours. They may be done more frequently if they are needed. Thats what "PRN" means.

**162**  Nurse MacKay agreed that the Defendant Hospital apparently decided or was concerned that the first four hours should be treated as a period of particularly high risk. I observe that this is consistent with Dr. Keyes' evidence.

**163**  I should observe here that the whole of Nurse MacKay's evidence should be considered; that I did not understand her to be saying at any time that Nurse Petryk did not follow the Defendant Hospital's Protocol, or that she did not assess Mr. Hayes in accordance with its requirements. The point is that she was saying that Nurse Petryk did in fact do what she was supposed to be doing, that is, assessing Mr. Hayes' vital and neurological signs every hour for four hours, although not always in what has been called the formal way; emphasising the primary point that Mr. Hayes was always alert and oriented and did not demonstrate any change in the level of his consciousness, which is key or telling information.

EVIDENCE OF DR. D.A. CAMERON

**164**  Dr. Cameron is the head of Neurology at the Lions Gate Hospital in North Vancouver. His qualifications were not at issue. He said that he was familiar with intra-cranial hemorrhage, including hemorrhage caused by thrombolytic therapy. I found him to be qualified as tendered, and as accepted by the defence. He was called to give evidence on behalf of Mr. Hayes.

**165**  According to his Report dated April 18, 2000, Dr. Cameron was asked whether more frequent checks of neuro-vital signs in the approximately four hours preceding 19:30 hours would have been likely to lead to earlier identification of the intra-cranial bleed. In his Report he states that it is his opinion that hourly neuro-vital signs monitoring and documentation would probably have led to an earlier identification of Mr. Hayes' intra-cerebral hemorrhage. He says:

A formal neurological assessment would have probably have detected even mild focal weakness on the left side earlier than 19:30 hours. Most patients with a focal intra-cerebral hemorrhage manifest focal abnormal signs prior to decreasing level of consciousness secondary to a mass effect of the remainder of the brain. The change in the level of consciousness probably occurred between 18:45 and 19:30 hours. The nurse assessed Mr. Hayes at 19:30, and found him to be very drowsy and weak on the left side.

**166**  He was also asked whether earlier identification and treatment of Mr. Hayes' intra-cranial bleed likely would have prevented or lessened the severity of Mr. Hayes' neurological injuries. His answer was:

Earlier identification of the intra-cerebral hemorrhage probably would have prevented or lessened the severity of the neurological injuries which Mr. Hayes has suffered. It is well recognized that patients who suffer an intra-cerebral hemorrhage, and who are receiving anti-coagulant therapy and anti-platelet therapy, will have continuing enlargement of the hematoma over time.

He goes on to say that earlier identification of the intra-cerebral hemorrhage would have resulted in discontinuance of the Heparin infusion at an earlier time; that this treatment would probably have resulted in Mr. Hayes suffering with a smaller size intracerebral hemorrhage, and therefore the severity of clinical neurological defects, both short term and long term, would probably have been lessened, or partially prevented. He also goes on to note that it is difficult to accurately assess what neurological deficits could be prevented. He also says that it is probable that if the intra-cerebral hemorrhage had been detected at an earlier time the size of the hemorrhage probably would have been smaller and the degree of visual deficit would have been less severe.

**167**  I observe here that in answer to the first question Dr. Cameron seems to emphasise the fact that Mr. Hayes complained of constant severe headache "immediately upon admission into to the Coronary Care Unit at 15:14 hours"; and that the complaint continued thereafter. This is apparently why he says that a formal neurological assessment would have probably detected even mild focal weakness on the left side earlier than 19:30 hours. However, I observe that there is no evidence of any neurological change or problem being in existence for over four hours, until about 19:20 hours when he was found by the technician, and when, I am satisfied, the intra-cranial hemorrhage had just got under way. Further, I am satisfied that the headache was nitro-glycerine induced, and was not associated with the intra-cranial hemorrhage.

**168**  I observe also that Mr. Hayes complained of the severe headache in the Emergency Ward, that is well before he was transferred to the Coronary Care Unit; that at that point in time a full neurological assessment was conducted, (which was according to his Report 54 minutes following the injection of the TNK), and he was found to be neurologically normal, his Glasgow Coma Scale recording being 15/15.

**169**  With regard to the second question, Dr. Cameron seems to emphasise that earlier identification of the intra-cerebral hemorrhage would have resulted in discontinuation of the Heparin infusion at an earlier time, with possible different results in the size of the hemorrhage. I observe that in this regard the nurses and the doctors at the Hospital, as well as Dr. Keyes, were all of the opinion that the headache was not related to intra-cranial hemorrhaging. And they also emphasised that a Heparin headache will continue for a hour or two after the Heparin has been stopped. The evidence also is that the effect of Heparin lasts for some time after it has been stopped. Thus in my view there is no basis for either of Dr. Cameron's opinions expressed in answer to the two questions. The evidence simply does not support them.

**170**  In this regard I note that Dr. Cameron advances little, if any, persuasive specifics, analysis or explanations as to the basis of his opinions and theories. With great respect I find them to be somewhat baldly stated and speculative. And they are inconsistent with what actually happened in this case, and with the very nature of intra-cranial hemorrhage, particularly the speed with which it progresses, and the revelation of its symptoms. They are also contrary to the evidence and opinions of Dr. Keyes which I find compelling. Having considered the whole of the evidence, I prefer Dr. Keyes' evidence and opinions over those of Dr. Cameron's where they differ. In reaching these conclusions I do not question Dr. Cameron's qualifications or expertise. And it need not be stated that honest experts in a field often differ dramatically in conclusions they have come to on a particular matter.

**171**  On direct examination, Dr. Cameron was taken through his Report dated April 18, 2000, and asked to explain different portions of it. He was asked to explain his reference to "a formal neurological assessment" at the bottom of pg. 5. This led to his following evidence:

Only specific questions of a patient, i.e., what is your name, where are we, what city, what is the date, etc., will establish the patient's orientation and level of alertness. If a conversation with a patient is superficial, and about other things, you may not detect that the patient is not fully oriented. The testing of sensory functions, for example, the testing of a patient's hand grip, is the only way to determine if there is any evidence of neurological deficiency. Further, a patient might not be aware of a particular problem which the physician could only detect on such formal examinations.

**172**  He was also asked to explain the following statement contained on pg. 6 of his report:

Most patients with a focal intra-cerebral hemorrhage manifest focal abnormal signs prior to decreasing levels of consciousness secondary to a mass effect of the remainder of the brain.

He said that focal abnormal signs are manifest prior to decreasing levels of consciousness because the hemorrhage is not large enough to press on other areas of the brain. At this point he was asked whether he was saying that the hemorrhage or bleeding was a slow process, and after some thought he said: "It can be, yes."

**173**  The answer is consistent with his apparent view that a patient could have subtle neurological differences or changes associated with intra-cranial hemorrhaging, for some time without more prominent symptoms being visible. Given the speed with which a thrombolytic intra-cranial hemorrhage progresses, I find it difficult to understand or accept this evidence. Dr. Cameron also said that both hemispheres of the brain or the stem have to be compressed in order to have a decreased level of consciousness; an opinion which Dr. Keyes does not share, at least in the circumstances of this case.

**174**  Dr. Cameron was referred to Nurse Kirkham's note for 19:30 in which she says she found Mr. Hayes very drowsy and absent a hand grip on the left side. He was then told Nurse Mowat's evidence; that "a few minutes before" she had found Mr. Hayes slumped over, a change in his speech and so on, but had hand grips still present. Dr. Cameron said that this was not possible. The slumping to one side indicated one of two things. Either the left side was weak, or there was compression of both cerebral hemispheres, a change in the level of consciousness. A normal hand grip is inconsistent with this scenario.

**175**  Dr. Cameron was next questioned with regard to his statement on pg. 6, that a change in the level of consciousness probably occurred between 18:45 and 19:30 hours. He was asked whether he could say when the hemorrhage began, or focal signs might have been present, prior to the change in consciousness level. He said that he was not able to do so; that he could not say when the focal weakness may have developed, adding that "in most cases it is present before there is a decrease in the level of consciousness".

**176**  Dr. Cameron was then asked to comment on Dr. Keyes' opinion, that the hemorrhage actually began after 18:45 hours, and more likely after 19:05 hours, and that in effect there would be nothing to detect. He does not agree with the opinion, nor does he agree with Dr. Key's opinion that headaches usually last for a long period of time after the nitro-glycerine has stopped. He gave the contrary opinion, that most headaches stop within a few minutes of the stopping of the nitro-glycerine, and that an on-going headache thereafter is a clue that something else is going on. He added that if a formal neurological assessment had been done, and if a focal weakness existed earlier on, it would have been detected.

**177**  I observe here that I accept Dr. Keyes' opinions that a nitro-glycerine headache will continue long after the nitro-glycerine has been discontinued, and that if the headache had been associated with intra-cranial hemorrhaging the tell-tale signs of it would have been present at or about the same time. And I am satisfied that the intra-cranial hemorrhaging did not commence until around 19:20 hours when the technician found that Mr. Hayes was in trouble, and that there would have been nothing to detect by any assessments prior to that time.

**178**  Dr. Cameron then referred to the CT Scan Report of Dr. A. Tan dated April 23, 1997, which is in evidence and is as follows:

There is a large intra-cerebral hematoma in the right temporal lobe. It measures about 6 cm across and has a blood serum fluid level, suggesting that this is of some standing. This has resulted in a mild mid-line shift to the left.

There is also a very small associated acute sub-duro over the right frontal convexity. (My emphasis).

**179**  Dr. Cameron said that this description is similar to blood having been left to stand in a test tube. After some time the serum comes to the top, and the plasma goes to the bottom. He said that this is what happened in Mr. Hayes' brain. He also agrees with Dr. Key's opinion that this may also be seen where there has been a hemorrhage in the brain. However, he says that it indicates that the hemorrhage "has been sitting there for a while - not a few minutes". He concludes from the Radiologist's Report that the hemorrhage had occurred potentially a few hours earlier, that is, was of some standing.

**180**  Dr. Cameron was then asked how long after the hemorrhage occurred would this change be seen. He said that he did not know. He noted that he has done a CAT Scan on a patient one hour after a hemorrhage has occurred, and he did not see the change referred to. What is seen is a uniform hemorrhage throughout.

**181**  He next challenged Dr. Key's reference to nurses being in and out of Mr. Hayes' room doing their tasks, suggesting constant and continuous observation of Mr. Hayes. He did not agree with this because, he said, Mr. Hayes' blood pressure and heart rate could be recorded at any time desired and would appear on the monitor. Thus in effect the nurse can take this information and put it into the chart, and not have to go into Mr. Hayes' room.

**182**  He also quarrelled with Dr. Keyes' view that the nurses had in fact performed numerous neurological assessments of Mr. Hayes. He said in effect that this can only be done if a formal neurological assessment was made. He said that a patient may have a mild weakness, which would not be detected unless a formal assessment was done. For example, he could still have it, that is the weakness, and talk to the nurse. It cannot be said that Mr. Hayes was neurologically intact by just going into his room. Further, he said that Dr. Keyes leads one to believe that the nurses were in Mr. Hayes' room all the time. Dr. Cameron says that this was not the case, that a lot of data is taken off the monitor, and the nurses did not have to go into Mr. Hayes' room to record it. It was clear to me, while Dr. Cameron was testifying, that to some extent he had become an advocate, and was challenging the honesty and truthfulness of both Nurse Petryk and Nurse Mowat.

**183**  Dr. Cameron also challenges Dr. Keyes' evidence, that if Mr. Hayes had any weakness on his left side, he would have expected Mr. Hayes to tell the nurse that. Again, Dr. Cameron does not agree. He said that it is not up to the patient to point out the weakness, he may not be aware of it.

**184**  Dr. Cameron next attacked what he said was Dr. Keyes' assumption that the fact that at 18:30 hours Mr. Hayes stood up to void was inconsistent with the finding of any weakness at that time. He does not agree. He said that a patient may be able to stand with no apparent weakness of his legs, and still have mild weakness in his arms and not detect it himself. Unless a formal assessment is made a weakness of the left arm may be missed.

**185**  Dr. Cameron explained that because of the anti-coagulation effect of Heparin, once the patient has hemorrhage he will continue to bleed and increase its size. The larger the hematoma the more devastating to the brain. There is evidence that the hemorrhage probably did increase in size over time, because of the progressive decline in the neurological status of the patient after he was discovered with a lower level of consciousness. All of his problems occurred over a period of time.

**186**  He said also that in most cases an acute hemorrhage happens abruptly, quickly and bleeding stops unless the patient receives anti-coagulant therapy. If the hemorrhage had been found earlier, and the Heparin stopped earlier, the degree of neurological deficit would not be as bad as the end result, according to Dr. Cameron.

**187**  At this point Dr. Cameron was asked what he meant by the words "earlier identification of the intra-cerebral hemmorhage probably would have prevented or lessened the severity of the neurological injuries". He had earlier been asked to explain this statement to the Court. When asked specifically with regard to the word "prevented", his answer was:

Prevented -- not prevented, prevented partially. In other words, if the hemorrhage had been smaller, he may not have developed the stroke, secondary stroke, because there would have been less pressure on the remainder of the brain.

He may have had prevention of the other abnormal signs that I found when I assessed this patient and the other physicians assessed this patient.

In other words, he had signs of multiple areas of brain dysfunction because of the size of the hemorrhage pushing on the rest of the brain.

I had difficulty with this explanation.

**188**  He was next asked about his statement in the paragraph referred to "earlier identification of the hemorrhage would have resulted in discontinuation of the Heparin at an early time". It was pointed out to Dr. Cameron that Dr. Keyes opined that it would have made no difference because there was continued deterioration after the Heparin was in fact turned off, and because Heparin continues to have an anti-coagulant effect for some hours after it is discontinued. He said that this was true, but added: "...but the anti-coagulant effect over time is lessened. And you can actually reverse the anti-coagulant effect of Heparin on an emergency basis immediately with an agent called Protamine".

**189**  The latter evidence may be misleading, in that it is clear that in this case Protamine could not be used. In this regard Defence Counsel, Ms. Woods, had this to say:

This is another example of a suggestion completely inconsistent with the actual facts of this case. On cross-examination, Dr. Cameron conceded that in fact no Protamine was ever given to the patient even after he was found compromised at 19:30, because of the risk of re-occlusion of the artery. Again, for Dr. Cameron to speculate on how the Heparin may have been reserved in a situation where such measures were never even taken is to demonstrate a completely result orientated approach to his opinion.

**190**  Finally, Dr. Cameron was referred to an opinion that Mr. Hayes was neurologically intact up to 19:30 hours. He disagreed, because, he said, the nursing assessments prior to 19:30 hours did not include formal neurological assessments. He then seemed to be saying that he was assuming that there was a neurological deficit present during the time specified, because no formal neurological assessment was made. When asked about this, the following exchange took place:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | The Court: |  | And you were assuming from that, what, or concluding from that? |  |
|  | The Witness: |  | Concluding from that that they can't state that he was neurologically intact through the whole time interval. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | The Court: | I see. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | The Witness: |  | In other words, unless you do the test, you can't say for sure whether theres a problem or not. |  |

**191**  In my view the doctor's evidence in this area is telling. Dr. Keyes says that there is no evidence of any neurological signs or defects until some time after 19:05 hours. Dr. Cameron says that since no formal neurological testing was done, subsequent to the assessment which was done at 15:14 hours, when Mr. Hayes was admitted to the Critical Care Unit, it cannot be said for sure whether there was a problem or not prior to 19:05 hours. But throughout his evidence he suggested, time and time again, that there may have been or was a problem at some point in time earlier on, which may have been missed, or was missed, by the nurses, because they did not do formal testing, and which, if found, might have prevented or lessened the severity of Mr. Hayes' neurological injuries. In fact that is the whole basis of his theory or evidence. He speculates about what might have occurred after 15:14 hours, but which never in fact occurred.

**192**  On cross-examination Dr. Cameron said that he believes that he is called to the Coronary Care Unit in Lions Gate Hospital perhaps once a week. He was asked how often he was personally involved as the treating neuro-surgeon, with a patient who had undergone thrombolytic therapy. He said that it was hard to answer, he does not see it often, it is uncommon to see. Less than 1% of the patients who receive TPA have a hemorrhage. "It is rare for all of us to see a patient like this".

**193**  With regard to the documents he reviewed, he did not look at the CT Scan films. Aside from the nurses' notes, he was not given or told any of their neurological evidence, or of their observations of Mr. Hayes' condition.

**194**  He agreed that when a patient is receiving TNK, Aspirin and Heparin together, they all play a role in the risk of bleeding. They created an environment in which if the patient starts to bleed he is going to keep bleeding because he does not have any clotting ability. He will continue to bleed unless this can be reversed by medication.

**195**  He agreed that the bleeding usually develops rapidly and is often fatal. Over 50% of the patients die. Because of the treatment the patient is receiving, the thrombolytic agent, the Aspirin and the Heparin, the hemorrhage develops much more rapidly.

**196**  He agreed that at 18:45 hours Mr. Hayes' level of consciousness had not changed; that he was alert at that time; that Mr. Hayes went from alert at 18:45 hours to drowsy at 19:30 hours. He also agreed that if the evidence was that at 19:05 hours Mr. Hayes was alert, (and that was Nurse Petryk's evidence), then any decrease in the level of his consciousness had to have occurred after that time. These admissions do not support his evidence.

**197**  He was asked if the evidence was that at 18:30 hours Mr. Hayes was able to stand beside his bed, whether that was an important finding with regards to his neurological status. Dr. Cameron said that Mr. Hayes could have been standing with a weakened or affected arm. However, he agreed that at that time his lower limbs would have been functioning. It was put to him that in terms of his hands and arms, the fact that he could get out of the bed, sit on the bed, push himself up into the half-sitting position and so on, was also a good indication that Mr. Hayes' arms were functionable as well. He did not agree, saying that because of the location of the lesion, he may not be aware of a weakness in his arms. You have to have formal testing of the strength of the arms to know the situation.

**198**  Counsel pressed Dr. Cameron to agree that if Mr. Hayes had been able to use his arms and legs to push himself up on the bed, that it was a good indication that his arms were functional. He would not agree. He said again that you cannot say that the strength and function of the arms are normal. You have to formally test them. I have already noted that I had some problems with this evidence, particularly in light of other evidence, including that of Dr. Keyes.

**199**  He was then asked whether he was saying that you cannot make the determination by a patient's body movement. He said that you could do so "pretty well, but you may miss weakness on one side". Here I believe he is again talking about a mild or subtle weakness, as opposed to normal function, a fine distinction.

**200**  Dr. Cameron agreed that a headache is common in patients on nitro-glycerine, and that cardiologists and nurses, who deal with patients on nitro-glycerine every day, are more familiar than he is with regard to how long it takes for the effect of the nitro-glycerine to stop, once it is discontinued. He agreed that the one half life of nitro-glycerine is three to four hours, but this he said had nothing to do with clinical effect. While it can cause the headache to continue for three or four hours after it is stopped, in the majority of the cases the headache only lasts a few minutes.

**201**  Dr. Cameron agreed that after Heparin is discontinued its effects continue unless it is reversed; that it could not be reversed in this case because of the heart attack. In this case the effect of the Heparin continued after it was shut off. It would gradually come down and decrease its anti-coagulant effect. It was down to the normal range at 00:30 hours.

THE EVIDENCE OF DR. KEYES

**202**  There is no issue as to Dr. Keyes' qualifications as a Neurologist. He is the Head of the Division of Neurology at St. Paul's Hospital. He has a most impressive curriculum vitae. I was impressed by him and by his evidence, and I am satisfied that he actively participates and specializes in the subject matters with which we are concerned, including the causes and consequences of post-thrombolytic therapy cranial hemorrhaging.

**203**  Dr. Keyes' direct evidence is contained in his lengthy and concise Report dated October 1, 2000. As I said earlier he was permitted to give further direct evidence, said to be by way of explanation of his Report. I will relate that evidence in the order that it was given.

**204**  I will refer briefly to some of his opinions contained in his Report before turning to his testimony. In his Report Dr. Keyes careful reviews the history of Mr. Hayes' stay in the hospital, from the time that he was admitted to the Emergency Ward until the time that he underwent the right temporal craniotomy from 22:00 to 23:34 hours on April 23, 1997. He also carefully reviewed some of the actions and the side effects of the medications that Mr. Hayes received following his admission to hospital, such as nitro-glycerine, aspirin and Heparin, and as well, the thrombolytic agent which he received.

**205**  He points out at pg. 19, contrary I believe to the evidence of Dr. Cameron, that when intra-cranial hemorrhage occurs in the setting of anti-platelet, anti-coagulation and thrombolytic therapy, the symptom onset is without warning, rapid, catastrophic and often fatal. The symptoms and signs initially depend on the area of the brain in which the hemorrhage occurs. Patients usually have a sudden onset of severe headache that is associated with unilateral weakness and/or sensory symptoms and signs, and the patient's level of consciousness rapidly deteriorates as a result of increased pressure within the brain induced by the hemorrhage. And at pg. 20 he expresses the opinion that Mr. Hayes had no clinical evidence of intra-cranial hemorrhage prior to 19:30 hours on April 23, 1997. In his opinion Mr. Hayes' persistent headache, nausea and vomiting were related to the systemic effect of an acute myocardial infarction and the side effects of the nitro-glycerine intravenous infusion. There was no evidence to indicate that they were related to an intra-cranial hemorrhage.

**206**  At pg. 21 he notes that if Mr. Hayes had developed any alternation in his level of consciousness at 18:20, 18:25 and 18:30 hours, the nurses would have noted it. Also that if he had developed weakness, or sensory changes on the left side during that period of time, without an alteration of consciousness, he would have indicated that to the nurse.

**207**  At pg. 21 he also notes that Mr. Hayes could not have got out of bed, stood beside the bed to void, and then settled himself back in bed, if he was experiencing intra-cranial hemorrhage at the time. In fact he would not have been able to stand at his bedside. Further, he opined that at the time he would have exhibited a decreased level of consciousness, and/or left sided weakness and/or numbness. There is no evidence of any such symptoms or signs at the time. And he expresses his further opinion that Mr. Hayes could not have experienced his intra-cranial hemorrhage at that time.

**208**  He then goes on to review events at further points in time, expressing the same conclusion that the intra-cranial hemorrhage could not have occurred at those times, referring to 18:45, 19:00 and 19:05 hours. And for the same reasons he expressed the opinion that it is probable that Mr. Hayes experienced his intra-cranial hemorrhage sometime after 19:05 hours.

**209**  And at pg. 23 he states that in his opinion that the CCU nurse looking after Mr. Hayes from 15:14 to 19:05 hours on April 23, 1997, provided constant and continuous observations of the patient's clinical status. There is no evidence in the nursing records to indicate that the patient suffered any neurological deterioration until after 19:05 hours and before 19:30 hours on April 23, 1997.

**210**  At pg. 24 Dr. Keyes reviews and discusses the Medical/Legal Report of Dr. Cameron. He explains away Dr. Cameron's concerns about the fact that Mr. Hayes' pupil sizes were not documented at 13:05 or 15:14 hours, and that Mr. Hayes complained of persistent headaches while in the CCU. He emphasises again that the intra-cranial hemorrhages that occur in thrombolytic therapy occur rapidly and are large in size; that there was a rapid deterioration in Mr. Hayes' clinical neurological status which was documented. In this regard he says:

This patient could not have gotten to the operating room and completed his operation any faster than what did occur with this patient. Whether this patient was found after 18:45 or after 19:05 the clinical neurological outcome would have been exactly the same as far as I am concerned.

**211**  Dr. Keyes also deals with Dr. Cameron's assertion that earlier identification of the intra-cerebral hemorrhage probably would have prevented or lessened the severity of Mr. Hayes' neurological injuries. He is of the opinion that the change of level of consciousness probably occurred between 19:05 and 19:30 hours. He emphasises at pg. 26 that the type of hemorrhage which occurred to Mr. Hayes does not move slowly into the brain over hours with the patient developing slow, progressive neurological symptoms and signs. He say:

such hemorrhages occur suddenly and expand rapidly over minutes. They occur without warning, they produce rapidly progressive neurological symptoms and signs, and they are often fatal when they do occur.

**212**  He also expresses his disagreement with Dr. Cameron's view that if Mr. Hayes' hemorrhage had been detected earlier it would have resulted in a better visual outcome for him. In his opinion Mr. Hayes' visual outcome would have been the same, whether his intra-cranial hemorrhage was diagnosed at 18:45 or 19:30 hours.

**213**  In his summary Dr. Keyes reiterates that in his opinion the nausea, vomiting and headaches experienced by Mr. Hayes in the CCU were related to the effects of the nitro-glycerine infusion and acute myocardial infarction. And that Mr. Hayes clearly had no neurological symptoms or signs at 18:45 hours or at 19:05 hours on the day in question.

**214**  Dr. Keyes concludes:

This patient developed a large right cerebral hemisphere hemorrhage the symptoms and signs of which developed between 19:05 and 19:30 hours on April 23, 1997. This patient had no risk factors that would have put him at increased risk for intra-cranial hemorrhage following the use of anti-platelet, anti-coagulation and/or thrombolytic therapy. This patient's clinical, neurological status deteriorated without warning and rapidly as is commonly the case in patients with intra-cranial hemorrhages secondary to thrombolytic therapy. While the risk of intra-cranial hemorrhage following the use of thrombolytic therapy is low, the morbidity and mortality of such events when they do occur is very high. This patient survived this event because of the rapid assessment and transfer to the operating room for evacuation of the right temporal clot. The patient developed a number of permanent neurological sequelae following this right cerebral hemisphere hemorrhage and surgery. The patient's intra-cranial hemorrhage could not have been predicted or prevented. This patient's neurological outcome would have been no different had his intra-cranial hemorrhage occurred after 18:45 or 19:05 on April 23, 1997.

**215**  I turn now to Dr. Keyes' evidence on direct examination. Dr. Keyes perused the actual CAT Scan film taken of Mr. Hayes' head on April 23, 1997. His practice is to personally review CT and MRI Scan films himself, and to rely on his own view rather than that of the Radiologist alone. The reason is that he has the advantage of the physical and history of the patient's systems which the Radiologist will not have. Sometimes their views are different, and sometimes they are similar. He often discusses the Radiologist's view with him in light of his extra knowledge.

**216**  Dr. Keyes was referred to the assumptions set out on pg. 3 of his Report. He was asked to add to them the trial evidence of Nurse Mowat to the effect that at 18:30 hours Mr. Hayes had stood beside his bed to void and had no difficulty standing; that he then got into bed on his own and pushed himself to a sitting position at the head of the bed using his hands and arms. He was asked whether this additional information changed his opinions in any way. He said: No, if anything it solidified his opinions even more at the time.

**217**  He was then asked to explain his evidence at pg. 17 of his Report, pertaining to the one-half life of nitro-glycerine, Aspirin and Heparin, which Mr. Hayes had been receiving. The term one-half life refers to the time it takes for a single dose of medication to be reduced to one half of the administered dose. For example, in the case of a simple dose of 1000 units of Heparin the one-half life is the length of time it takes the body to reduce the units to 500 units. The purpose of one-half life is to determine how long a specific medication will remain in the body, and specifically how long will it affect a single organ system of the body. In the case of Heparin the one-half life is two to three hours. This essentially means that after the Heparin infusion is stopped the patient's clotting parameters will not return to normal for at least two to three hours after it has been stopped; provided that Heparin is the only medication being given for the alteration of the clotting function. The one-half life of nitro-glycerine is about three to four hours. Thus, the dilation of the brain or cerebral blood vessels can persist for at least three to four hours after the nitro-glycerine is stopped.

**218**  When a patient received nitro-glycerine the patient's blood vessels are dilated or enlarged. The pain fibres surrounding the blood vessels are stimulated and produce headache. It is impossible to distinguish a nitro-glycerine headache from other cranial headaches if one looks at the nitro-glycerine headache without, or in the absence of, other neurological signs and symptoms.

**219**  Dr. Keyes was next referred to pg. 19 of his Report and the two thrombolytic agents, TPA and TNK. Both are associated with an increased risk of intra-cranial hemorrhage. Studies available at the time of Mr. Hayes' admission on April 13, 1997, indicated that the risk of intra-cranial hemorrhage was approximately 0.7%. This applies to both TPA and TNK. That is, the risk is the same.

**220**  The only difference between TPA and TNK is in its molecular structure; such that the length of time that TNK will remain in the system is longer than TPA. Thus a patient can receive a single injection of TNK, but requires on-going infusion of TPA. However, the risk of intra-cranial hemorrhage with regard to the two drugs remains identical.

**221**  Dr. Keyes was referred to the following statement contained in the last paragraph on pg. 19 of his Report, "unfortunately when intra-cranial hemorrhage occurs in this patient population, the symptom onset is without warning, rapid, catastrophic and often fatal". This depends on where the primary hemorrhage is in the brain. Almost universally the first symptom is an alteration of the patient's level of consciousness. This is because the patient is receiving medication to decrease the ability to form a clot.

**222**  Once the hemorrhaging begins there is a very rapid accumulation of blood within the area of the brain in which the hemorrhage occurs. Because the blood in the brain is unable to clot, and the accumulation of the blood in the brain occurs rapidly, the patient develops quick detoriation of neurological function, that is measured over a period of minutes, usually to an hour or so.

**223**  Typically then once it starts it progresses very rapidly over a period of a few minutes to about one hour. Thus you have a patient who at time zero is neurologically normal, and over the ensuing 30 to 60 minutes will become comatose and unresponsive. Because the clot parameters of the brain have been altered by the medication, the hemorrhage is very large, the normal clot formation does not occur, pressure builds up in the brain, and ultimately it builds up sufficiently that pressure comes to bear on the stem of the brain, which is located at the base of the brain and contains all the vital functions such as control of breathing, heart rate etc., and when this happens the patient will die a neurological death from irreversible brain damage.

**224**  When asked what was meant by the words "without warning, rapid" and so on, he said: "Like that" and snapped his fingers. There is no warning prior to the onset of the actual blood starting to leak into the brain tissues. The first sign or symptom is the change in the level of consciousness as the blood leaks into the tissue. There is a rapid increase in the amount of blood where the leak takes place. That causes pressure and loss of function in brain tissue where the blood is located. That in turn leads to neurological symptoms and signs. It is not a gradual onset of symptoms and signs, but a rapid one, because the patient is receiving the three medications. For that reason the complication rate for intra-cranial hemorrhage, that occurs in patients receiving thrombolytic therapy, is found to be 87%, and of the 87% approximately 50% of the patients will die. The remaining 37% will have permanent neurological symptoms and signs of varying degrees.

**225**  Dr. Keyes was next asked to explain his statement at pg. 20: "Again, it is my opinion that that patient had no clinical evidence of his intra-cranial hemorrhage prior to 19:30 hours on April 23, 1997". When asked why he said this he said that in essence it was for the reasons that he had just described, that is that the hemorrhaging occurs rapidly. He repeated that the patient goes from being awake and responsive to comatose and non-responsive over a matter of minutes up to one hour.

**226**  He was next referred to the following passage contained at pg. 21 of his Report:

At 18:30 there is additional information that has been provided to me that indicated that the patient was assisted to stand at the bedside by the CCU Nurse and another Nurse in order that he might urinate. The CCU Nurse made an entry of the 100 CCs of urine being passed by the patient at 19:00. During that activity the patient was alert, oriented and he had no evidence of limb weakness. The patient was settled back to bed. Once again, it would be by opinion that if this patient had experienced his intra-cranial hemorrhage at that time then he would not have been able to stand at the bedside. He would also have exhibited a decreased level of consciousness and/or left-sided weakness and/or numbness at the time. He had no evidence of any such symptoms or signs at that time and therefore in my opinion this patient could not have experienced his intra-cranial hemorrhage at that time.

**227**  Dr. Keyes said that any of the symptoms or signs referred to would have made it impossible for Mr. Hayes to stand and urinate; that if he attempted to get out of bed, he would have fallen to the floor.

**228**  Dr. Keyes was then asked whether it was possible that a "subtle left-side weakness" could have existed at that time. He said: "I don't believe so". He said that Mr. Hayes' intra-cranial hemorrhage was located primarily in the right temporal lobe; that one would have expected, with the hemorrhage starting in this area, that Mr. Hayes would have experienced a change in his cognitive functions and an alteration in his level of consciousness. Further, he said that if Mr. Hayes had any subtle weaknesses at that time, they would have been most obvious when doing large motor movements with the left side of his body. Specifically, he would not have been able to get out of bed using his arm. Again, if he tried to stand on his left leg, if there was a subtle weakness present, he would not have been able to weight-bear on the leg. He would have been unsuccessful in getting out of bed at that time, and he would have lost his balance or fallen when he tried to stand up.

**229**  Dr. Keyes did not agree with Dr. Cameron's opinion that just because Mr. Hayes was able to push himself up on the bed, using his hands and arms, does not mean that a subtle weakness was not there. Dr. Keyes explained that Mr. Hayes' hemorrhage was located primarily in the right temporal lobe, which is behind the right frontal lobe, which is the area for which left-sided motor functions arise. For Mr. Hayes to develop left-sided weakness, subtle or otherwise, the right frontal lobe had to be involved. It would only become involved after the primary event, that is the hemorrhage, had spread from the right temporal lobe to other areas of the brain, including the right frontal lobe. However, with a hemorrhage starting in the right temporal lobe an alteration in the patient's level of consciousness is to be expected then.

**230**  Dr. Keyes was then asked to explain his statement at pg. 23 of his Report, that Mr. Hayes' neurological outcome would have been the same whether his intra-cranial hemorrhage occurred after 18:45 hours or whether it occurred after 19:05 hours. He said again that patients who have intra-cranial hemorrhage associated with thrombolytic therapy develops their symptoms quickly and rapidly. The injury to the individual nerve cells in the part of the brain that is affected - occurs immediately at the time the blood starts to interfere with the brain cell functions, or if the blood within and around the hemorrhages produces spasm, that is, narrowing of the blood vessels supplying blood to the area of the brain in and around the hemorrhage. When you deprive blood cells of oxygen and/or glucose for more than four minutes the brain cells start to die and become irreparably damaged. Given the speed at which the event took place, in his view whether or not the diagnosis was made at 18:45 hours or 19:05 hours, the events as they subsequently unfolded would have resulted in exactly the same neurological outcome.

**231**  Dr. Keyes did not agree with Dr. Cameron's opinion that oedema takes hours or even days to develop. He said that in the setting of intra-cranial hemorrhage, blood and other fluids normally contained within the blood vessel immediately leak out into the surrounding brain tissue, producing rapid on-set of cerebral edema or brain swelling.

**232**  Dr. Keyes was next referred to Dr. Cameron's evidence that to have decreased level of consciousness from a bleed it was a slow process and both hemispheres of the brain or the brain stem had to be comprised. He did not agree. He said that patients having a hemorrhage in the right or left temporal lobe typically have an alteration in the level of consciousness. Hence, you do not have to have both sides of the brain involved in order to have an alteration in the level of consciousness. And intracerebral hemorrhaging, in a setting of thrombolytic therapy, does not occur slowly. It occurs very rapidly.

**233**  And I am satisfied that in the circumstances of this case a change in Mr. Hayes' level of consciousness was the first symptom to be expected, and was in fact the first symptom to occur; that any left-sided weakness would not have occurred until the hemorrhage had spread from its primary location in the right temporal lobe to the right frontal lobe, which controls left-sided motor functions.

**234**  He was next asked to comment on the evidence of Nurse Mowat, that she found Mr. Hayes' hand grips present on both sides, a matter of minutes before Nurse Kirkham found the left hand grip absent at 19:30 hours. Dr. Cameron had said that it was impossible for Mr. Hayes to have his left hand grip present, if at the time he was slumped over to his left. Dr. Keyes did not agree with the opinion. He also did not find their findings to be incongruent. This, he said, was because of the primary mechanism of what was occurring in Mr. Hayes at that particular time. That was an intra-cerebral hemorrhage which was rapidly expanding over a period of minutes. The difference in the two observations was a reflection of the rapidly increasing size and spread of the hemorrhage.

**235**  He was next referred to Dr. Cameron's view of Dr. Tan's CT Scan Report dated April 23, 1997. Dr. Cameron interpreted the words: "some standing" to mean that the blood had been sitting there for a while and that the hemorrhage occurred at an earlier time, potentially as much as a few hours before the CT Scan was conducted. The Report says that it was conducted at 19:57 hours.

**236**  Dr. Keyes did not agree with Dr. Cameron's opinion. He said that the findings would be unusual in a patient who has intra-cerebral hemorrhage, but who is not on thrombolytic therapy. A typical CT appearance of a intra-cerebral hemorrhage in a non-thrombolytic patient is a uniform or single density. The reason for this is because clotting parameters are normal, and as soon as the blood gets out of the blood vessels it commences to clot. However, in a patient on thrombolytic therapy, where the clotting factors and abilities are abnormal, the ability of the blood in the brain outside the blood vessels to clot is abnormal. Therefore, some of the intra-cranial hemorrhage in patients receiving thrombolytic therapy, will clot and some will not. This difference in the ability of the blood to clot is what results in the different density abnormality found on the CT Scan in Mr. Hayes. The Scan shows what typically occurs in a patient on thrombolytic therapy who has an intra-cranial hemorrhage.

**237**  Thus, the finding of blood serum fluid level on the particular CT Scan does not indicate that the hemorrhage had been present for several hours as suggested by Dr. Cameron. Mr. Hayes also had another hemorrhage over the right frontal lobe, a subdural hemorrhage. Dr. Keyes said that he saw the Report and also viewed the Scan photographs. What it referred to is the second hemorrhage outside of the brain, but inside the inner lining of the skull. He said that in his opinion the presence of the two different types of hemorrhages is further evidence of the effect that the thrombolytic therapy had on Mr. Hayes' clotting parameters.

**238**  Finally, when Mr. Hayes was taken to the operating room, most of the hemorrhage that was removed from within the brain was still in a liquid state. If he had not been receiving thrombolytic therapy then the entire clot within his brain would have been solid. All of this is why Dr. Keyes believes that the CT Scan does not reflect the presence of a hemorrhage of long standing duration.

**239**  He was next referred to Dr. Cameron's opinion that if the Heparin had been stopped earlier it may have prevented the stroke which developed from the hemorrhage. He does not agree. He said again that if the Heparin had been stopped it would have to have been stopped a minimum of four hours before 19:30 hours, in order for the Heparin effect to have been gone by that time. He pointed out that the question only referred to Heparin, and that there was another reason. Both Aspirin and TNK are known to be associated with increased incidences of cerebral hemorrhage. Therefore, it would be incorrect to say that stopping Heparin would have altered the neurological outcome. And if you go back four hours, before 19:30 hours, i.e, to 15:30 hours and stop the Heparin, when the patient had clearly sustained a heart attack, in the absence of any neurological symptoms or signs, that would have made the discontinuance of Heparin inappropriate.

**240**  Finally, he was referred to Dr. Cameron's opinion that even if the Heparin had been discontinued it would have less effect than if it had been kept running. Dr. Keyes said that he had some difficulty with that opinion, because he was not entirely certain of Dr. Cameron's time frame. And he noted that, having said that, Mr. Hayes was receiving three separate medications, all of which affected his clotting parameters. And the measurement of the Heparin effectiveness on blood clotting, the PTT, was in the appropriate range following 19:30 hours. Dr. Keyes said that he did not believe that one could confidently state that the discontinuance of the Heparin would have lessened Mr. Hayes' neurological symptoms and signs, given the other medications that he was receiving at the time.

**241**  I turn to Dr. Key's evidence on cross-examination. Dr. Keyes acknowledged that as a Neurologist he does not treat heart disease patients with myocardial infarction, and he does not administer thrombolytic therapy to them. Normally he would be called in for consultation by someone else who had concluded that the patient was experiencing cranial hemorrhaging. He also agreed that intra-cranial hemorrhage caused by thrombolytic therapy used for myocardio infarction was quite a rare occurrence. He agreed also that in addition to reviewing the medical records and the hospital charts, he was provided with additional information not in those records, what various nurses said or did at various times, and for the purposes of his Report, he assumed that the information was true. An example was that he based his opinion in part on Nurse Mowat's evidence that Mr. Hayes stood beside his bed in order to void at 18:30 hours. He agreed that this fact was not recorded in the records, other than that he had voided.

**242**  He agreed also that intra-cranial hemorrhaging is a known risk of thrombolytic therapy; that it is the most serious potential complication arising from it.

**243**  He agreed that over the years he identified certain types of people as being at increased risk for this complication. For example, people with a previous stroke or high blood pressure. Because of this they may not be given the therapy.

**244**  He agreed also that there was still a risk for patients, like Mr. Hayes, i.e., patients with no known problems. He said that there was a risk whenever therapy is given. Although the risk is a small one, if it happens it is fatal half the time. Whether or not it is fatal depends upon various factors, including how quickly it is treated, and how rapidly it is progressing in the individual patient. Thus, when patients are given the therapy, the healthcare givers must be aware of its risk.

**245**  Dr. Keyes was then referred to his statement in his Report, and his evidence, that the risk of intra-cranial hemorrhage is essentially the same whether TPA or TNK is used. That was not known with the same level of certainty at the time that Mr. Hayes was given the TNK. He agreed that the major purpose of the clinical trial was to find out what the risk would be in using it, and added that as well it was to find out whether it was as effective as TPA in the treatment of myocardial infarction. An important aspect of the trial was to find out how big or how small the risk was. That is why it was called a safety trial.

**246**  Dr. Keyes said that as a result of the trial and other studies it was found that TNK had the same risk as the standard drugs such as TPA. It was put to him that the studies did not address the question of whether individual patients would be more prone to hemorrhage with one drug versus the other; and that even though the numbers are the same, from a statistical point of view, they cannot really say that a patient who happened to suffer a hemorrhage with one of the two drugs would or would not have been likely to suffer with the other. Dr. Keyes did not agree. He said that the study looked at the risk factor, that Counsel had eluded to in part, and had found them to be the same; although they still have a small percentage of the patients, who, like Mr. Hayes, will have a hemorrhage, even in the absence of the known risk factors. He said, in response to Counsel's question:

I'm not sure that you can make that conclusion. I think its reasonable to conclude also that, if you have done a study with TNK, as was done subsequent to this patient's event, and if you discover that the incidents of intra-cerebral hemorrhage on patients receiving TNK is the same incidence as patients receiving TPA, and that the risk factors are identified in both of those two drugs are identical, then I think it is reasonable to conclude that the risk of a single patient receiving either TPA or TNK is the same.

**247**  Counsel then put it to the doctor that it appeared that no complaint of headache was made in the Emergency ward, and if that is the case, the onset of the headache appeared to have been fairly sudden, since it was present when Mr. Hayes arrived at the Coronary Care Unit. He agreed that if the headache was not present a short time earlier in the Emergency ward, then that would suggest a headache coming on fairly suddenly. I observe here that the evidence is that Mr. Hayes was in fact complaining of his headache for some time when he was in the Emergency ward.

**248**  When it was put that the sudden onset of a severe headache is one of the characteristic symptoms associated with this kind of hemorrhage, Dr. Keyes acknowledged that intra-cerebral hemorrhages are associated with headaches; but they are also very common where a patient is receiving nitro-glycerine. He reiterated his evidence that it is difficult to distinguish a nitro-glycerine headache from other headaches on the basis of the headache alone. And I observe that in the case at Bar there were no other symptoms associated with the headaches complained off; that this was because of the fact that the intra-cranial hemorrhaging did not commence until about 19:20 hours, and there were no other symptoms to be seen or tested for.

**249**  He was then taken through the differential diagnosis approach followed by medical professionals when dealing with signs or symptoms that are consistent with a number of possible causes, including one which is life threatening. He agreed that priority had to be given to either ruling out the life threatening cause, or confirming it and taking the necessary steps. Also, that one had to utilize other symptoms and signs that the patient has at the time that the primary presenting complaint is being evaluated. For example, if a patient complains of a headache, and there are no other neurological signs or symptoms revealed "you can at that point at least stay with the assumption that the headache may be caused by the nitro-glycerine". (And I observe that that was the case after 15:14 hours). If later on examination reveals some neurological abnormality, then you have to go back and re-visit the earlier decision that the headache was caused by the nitro-glycerine. And I observe that no neurological abnormalities were present to be found prior to 19:20 hours.

**250**  It was suggested that in such a case it was normal to turn off the Heparin. He agreed that that would be one thing to do. He added that stopping the Heparin would not alter the patient's coagulation factor for four hours after it was turned off. The decline in its effect is gradual. He noted also that in Mr. Hayes' situation Heparin was only one of the three medications that effected his coagulation factor, and that Heparin was the only one that they could alter at that particular stage.

**251**  Dr. Keyes was then questioned about the statement in his Report that if Mr. Hayes had developed weakness or sensory change on the left side, without an alteration of consciousness, prior to 19:30 hours, he would have indicated that to the nurse, as well as any other clinical presentations which were found at 19:30 hours. He said: "but I hardly think a patient whos in the Coronary Care Unit who develops weakness on one side is going to be unaware that thats present, and is not going to mention it to the nursing staff".

**252**  Counsel then returned to the subject of the headaches, which Mr. Hayes was experiencing in the Coronary Care Unit. Here Dr. Keyes reiterated his earlier evidence that if the headache was due to an intra-cerebral hemorrhage, in the setting of thrombolytic therapy, then other neurological symptoms and signs would have been evident at the time. And I observe that this evidence is a complete answer to the theories of Dr. Cameron and Nurse Werry that perhaps subtle symptoms or signs might have been present and missed because of the fact a more formal assessment had not been carried out.

**253**  I repeat here, with regard to the headache, that I am satisfied that it was caused by the nitro-glycerine, rather than by hemorrhaging or bleeding into the brain. I am also satisfied that if the headache, which was in fact experienced by Mr. Hayes in the Emergency room as well, was related to or caused by hemorrhaging, other neurological symptoms or signs would have been clearly visible, through Mr. Hayes' conduct being observed, and probably as well as a result of his oral complaints, without the necessity of any formal neurological testing being required. There is no evidence before me of the appearance of any such symptoms or signs until they were discovered around 19:20 hours. We are not talking about a slow process, or trivial neurological changes, notwithstanding the use of the word "subtle" by some of the witnesses. We are talking about a very rapid process, which occurs over minutes, and severe or acute symptoms, including a lack of proper function of the left arm and left leg.

**254**  Returning to Dr. Key's evidence, he was next questioned with regard to the period after the intra-cranial hemorrhage was discovered. Once it was diagnosed rapid evacuation of the hemorrhage is associated with improved clinical outcome. Thus, it is important to diagnosis the hemorrhage as early as possible so that rapid treatment can take place. He agreed that the earlier some abnormality is noted, the faster the diagnosis can be made and the faster the appropriate treatment can be given. However, he added that it does not necessarily alter the clinical outcome. He agreed that it was particularly important to diagnosis the hemorrhage as soon as possible because even under the best of circumstances if surgery is needed, as in this case, there will always be some delay before that can actually be done. And I refer to Dr. Keyes' earlier evidence to the effect that in this case everything was done that could be done once the neurological deficits were discovered, which was minutes or seconds after the hemorrhage commenced.

**255**  He agreed also that aside from surgery, in some situations medical treatments can be given. For example, a patient can be given certain blood products or drugs that have the effect of helping coagulation. He then went on to say that because of the rapidity of the hemorrhaging process, the use of such medical treatments does not alter the neurological outcome. He said:

Well, in this particular patient, or in any patient receiving thrombolytic therapy when they have an intra-cranial hemorrhage - as you have heard me say several times this morning, and I'll repeat it again -- the process is very rapid and occurs over a period of minutes. An institution of medical therapy usually at that particular time does not alter the neurological outcome, because the hemorrhage has reached a sufficient size that in those patients neuro-surgical evacuation of the clot is required, usually to preserve life.

And, after agreeing that it is the growth of the hemorrhage that is particularly dangerous:

Any patients on thrombolytic therapy, the growth of that process, as you have already heard me say, is instantaneous and rapid.

**256**  He was next questioned with regard to his evidence that alteration in the level of consciousness is typically an early sign of hemorrhage in the temporal lobe. It is usually the first symptom in patients who have a hemorrhage in the temporal lobe. However, he agreed that there would be some cases where it was not the first symptom. But in those cases, abnormalities in personality, memory and cognitive functions would be expected.

**257**  Dr. Keyes was then referred to a 1995 article in NEUROLOGY The Official Journal of the American Academy of Neurology, entitled: Clinical Features and Pathogenesis of Intra-cerebral Hemorrhage After RT, TPA and Heparin Therapy for Acute MI. He did not recall the particular article, but he had said earlier that it is an authoritative journal in his field.

**258**  I do not propose to consider in detail the cross-examination on the article in question. I will observe that the doctor was of the view that the article supported his opinion that the most common initial clinical symptom associated with intra-cranial hemorrhage in the temporal lobe was the alteration in the level of consciousness. I did not conclude from his answers on portions of the article that he was resiling in any way from his earlier opinion that an alteration in a patient's level of consciousness is universally, or typically, the first sign of a hemorrhage in the temporal lobe. I observe also that I have found that the first sign or symptom to be expected in the case at Bar was an alteration in the level of Mr. Hayes' consciousness, and that this is exactly what happened.

**259**  Dr. Keyes was next questioned with regard to his opinion disagreeing with the opinion expressed by the Radiologist, (as interpreted by Dr. Cameron) that the hemorrhage was long standing. He said again that the appearance of the hemorrhage in the CAT Scan film is a typical appearance of a hemorrhage in a patient on thrombolytic therapy, that is a patient who has received all of the medications which Mr. Hayes was receiving. And he noted that the Radiologist's Report did not say "long standing", but rather "some standing".

**260**  I turn now to the submissions of Counsel, and my observations on particular points from time to time.

THE SUBMISSIONS

**261**  Mr. Smith submitted that Mr. Hayes has established on the evidence that the injuries that he suffered on April 23, 1997, were the result of the ***negligence*** of the Defendant Hospital. The Hospital's employees failed to properly monitor him for signs of intra-cranial hemorrhage, which they knew to be a risk that was present in the circumstances. The Hospital also failed to adequately warn Mr. Hayes of the risk associated with the drug TNK. The latter is a secondary issue.

**262**  It is common ground that the standard treatment in the circumstances of this case involves the use of medication known as thrombolytics, which are used to dissolve the blood clot that is causing the infarction. And that the risk created by thrombolytic therapy, particularly when used in association with anti-coagulants, such as Heparin and Aspirin, is bleeding, including intra-cranial hemorrhage.

**263**  It is seen that in my opinion the evidence to the contrary, that is, that the injuries suffered by Mr. Hayes were not caused or contributed to by any act or omission on the part of Nurse Petryk, or of any other nurse, is overwhelming; that Mr. Hayes was adequately or well warned with regard to the risks associated with the drug TNK. Further, it is common ground that had he elected not to participate in the ASSENT I trial, the drug TPA, which has the same risks, would have been used.

DID THE NURSING STAFF IN THE CCU BREACH THE EXPECTED STANDARD OF CARE?

**264**  Mr. Smith submitted that the nursing staff was in breach of the expected standard of care by failing to perform the required hourly assessment of neuro-vital signs, including testing for differences in strength in the left and right sides of the body. The Hospital Nursing Protocol for the care of patients who have had thrombolytic therapy requires neurological signs to be taken once an hour for the first four hours after administration of the drug; the latter four hour period being the period of particular concern, when a hemorrhage might occur.

**265**  Mr. Smith said that the Nurses' Protocol for care of patients who have had thrombolytic therapy is the applicable standard of care; that the standard of care was breached in two ways. First, Nurse Petryk did not conduct a formal neurological assessment of Mr. Hayes each hour as required by the Protocol. While she conducted a complete neurological examination of Mr. Hayes at 15:14 hours, the first hour after the administration of the TNK, she failed to conduct formal assessments for the next three hours, namely, 16:14, 17:14 and 18:14 hours. The times, of course, are approximate. Mr. Smith says that this failure alone constitutes ***negligence*** on the part of Nurse Petryk.

**266**  Second, given the evidence of the Plaintiff's experts, Nurse Werry and Dr. Cameron, Nurse Petryk failed, on those occasions, or at any time, after the 15:14 hour assessment, to test the strength of Mr. Hayes' hand grips by having him squeeze her hands, and the strength of his legs by having him push his feet or toes against her resisting hands. I will refer to these tests as the hand and feet strength tests, although they are actually arm and leg tests.

**267**  Before proceeding further with Mr. Smith's submission on the subject issue, I will observe here that in my view his submissions are based substantially on the opinions of Dr. Cameron, which opinions I do not accept, and ignore what actually happened. In this regard I am satisfied, based on Dr. Keyes' evidence, and other evidence, including that with regard to what actually happened, that the hemorrhage which Mr. Hayes eventually suffered occurred at about 19:20 hours, approximately one hour after the expiration of the four hour period and the last of the required one hour assessments.

**268**  Further, in my opinion, no neurological deficits or changes were in existence prior to 19:20 hours and would not have been discovered no matter what assessments were conducted by Nurse Petryk, including those required in the Protocol, if followed verbatim. In my opinion, nothing that the nursing staff did, or omitted to do, up to 19:20 hours was causative of the injuries suffered by Mr. Hayes, which I am satisfied were inevitable once the hemorrhage was under way. I will have more to say about this in a moment.

**269**  I return to Mr. Smith's submission. He next referred to, or emphasised, the severe headache which Mr. Hayes began to experience in the Emergency ward, and continued after he arrived in the CCU. He similarly emphasised the fact that Mr. Hayes had experienced some nausea and had vomited in both the Emergency ward and the CCU. He observed that the headache, nausea and vomiting were symptoms associated with intra-cranial hemorrhage; that Nurse Werry referred to them as "an increased index of suspicion" which required further neurological investigation.

**270**  I observe here that Nurse Petryk did perform a formal neurological assessment of Mr. Hayes at 15:14 hours, and that she found no neurological deficit or change which would suggest that the headache and/or nausea and vomiting might be caused by a hemorrhage; that the headache, nausea and vomiting were reported to the doctors. She was of the view, as were the doctors, that they were caused by the nitro-glycerine, which Mr. Hayes was receiving because of his heart attack, and clearly they were proven to be right. Had she observed any abnormal neurological sign as a result of the 15:14 hour assessment, or of her subsequent partial informal assessments, of course she would have reported this to the treating doctor. However, as I have already noted, those signs were not there to be found.

**271**  In my opinion, if the persisting headache, and the minor nausea and vomiting, which occurred on one occasion in the Emergency ward, and on a second occasion in the CCU, were caused by hemorrhage, the various neurological signs attendant on the hemorrhage would have been observed shortly after Mr. Hayes arrived in the CCU, if not before while he was in the Emergency ward. And in any event, they would have been seen long before the hemorrhage which actually occurred, given the rapidity of the hemorrhage once it began and the sequence of signs, as testified to by Dr. Keyes.

**272**  Mr. Smith next dealt with Nurse Werry's evidence and that of Dr. Cameron, to the effect that Nurse Petryk's informal assessment of Mr. Hayes' neurological status is not sufficient because it might miss subtle changes, or findings, "that can be an early indicator of trouble". The trouble which is being watched for, of course, was the change in neurological status caused by hemorrhaging. Assuming, but not deciding, that the point taken is correct, and that you can have subtle strength changes or findings without a change in the level of consciousness in the circumstances of this case, I observe again that such findings could not have been made simply because no hemorrhaging occurred prior to 19:20 hours.

**273**  I do not accept Dr. Cameron's evidence, or that of Nurse MacKay, if such was her evidence as argued by Mr. Smith, that Mr. Hayes' headache, which I am satisfied was nitro-glycerine induced and continued, should have subsided shortly after the nitro-glycerine was stopped. I prefer the evidence of Dr. Keyes and that of Nurse Petryk, who has spent most of her working life in the CCU, that the nitro-glycerine headache will continue for hours after the nitro-glycerine has been stopped. Again, there is no evidence before me of the existence of any neurological sign or change prior to 19:20 hours. They simply were not there, because the hemorrhage did not start until 19:20 hours.

**274**  Mr. Smith also emphasises that it was wrong for Nurse Petryk to assume that if Mr. Hayes was suffering from weakness on his left side he would have told her about it. In this regard Dr. Cameron's evidence was that a superficial conversation with the patient is not enough, because the patient might not be aware of a problem until the hemorrhage is large enough to press on other areas of the brain; that a decrease in consciousness occurs when both sides of the brain are comprised. I do not accept this evidence. I prefer that of Dr. Keyes to the effect that because the hemorrhage was primarily located in the right temporal lobe, a change in consciousness would have been observed almost immediately; and that an intelligent patient, like Mr. Hayes, is likely to complain to the nurse if he had any weakness on his left side, assuming that there was no change in his level of consciousness, which is a matter of common sense. And I am satisfied on the basis of what Nurse Petryk and Nurse Mowat found when they examined Mr. Hayes shortly after 19:20 hours, as well as the evidence of Dr. Keyes, that Mr. Hayes' first symptom associated with the hemorrhaging which began at about 19:20 hours was a change in his level of consciousness.

**275**  While Dr. Cameron is referring to a subtle change or weakness, the use of the word "subtle" may be misleading. "Acute" may be more descriptive of what is to be expected, and what is to be looked for. For it is Dr. Keyes' evidence that Mr. Hayes could not have stood beside his bed, and climbed back into his bed on his own, if at the time he was experiencing subtle weakness on his left side. Rather, he could not have stood on his left leg, and he would have fallen; and he could not have pushed himself onto and up to the head of the bed using his left arm. Dr. Keyes' opinions, which I accept, suggest not only that the use of the word "subtle" is misleading, but also that Mr. Hayes would likely have complained about left sided weakness, assuming no change in the level of consciousness, long before the actual hemorrhage occurred at 19:20 hours. I repeat, I am satisfied that there were no signs or symptoms of neurological deficit or change to be found prior to immediately before 19:20 hours.

**276**  Mr. Smith next dealt with the thoroughness of Nurse Petryk's informal assessments or observations, suggesting that the Court should infer that they were more casual and less careful than she now remembers, particularly since she did not record them in the hospital chart, as the protocol required. He attempts to support these submissions with Mr. Bateman's description of Mr. Hayes when he visited him at about 16:30 hours. Assuming that Mr. Bateman was in Mr. Hayes' room at 16:30 hours, and that Mr. Hayes' condition was as described by Mr. Smith, I do not accept that description as evidencing hemorrhaging having occurred around that time. As I have said, in my opinion the hemorrhaging did not commence until about 19:20 hours, three hours later. Around 16:30 hours there were no neurological changes there to be found.

**277**  I accept Mr. Smith's submission, which he attributes to Nurse MacKay, that there is a small, but well known, risk of a catastrophic complication which, if it occurs, must be diagnosed and treated as quickly as possible. No doubt if this is not done the patient will probably die. In fact over half the patients suffering intra-cranial hemorrhage during thrombolytic therapy actually do die. But the emphasis must be on the words "if it occurs". On the basis of Dr. Keyes' evidence, particularly with regard to the rapidity of the thrombolytic hemorrhaging process once it commences, it seems to me that once hemorrhaging commences serious injury to the patient is inevitable, no matter how quickly the patient is diagnosed and taken to surgery. While this was done in this case, Mr. Hayes suffered serious injury, and was fortunate in that the surgery saved his life. As I have said, statistically more patients in Mr. Hayes' situation die than live.

**278**  Mr. Smith completed his submission on this issue as follows:

1. The protocol required Nurse Petryk to be doing full neuro-vital assessment, including hand grips and other assessments that were capable of detecting a unilateral weakness, every hour. That is also consistent with the general standard of nursing, given the clinical setting and Mr. Hayes' persisting complaint of headache. The need for that assessment became even greater when Mr. Hayes' headache did not improve after nitro-glycerine was turned off.
2. It is submitted that Nurse Petryk, and other nurses, failed to perform the required assessments, and were therefore in breach of the applicable standard of nursing care.

**279**  I have previously dealt with these submissions. Prior to 19:20 hours there was no unilateral weakness present to be found. The headache was clearly nitro-glycerine induced, and continued after the nitro-glycerine was discontinued. Had it been associated with hemorrhage the sought after neurological signs or changes would have been readily available long before 19:20 hours. Further, the hemorrhage did not occur until 19:20 hours, which was one hour after the last hourly assessment was to have been done; that is around 18:30 hours when Mr. Hayes was out of his bed, was assessed as neurologically stable, and was in fact stable, and three hours before the next assessment was to have been done, all pursuant to the protocol. No hemorrhage-associated neurological deficit or symptoms were found, nor could they have been found, during the four hour period which expired around 18:30 hours.

**280**  On this point Ms. Woods pointed out that since Nurse Werry concedes that Mr. Hayes' demonstrated ability to stand at 18:30 hours indicates that he was able to move his toes, and that his ability to hold a urinal did not support absent hand grips, there is no evidence to suggest that if a formal neurological examination had been conducted at 18:30 hours Mr. Hayes would have demonstrated absent hand grips or an inability to move his toes on his left foot; that it is these findings which she said would have been detectable, not simply subtle differences.

**281**  Nurse Werry also testified as to the Nursing Protocol for management of thrombolytic therapy patients at her Hospital, that is St. Paul's Hospital. The Protocol is dated November 1996. It provides that after the infusion of the thrombloytic drug, the patient's vital signs and neurological status is to be monitored every four hours "and PRN if no other intervening procedures or conditions exist". It also contains the following under the topic "Interventions: Emergency":

1. If acute changes in neurological status occur deemed not to be due to sedation or analgesia, check Glasgow Coma Scale, motor strength and VS and notify MD stat. (My emphasis).

**282**  Clearly the standard of care at St. Paul's Hospital is much less stringent than that in the Defendant Hospital. There the nurse is only to report acute changes, not subtle changes, which are deemed not to be due to sedation. Only then is the nurse to check the Glasgow Coma Scale, motor strength and vital signs. The neurological assessment is only done every four hours, "and PRN if no other intervening procedures or conditions exist". I am told that the letters "PRN" mean "at the nurse's discretion"; that if by her observations the nurse has a concern, she then does an assessment. It is a matter of judgment.

**283**  Nurse Werry was referred to the physician's orders in evidence, which of course the nurse must obey, which contains provisions similar to those in the St. Paul's Protocol. For example, in the doctor's orders, under the topic "Planned Care Orders - Acute Myocardio Infarction" under the topic "Procedures/Treatments/Assessments" the following is contained: "vital signs Q4H and PRN"; which means that vital signs are to be checked every four hours at the nurse's discretion.

**284**  Similar wording is contained in the doctor's orders under the topic "ASSENT I TNK/TPA Clinical Trial Acute MI Orders". There under the topic Procedures/Treatments/ Assessments" the following is again contained: "Vital signs Q4H and PRN".

**285**  Ms. Wood had the following to say about the subject matter in her written submission:

Nurse Werry also testified that St. Paul's Hospital Nursing Protocol for Care of Post-Thrombolytic CCU Patients call for notification of the physician only if there are acute changes in the patient's neurological status not attributable to sedation or other medications. Nurse Werry explained that this is because of the kind of neurological changes that are expected with post-thrombolytic bleeds are, in fact, acute neurological changes. This is completely consistent with the evidence of Dr. Keyes about the very acute nature of the accompanying neurological symptoms secondary to a post-thrombolytic intra-cranial bleed.

I agree with this submission.

**286**  I note also that the witness' evidence seemingly weakens, if not negates, her earlier suggestion, and that of Dr. Cameron, that Nurse Petryk's less formal method of assessing a patient's neurological status (which is really only confined to the method of testing the patient's ability to move about or limb strength) is not as good as the formal assessment, involving the testing of the hands and feet, because Nurse Petryk's method might not disclose a subtle sign or weakness. What the nurses are looking for, in my view, are not subtle signs, (assuming that they could exist on their own, and I do not accept that they could) but rather acute signs, and this is in accordance with the evidence of Dr. Keyes. That is what would be found if hemorrhaging has commenced.

**287**  I will also set out here Ms. Wood's further submissions on the subject matter contained in her written submission:

The nursing protocol in place at St. Paul's Hospital did not require neuro vital sign checks every hour for the first four hours on post-thrombolytic patients. It required such checks only after four hours. This is likely because the kind of changes it anticipated accompanying a post-thrombolytic bleed were acute changes in the neurological status and only such acute changes were to be reported to the attending physician. On that basis, had Nurse Petryk been practising at St. Paul's Hospital, she would in fact have exceeded the standard of care expected of the CCU nurses there in her care of Mr. Hayes. One has to ask why Nurse Petryk should be seen to have fallen below the standard of care expected of a reasonable CCU nurse because she was making her observations of neurological status in the way that an experienced nurse might make, and failed only in respect to specific motor strength testing of a patient who clearly had no compromised motor strengths on the basis of observations of the patient actually using his limbs. According to Dr. Keyes, patient movement is a much more reliable indicator of neurological health than grip strength testing would be. In his evidence that subtle left side weakness would have been most obvious when the patient was doing large motor movements with the left side of his body.

**288**  In sum, it is Mr. Smith's position then that Nurse Petryk failed to perform the required assessments, and was therefore in breach of the applicable standard of nursing care set out in the Protocol. Subtle neurological changes might have been found if formal assessments had been made. The need for them was even greater because of the fact that Mr. Hayes was suffering from a headache.

**289**  And it is my view that the submissions cannot succeed. I am not satisfied on the evidence that there could be a situation where the intra-cranial hemorrhage had begun, and the only symptom of it would be a subtle one, a fine distinction to be discovered by a subjective physical testing or comparison of the strength of two limbs; or that if discovered, immediate steps could be taken which would change or reduce the effects of the intra-cranial hemorrhaging, given its nature and, in particular, its very rapid progression. Dr. Cameron's theory seems to be at best a remote possibility, unsupported by the facts, and not sufficient to support a finding of liability or to entitle the court to "apportion" between the effects of the intra-cranial hemorrhaging per se and the effects of any delay due to failure to discover such a subtle symptom.

**290**  In any event, I am satisfied that this did not occur in the case at Bar. I am satisfied that the first symptom revealed was a change in Mr. Hayes' level of consciousness, and that it was discovered probably seconds after the intra-cranial hemorrhaging began at around 19:20 hours. Further, in my view, any subtle symptom, or part of the process that can be described as subtle, would be short-lived. It would be a quick snap-shot in time of a swiftly moving and deadly changing process which quickly reveals itself.

**291**  In my opinion, in the circumstances of this case, Nurse Petryk substitution of her observations of Mr. Hayes' movements in and about the bed for the formal testing of his hand and foot strength was not unreasonable. I am satisfied that it was just as effective and would have revealed the same symptoms which would have been revealed by the formal testing, given the rapidity of the intra-cranial hemorrhage. Thus, ***negligence*** in failing to follow the Protocol, or in failing to test Mr. Hayes' hands and feet has not been made out. And, of course, it if was, causation remains a primary factor which Mr. Hayes cannot establish.

**292**  I turn now to Ms. Wood's submissions on the first issue, in light of the expert evidence of the two nurses referred to. While maintaining that the evidence does not disclose a breach of duty, or of the Protocol, on the part of Nurse Petryk, Ms. Woods submitted that the Plaintiff has failed to establish the standard of care applicable in the circumstances, and against which Nurse Petryk's conduct is to be tested.

**293**  Counsel commenced by pointing out that generally the standard of care is a matter of expert evidence; that Courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field. And reference was made to the Supreme Court of Canada's decision in Ter Neuzen v. Korm [*(1995), 127 D.L.R. (4th) 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=) at 590.

**294**  Counsel also submitted that if Nurse Petryk was wrong when she decided to rely in part upon her 33 years of nursing experience when ascertaining the neurological status of Mr. Hayes, as opposed to conducting more formal physical limb comparison assessments, she simply made an error of judgment which does not constitute actionable ***negligence***. In this regard she relies on the decision of the Supreme Court of Canada in Wilson v. Swanson, [*[1956] S.C.R. 804*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M12J-00000-00&context=), at pgs. 811 and 812. Counsel also maintained the alternative position, which I believe to be her first position, that Nurse Petryk's informal assessments were appropriate and valid such that her conclusions with regard to Mr. Hayes' neurological status were accurate. This she submitted was in accordance with the evidence of Nurse MacKay and that of Dr. Keyes.

**295**  I have already found that Nurse Petryk's alternative method of assessing Mr. Hayes' ability to move was a reasonable substitute for what has been described as the formal method, that it was in accordance with the evidence of Nurse MacKay and Dr. Keyes, and that its use did not constitute ***negligence***. I do not find it necessary to deal with the principles applying to matters of judgment referred to in Wilson, in the circumstances of this case.

**296**  Counsel next pointed out that the standard of care evidenced by the Defendant Hospital's Protocol was different from that contained in the comparable protocol of St. Paul's Hospital, and those required in the doctor's orders and in the ASSENT I Protocol. She submitted in effect that the standards of care adopted in the Defendant Hospital's Protocol are substantially higher than those adopted in the Protocol of St. Paul's Hospital, the doctor's orders and the ASSENT I Protocol, and are higher than the standard of care to be expected of a Registered Nurse in Nurse Petryk's situation. It follows then, she submitted, that Nurse Petryk would not necessarily be guilty of ***negligence*** if it is found that she failed to comply with the Defendant Hospital's Protocol. This assumes, of course, that Nurse Petryk's in part informal assessment was not an adequate substitute for those stipulated in the Protocol.

**297**  Ms. Woods next submitted that in carrying out her duties, Nurse Petryk's conduct, including her informal assessments of Mr. Hayes' neurological status from time to time, met the standard of care of a reasonable CCU nurse in the circumstances, and also met the standard adopted or contained in the Defendant Hospital's Protocol. I will observe also that it seems to me that the only real difference between Nurse MacKay's evidence and that of Nurse Werry, once Nurse Werry was made aware of what Nurse Petryk actually did and observed, is Nurse Werry's opinion that a subtle difference or symptom, if present, might have been missed by Nurse Petryk because she did not perform formal hand and feet strength tests. This is the basis for her opinion that Nurse Petryk's informal method of assessing Mr. Hayes' hand and feet strength was not an appropriate substitute for the Protocol requirement.

**298**  And I observe again that in my opinion no difference or symptom could have been missed by Nurse Petryk in the circumstances of this case. None were in existence prior to the hemorrhage commencing at about 19:20 hours. This still leaves the somewhat academic question of the appropriateness of the informal part of the testing of Mr. Hayes' motor response, or his ability to move his limbs. And it is seen that I have concluded after much consideration that in the circumstances of this case Nurse Petryk's informal assessment was a reasonable substitute for the more formal assessment, in that the same information would be obtained by either method; that Nurse Petryk did not breach the Protocol.

**299**  I turn now to what I consider to be Ms. Woods' main position on the standard of care in the case at Bar, and that is that it is not open to the Court to simply prefer the evidence of Nurse Werry over that of Nurse MacKay in order to sustain a finding of ***negligence***. She relies on the Court of Appeal's decision in Belknap v. Meakes [*(1989), 64 D.L.R. (4th) 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-2188-00000-00&context=), and cases which were followed, for that and other propositions. A division of medical opinion is no basis for a finding of ***negligence*** if Nurse Petryk's practices conform to a respectable body of professional opinion. There are two schools of thought on the standard of care, and on whether Nurse Petryk breached that standard. Preferring one is no basis for a conclusion of ***negligence***.

**300**  Counsel submitted:

The law requires that the nurses here must have been guilty of such failure as no nurse of ordinary skill would be guilty of if acting with ordinary care. It is submitted that there is no evidence that meets this test here. On the contrary, the level of care provided by Nurse Petryk and her fellow nurses that night exceeded the standard of care expected in the St. Paul's Hospital Nursing Protocol. The frequency of the nursing observations of the patient's neurological status, the frequency of the taking of the patient's vital signs, the sheer volume of observations of this patient, all conspire to suggest that a mere failure to apply formal motor strength testings in contravention of the hospital Protocol does not amount to actionable ***negligence*** but to no more than an error of judgment. An error of judgment made by Nurse Petryk that, in the circumstances, and based on her considerable experience, she was able to make valid observations of the patient's neurological status without formal motor strength testing. A level of observation which is supported by the expert opinions of Nurse MacKay and Dr. Keyes. Without evidence from the plaintiff to suggest what the usual standard of care is and that Nurse Petryk failed to meet it, all we are left with is a breach of the strict letter of the Royal Columbian Hospital Protocol which, in the hospital's respectful submission, does not amount to the necessary proof of a breach of the standard of care expected of a reasonable CCU nurse in the circumstances.

**301**  Counsel also submitted:

Similarly, in this case, to suggest that the patient's headache and nausea required some extra vigilance on the part of the nursing staff in the absence of other neurological symptoms is to ignore the fact that these symptoms were reported to the attending physicians - both the CCU resident Dr. Oyler and the attending cardiologist Dr. Brown, who were not obviously concerned by the symptoms. Clearly, Dr. Brown was not concerned enough when told of the patient's headache and nausea and vomiting by Nurse Petryk to conduct a full neurological assessment of the patient himself, but was satisfied on his physical examination conducted at 17:30 hours to simply order a discontinuation of the nitro-glycerine drip. He also ordered an anti-emetic. Similarly with regard to Dr. Oyler, he did not even attend to examine the patient when these symptoms were reported to him. To attribute major significance to the patient's complaint of headache and nausea is clearly an exercise of hindsight.

And I would add that such hindsight is misguided, since it is clear in my view that the persisting headache, and the two short spells of nausea and vomiting, could not possible be attributed to the intra-cranial hemorrhaging which did not occur until much later, at about 19:20 hours.

**302**  Finally, Counsel referred to the decision of Mr. Justice Macaulay of this Court, [*[1999] B.C.J. No. 1763*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G0WP-00000-00&context=), July 26, 1999, No. C973422, at pg. 52, where he states:

Nurses will be held to the standard of care expected of a registered nurse of average competence. As with physicians, nurses will not generally incur liability in ***negligence*** for errors in judgment: Heidebrecht v. The Fraser Burrard Hospital Society, [*[1996] B.C.J. No. 3042*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S17F-00000-00&context=) (October 10, 1996) Vancouver No. C933456 (BCSC) at 46. Generally, expert evidence is required to establish the standard of care expected of a registered nurse of average competence. As Henderson, J. stated in Heidebrecht, supra, at 46:

Nursing is an independent profession with its own practices, procedures and standards of competence.

It is clear, however, that nurses are not responsible for diagnosis, nor are nurses free to depart from a physician's instructions absent "clear and obvious" neglect or incompetence. In Serre v. de Tilly [*(1975), 58 D.L.R. (3d) 362*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JBM1-M42B-00000-00&context=) (Ont.H.C.), the court considered the liability of nurses who, in accordance with a physician's instructions, discharged a patient. The patient later died. In dismissing the action against the nurses, the Court stated at p. 367:

...diagnosis is surely not a function of the nurse; unless there were clear and obvious evidences of neglect or incompetence on the part of the family doctor, it would be unthinkable that the hospital or its agents should interfere with or depart from his instructions.

In my view, the two nurses met the standard of care throughout.

**303**  I will here express some concern I have with the expert opinion evidence before me with regard to the standard of care against which Nurse Petryk's conduct must be measured. It seems to me that it could have been better set out, so as to clearly demonstrate that the experts, Nurse Werry and Nurse MacKay, were giving expert evidence as to the standard of care to be expected of the ordinary skilled nurse professing to have and exercising the special skill of a CCU nurse; and which would be the expression of the consensus of a responsible body of registered nurses practising in the CCU, and not simply their individual view alone of what they would have done in the circumstances.

**304**  The onus, of course, is on Mr. Hayes to establish the standard of practice in the CCU in the circumstances of this case, through expert evidence; and further to establish a breach of that standard practice by Nurse Petryk. If the standard practice is not established by the expert evidence, then Mr. Hayes' case must be dismissed. Fortunately, at least in that regard, I am able to glean the standard practice in this case from the expert evidence, sufficient for my purposes; from the evidence of Nurse MacKay, and Dr Keyes, and which is almost supported by that of Nurse Werry.

**305**  I must say as well that I am troubled with the proposition that two of the main hospitals in the Lower Mainland, only a few miles apart, have such seemingly different standards which they expect of their nurses when performing identical services in the CCU. I am equally concerned with the apparent differences between the Defendant Hospital's Protocol and the directions contained in the doctor's orders and in the ASSENT I Protocol. It is really not for the Court to attempt to resolve these issues, for they are medical or scientific issues which must be resolved in that arena. In any event, it may be that these observations refer only to the tip of the iceberg, given the very nature of intra-cranial hemorrhage.

**306**  Nor is it my task to say which opinion I prefer over the other. The question is whether I have before me a respectable body of professional nursing opinion which supports Nurse Petryk's decision to assess Mr. Hayes' neurological status, particularly his ability to move, in the informal way described, as opposed to the usual or formal way of testing his hand grip and feet push, as being reasonable in the circumstances, and in compliance with a standard practice which itself is not fraught with obvious risk.

**307**  In my view, such a body of competent professional opinion is before me, made up of the evidence of Nurse MacKay, and that of Dr. Keyes. That evidence, which I accept, satisfies me that Nurse Petryk's decision and conduct were in accordance with the standards of practice or care followed by her colleagues in her profession. Mr. Hayes has failed to prove Nurse Petryk to be guilty of such failure as no CCU nurse of ordinary skills would be guilty of if acting with ordinary care.

**308**  There is no doubt that the evidence of the two nurses, Werry and MacKay, can be interpreted as saying that the standard of care applicable to Nurse Petryk was that contained in the Defendant Hospital's Protocol; although they would still differ as to whether Nurse Petryk's informal aspects of her assessments met the requirements of the Protocol. In this regard her informal method of assessment was not tested because of the fact that the hemorrhaging did not commence until about 19:20 hours. Similarly, the strict Protocol methods could not have been tested, and for the same reason.

**309**  In any event, for my purposes, I have also assumed that the applicable standard of care was that contained in the Defendant Hospital's Protocol, which is the highest level of standard of care which Mr. Hayes could expect. And I am satisfied that Nurse Petryk's assessments, including the informal aspect of it, not only met the standard of care to be expected of a nurse of average competence in the CCU, but also met, if there is a difference, the requirements of the Defendant Hospital's Protocol. Finally, I observe that if I am wrong with regard to the standard of care applicable, and the question of whether Nurse Petryk was negligent, I am strongly of the view that the issue of causation is determinative. And, as I have said, that Mr. Hayes cannot succeed.

**310**  Even if I were to find Nurse Petryk guilty of ***negligence***, in breaching the standard of care imposed by the Protocol, or otherwise, in failing to comparatively test the strength in Mr. Hayes' hands and feet, the finding would be made in a vacuum, or in the abstract, and would not entitle Mr. Hayes to succeed. In law there would be no causal link between that finding and the injuries he suffered as a result of the subsequent hemorrhage which occurred or commenced at about 19:20 hours.

DID THE BREACH OF THE STANDARD OF CARE CAUSE OR CONTRIBUTE TO MR. HAYES' INJURIES?

**311**  It is to be seen that Mr. Smith's submission in the main depends upon the court rejecting the opinions of Dr. Keyes, in favour of the opinions expressed by Dr. Cameron, and rejecting as well the evidence of Nurse Petryk and Nurse Mowat, particularly in areas where their trial evidence is not clearly recorded in the Hospital documents. I have already expressed my opinion on both issues. I accept the evidence and opinions of Dr. Keyes, and prefer them over that of Dr. Cameron where there is any conflict. I also accept the evidence of the two nurses. I found them to be honest and credible witnesses. As well I found their evidence to be consistent with what actually happened, with the medical expectations, and with the evidence of Dr. Keyes.

**312**  I have given careful consideration to the fact that Nurse Petryk did not complete the top portion of the clinical record pertaining to her neurological assessments of Mr. Hayes from time to time, after the thorough assessment performed by her at 15:40 hours. Some vital signs and other information, which perhaps were easier to record in her circumstances, are in fact recorded. Some positive findings such as nausea and vomiting, and the continuing headache, were in fact recorded in the Nurses' Notes. I accept Nurse Petryk's explanation in the circumstances of this case as to why she did not record fully her neurological observations and findings, which of course, were negative, that is to say, did not disclose any neurological deficit or symptom.

**313**  In accepting her explanations I do not condone the practice. In a given case, the failure to do exactly the task described, or to record it, could result in a finding of ***negligence*** where the conduct can be linked to the injuries suffered. I observe as well, that in my opinion, no matter how detailed Nurse Petryk's neurological assessments of Mr. Hayes were up to about 19:20 hours, it is clear that no positive finding would have been made. The neurological changes which would result in such findings simply were not present. I have already observed that I am fully satisfied that the bleeding or hemorrhaging began around 19:20 hours.

**314**  Mr. Smith's main attack appears to be on the evidence and credibility of Nurse Mowat, particularly her observations of Mr. Hayes at 18:30 hours when he was standing by his bed having just voided, getting back into his bed and pushing himself up to a sitting position at the head of the bed, all on his own, as described earlier; as well as her opinion, which is supported by Dr. Keyes, that at the time Mr. Hayes was neurologically stable. Counsel says that it is unlikely that she would remember this evidence in any detail, particularly as Mr. Hayes was not her responsibility. On the other hand, she says in effect that it was a most upsetting experience and that she will not forget what happened. She was not required to record these findings, but she did pass them on to Nurse Petryk, as Nurse Smith pass on his findings to her on her return from her break. Nurse Petryk also found Mr. Hayes' vital and neurological signs to be stable when she looked in on him at 18:45 hours.

**315**  Mr. Smith also challenges Nurse Mowat's findings that Mr. Hayes had hand grips present when she assessed him when it was obvious that the hemorrhaging had begun, and minutes before Nurse Kirkham found his left grip to be absent; a finding which Dr. Cameron says was impossible. However, Dr. Keyes' evidence was to the effect that the findings of the two nurses were quite consistent, given the rapidity and the sequencing of signs of the bleeding. I have already observed that in my opinion the hemorrhaging was barely under way when the technician discovered Mr. Hayes' distress, and when he was examined by Nurse Petryk and Nurse Mowat.

**316**  I have considered the decision of Hains, J. in Colesar v. Jeffries [*(1974), 9 O.R. (2d) 41*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JBM1-M43Y-00000-00&context=), on which Mr. Smith relies. That was an exceptional case in which an inference was drawn, as a result of the absence of entries by the nurses, that nothing was charted because nothing was done. The case in my view is factually distinguishable. While I appreciate that in a given case the failure of a nurse to record her observations or findings could lead to a negative inference reflecting negatively on her evidence, I am not prepared on the evidence before me to draw an inference that the events of 18:20 hours, and those after Mr. Hayes was found to have suffered a stroke, as described by Nurse Mowat, did not occur. I found her to be a truthful witness. I found her evidence to be consistent with what actually happened, with Dr. Keyes' evidence and with my earlier and later findings, particularly that the hemorrhaging did not start until approximately one hour later, around 19:20 hours.

**317**  With the above observations I turn to Mr. Smith's submissions on causation. He commenced with the proposition that if full neuro vital assessments had been conducted on an hourly basis, they would have resulted in earlier identification "of Mr. Hayes' developing hemorrhage and correspondingly earlier invention. The failure to perform those assessments therefore materially contributed to the injuries Mr. Hayes suffered." In support of this submission he refers to Dr. Cameron's evidence that hourly monitoring would probably have led to earlier identification of the hemorrhage "by revealing even mild focal weaknesses on the left side" which he said would likely have been present before the obvious change of consciousness occurred some time after 18:45 hours.

**318**  I do not accept Dr. Cameron's evidence as described, and I am unable to agree with these submissions. Specifically, I do not agree with Dr. Cameron's theory that a "mild focal weakness" or a "subtle difference" might have been discovered if the hand and feet strength tests had been conducted. It appears to me on the evidence before me that there was nothing subtle about Mr. Hayes' thrombolytic hemorrhage immediately it commenced, or was initially located, in the right temporal lobe. The first symptom would have been, and was in fact, a change in the level of consciousness; and, in any event, it is more likely than not that any change would be acute, rather than subtle, as actually was the case. Dr. Keyes' evidence as to the rapidity of the bleeding and the speed and sequencing of neurological signs from the right temporal lobe makes this abundantly clear, in my opinion. As I have already stated, in my opinion there were no neurological deficits or changes, subtle or otherwise, to be found or observed prior to the commencement of the hemorrhaging or bleeding at about 19:20 hours.

**319**  Henceforth I will encapsulate some of Mr. Smith's submissions, and provide, somewhat repetitively, my view or decision thereon.

**320**  The headache, particularly when it was not relieved at all following the discontinuation of the nitro-glycerine, was a clear warning sign. I do not agree. It is probable that the nitro-glycerine headache continued for a number of hours, as often is the case. Clearly the hemorrhaging was not going on throughout the life of the headache, and there were no other neurological signs observed. The hemorrhaging did not start until about 19:20 hours.

**321**  Earlier identification of abnormal signs would have resulted in earlier discontinuance of Heparin, which in turn would have resulted in a smaller hemorrhage, lessening or partially preventing the severity of the resulting neurological deficits. I comment that there were no abnormal signs to be identified prior to 19:20 hours; that the effects of Heparin last long after it has been stopped.

**322**  The continued growth of the hemorrhage would have been slowed if the Heparin had been stopped. Mr. Hayes likely would not have suffered the "secondary stroke" which increased the disabilities. Because of the size of the hemorrhage Mr. Hayes suffered multiple deficits. I do not agree, as I indicated previously, with Dr. Cameron's Heparin theory. It is negated by Dr. Keyes' evidence, and by what actually happened after the Heparin was stopped.

**323**  In addition to earlier discontinuation of Heparin, earlier diagnosis would also have advanced the timing of all the events that happened after the neurological abnormality was in fact noted at 19:30 hours, resulting in earlier surgical evacuation of the hematoma, if that in fact would still have been necessary. Dr. Keyes agreed that depending on when the hematoma is identified, there are non-surgical treatments available. I comment that Dr. Keyes did not agree with this evidence or theory. He said that the signs of the right cerebral hemisphere hemorrhage suffered by Mr. Hayes developed between 19:05 and 19:30 hours (I find that it did so at about 19:20 hours) and could not have been predicted or prevented. Further, it is his opinion that Mr. Hayes' neurological outcome would have been no different had his intra-cranial hemorrhage occurred after 18:45 or after 19:05 hours. It follows that earlier identification of abnormal signs in this case would not have occurred at any time prior to the commencement of the bleeding, which I have found occurred at 19:20 hours. Finally, it is my recollection that Dr. Keyes said that non-surgical treatments were not available in Mr. Hayes' case.

**324**  Mr. Hayes was given TNK as part of a study specifically intended to determine the level of risk of intra-cranial hemorrhage when TNK is used. This may be a fair description of the ASSENT II trial, which followed the ASSENT I trial. But the purpose of the ASSENT I trial, in which Mr. Hayes participated late in the day, and in which he received the smaller dosage, was to ascertain which of the three dosages was the safest.

**325**  Mr. Hayes' headache, reported on his admission to CCU, appears to have been of sudden onset. In his Report Dr. Keyes says that sudden onset of a severe headache is a characteristic symptom of this kind of hemorrhage. I note first that the headache was not of sudden onset. Mr. Hayes in fact complained of it on more than one occasion when he was in the Emergency ward, and before coming to the CCU. And he had it when he arrived. Dr. Keyes' evidence was based on Counsel's suggestion that the first report of the headache occurred on Mr. Hayes' arrival at the CCU, which is not the case.

**326**  Proper neurological examination does not rely on the patient to volunteer information about all clinically relevant symptoms. Information about other symptoms is often elicited by specific questioning about those symptoms, and proper testing can reveal abnormal neurological signs in a patient who appears grossly normal. Dr. Keyes and Nurse Petryk did not say that they would rely alone on what the patient told them alone. Nurse Petryk said that if Mr. Hayes had been suffering from neurological changes in his arm and foot (and I am satisfied that he was not) then she would have expected him to tell her about it, as he had told her about his other complaints. Dr. Keyes gave similar evidence. I accept their evidence that what a patient reports is an important factor in assessing the patient, particularly where it is said that the patient is suffering from an inability to use his arm to move about in the bed, or to stand on his legs.

**327**  Dr. Keyes does not dispute the proposition that signs of a developing problem, if present, would have been picked up by a neurological examination. All of his evidence flows from the opinion that the hemorrhage did not begin at all until some time after 18:45 or 19:05 hours. This, in turn, flows from his theory that this kind of hemorrhaging develops rapidly, and the first sign of trouble is a change in consciousness. I agree. The change would be obvious, as it was in Mr. Hayes' case. And if discovered earlier on, and neurological assessments had been done, they would have revealed the rapidly developing problems, as actually occurred as well.

**328**  Dr. Keyes also accepted the authority of medical literature put to him in cross-examination, that a change in consciousness is not necessarily the first symptom of an intra-cranial hemorrhage caused by thrombolytics. This is the case even where the hemorrhage occurs in the specific area of the brain where it occurred in this case. This article showed a wide variety of other symptoms, including headache and focal deficits, that proceeded change of consciousness in some patients.

**329**  I do not agree with the underlying suggestion of this submission. Dr. Keyes agreed with Counsel when it was put to him what appeared to happen in the small sampling which was considered. In some of them the hemorrhages occurred in other areas. Dr Keyes said generally that the article bolstered his opinion that usually the first symptom is a change in the level of consciousness as happened in this case, and I did not understand Dr. Keyes to resile from his initial opinion that in this case the first symptom would have been loss of level of consciousness, and which was actually the case given what was initially found by Nurse Petryk and Nurse Mowat.

**330**  The same literature states that 70% of such hemorrhages have gradual symptom onset, with some patients going from first symptom to maximum neurological deficit in a period of up to six hours. In fact, "rapid symptom onset" is defined in the article as being less than six hours. In some patients, progress of the hemorrhage and its symptoms takes even longer. I do not agree, if the suggestion is that Dr. Keyes stood down his own opinion in favour of the article, and in effect acknowledged that there could be developing neurological symptoms over a lengthy period of time in Mr. Hayes' case. I repeat the answer to the last question, and I observe that the submission is not consistent with what happened, or with Dr. Keyes' opinion. Specifically, he said that once the bleeding began it spread very rapidly, over a matter of minutes, resulting in symptoms being readily seen, as in the case at Bar.

**331**  The opinion expressed by Dr. Keyes in his Report and his evidence in chief, flowed from his dogmatic assertion that intra-cranial hemorrhage in this clinical setting always comes on rapidly, with little or no warning, then progresses so rapidly that little can be done about it. However, after being presented with the article written by authors whose other work he, himself, cited, Dr. Keyes eventually made the certain concessions on cross-examination. Counsel then set out a passage taken from the transcript of Dr. Keyes' evidence. I have already dealt with this. I do not agree with Counsel's interpretation of the effect of the article on Dr. Keyes' evidence. I do agree that Dr. Keyes said, and I accept, that the intra-cranial hemorrhage in this clinical setting usually comes on rapidly, with little or no warning, and then progresses so rapidly that little can be done about it. That is what happened in the case at Bar. Dr. Keyes put it this way in his Report at pg. 19:

The risk of intra-cranial hemorrhage is essentially the same whether one is using standard TPA or TNK. Unfortunately, when intra-cranial hemorrhage occurs in this patient population the symptom onset is without warning, rapid, catastrophic and often fatal. Studies would suggest that the 30 day mortality rates for all patients with intra-cranial hemorrhage following thrombolytic therapy can be as high as 50-60%. Thus, while the risk of intra-cranial hemorrhage following thrombolytic therapy is low, (0.7%) when such a complication occurs 87% of patients die or have significant or disabling neurological sequelae. Additional studies would indicate that rapid evacuation of the intra-cranial hemorrhage is associated with improved clinical outcomes.

**332**  The Hospital reported the onset of the stroke symptoms as being 15:40. The hour was changed to 15:14 hours in the document, and the latter time is simply wrong in the face of the facts. On the contrary, the 15:40 time recorded is wrong. Further, Nurse Petryk did a complete vital signs and neurological testing commencing at 15:14 hours, and which ended around 15:40 hours, and Mr. Hayes was found to be neurologically sound. No symptoms were in existence, save for his headache, which I am satisfied was caused by the nitro-glycerine infusion.

**333**  Similarly, the Radiologist who reviewed the CT Scan at the time, said that the hemorrhage appeared to be "of some standing". Although Dr. Keyes again disagrees, Dr. Cameron said that is consistent with his view that the hemorrhage was present much longer than Dr. Keyes believes. I do not agree. Dr. Keyes, who was the only one to look at the actual photograph, explained the appearance of the hemorrhage in it; that it was a typical image of blood containing the three medications given to Mr. Hayes. The description "of some standing" is not consistent with the actual facts, which in my view show that the hemorrhaging did not start until 19:20 hours. Again, Dr. Keyes found in effect that the hemorrhage could not have been of some standing.

**334**  Finally, Counsel submitted that the Court should prefer the evidence of Dr. Cameron to that of Dr. Keyes, which I am not able to do for reasons already given. Counsel then said that if there was uncertainty in weighing their evidence, such uncertainty must be resolved in light of the principles set out by the Supreme Court of Canada in Snell v. Farrell [*(1990), 72 D.L.R. (4th) 289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=), which has been followed by our Court of Appeal in a number of cases, some of which were referred to by Counsel.

**335**  I observe that I encountered no uncertainties in weighing the evidence of Dr. Cameron and Dr. Keyes. I prefer Dr. Keyes' evidence and opinions where they differ, and in my view there is no need to resort to the Snell v. Farrell principles. This is not a case where affirmative evidence on the part of Mr. Hayes will justify the drawing of an inference of causation in the absence of evidence to the contrary. That affirmative evidence is lacking. Additionally, there is overwhelming evidence to the contrary. And the weighing of all the evidence, and the taking of a robust and pragmatic approach to the facts, does not and cannot favour Mr. Hayes. On the contrary, the evidence leaves no doubt that what Nurse Petryk, or any other nurse, did or did not do did not cause, or contribute to the cause, of the Plaintiff's intra-cranial hemorrhaging or any of the tragic results thereof.

**336**  Mr. Smith submitted that the principles of Snell v. Farrell allow a finding of causation where it is found that the Defendant materially increased the risk of injury. I am unable to make such a finding in the case at Bar. Here, says Counsel, the hemorrhage was caused by the thrombolytic and anti-coagulant medication. The risk of injury, or increased injury from that cause was increased by a failure to monitor the patient for earlier signs of the hemorrhage. If I have not made my views clear earlier, there is simply no evidence before me that what Nurse Petryk did or did not do had any causal relationship to the asserted increase in risk or to the injuries suffered.

**337**  Mr. Smith emphasised that it is important to note that uncertainty over causation flows directly from the very facts which the Plaintiff says constitutes ***negligence*** - the failure of the nursing staff to perform, and record the results of, proper assessments. I observe again that in my opinion there is absolutely no uncertainty over causation in the case at Bar. This is not a case where the very conduct of the nurse complained off has taken away Mr. Hayes' ability to prove his case. I have before me the observations of the nurses as to Mr. Hayes' neurological status at various times, which I am satisfied were as appropriate or accurate as any findings made on a formal testing of the strength of Mr. Hayes' arm and leg. And, perhaps more importantly, on the evidence before me, as I have already stated, it is clear that prior to 19:20 hours there were in fact in existence no neurological deficits or changes which could have been ascertained by timely formal neurological testing. The hemorrhaging did not start until around 19:20 hours, and Dr. Keyes says that there would have been no difference if hemorrhaging had started closer to 19:05 hours. The hemorrhaging did not start until around 19:20 hours, about one hour after the last neurological testing was to have been done, and when Nurse Mowat found Mr. Hayes to be neurologically sound, and which Dr. Keyes confirms.

**338**  The clinical and other evidence, and the expert evidence and the opinions which I accept, simply do not support the plaintiff's case. Mr. Hayes has failed to establish, on a balance of probabilities, that Ms. Petryk's failure to formally assess Mr. Hayes' hand and foot strength on an hourly basis was at least a material cause-in-fact of Mr. Hayes' resulting injuries. Common sense dictates that Mr. Hayes has not met the onus upon him. The evidence before me is overwhelmingly in favour of a finding that Mr. Hayes' injuries were caused by the medications he was required to take, and nothing more.

**339**  Mr. Smith concludes his submission on this point, stating:

It is respectfully submitted that the plaintiff has proved on the medical evidence that the Defendant's ***negligence*** caused or contributed to the injury. The probability is that Mr. Hayes' hemorrhage was developing well before it became obvious to the nursing staff and that proper nursing assessment would have revealed the developing signs. However, it is further submitted that a proper application of the law arising from Snell requires that any uncertainty arising from the medical evidence be resolved in favour of the plaintiff. (My emphasis).

I say again that I do not accept Dr. Cameron's "developing theory", that the hemorrhaging could have been proceeding well before it became obvious to the nursing staff, or that formal assessment would have revealed the asserted signs. It is simply conjectural, and there is no evidentiary or medical basis for it. They were simply not there, and because of that were not found by Nurse Petryk or Nurse Mowat, (especially at 18:30 hours) until after 19:20 hours.

**340**  I have already noted that there is no uncertainty arising from the medical evidence. Resort need not be had to Snell v. Farrell for the reasons I have outlined above. There is overwhelming evidence, medical and other, adduced by the Defendant Hospital, which in my view bars any inference of causation in favour of Mr. Hayes. Finally, as I have said, the robust and pragmatic approach to the facts is found to be of no assistance to Mr. Hayes.

**341**  I do not find it necessary to deal with Ms. Wood's submission on the issue of causation at any length. It is reflected in part in my observations and conclusions made with respect to Mr. Smith's submissions. However, there are a few points which she emphasises, and to which I will refer.

**342**  Ms. Wood commenced in part with the following:

The Plaintiff must prove on a balance of probabilities that the nursing staff at the Hospital in fact caused the damage claimed. It is quite clear that no act or omission on the part of the Hospital or its employees caused the intra-cranial hemorrhage suffered by Mr. Hayes. That was an unfortunate consequence of the thrombolytic therapy he received, which carries with it a small risk of intra-cranial hemorrhage, which, when compared with the overwhelming risk of mortality and morbidity due to the heart attack, pales in comparison.

**343**  And she continues:

This putative left-sided weakness would have had to have been present prior to 18:20 hours, for the nurses to face exposure in any event, because that is the last time a formal neuro vital sign check was required according to the Hospital protocol. Accordingly, the plaintiff has to prove not only that there would have been left-sided weakness attributable to the intra-cranial hemorrhage detectable on formal motor strength testing by the nurse at or prior to 18:20 hours, but also that the bleed existed then to cause the secondary symptoms. There is absolutely no evidence to support that the bleed was present prior to 18:20 hours. Dr. Cameron does not give this evidence. He simply speculates that there may have been earlier subtle signs present, but gives us no time frame. The one time frame that he does give us is that the decrease in Mr. Hayes' level of consciousness did not occur until after 18:45 hours based on the nurse's chart notes, and after 19:05 based on the evidence he was presented with in cross-examination about the patient's level of alertness when Nurse Petryk went in to zero the IVs. Nowhere does Dr. Cameron say that this bleed occurred prior to 18:20 hours. Nowhere does he say that the left-side weakness he speculates could have been picked up on more formal neurological testing was present prior to 18:20.

**344**  And:

In contrast, Dr. Keyes' evidence is compelling to the effect that this bleed did not happen until some time after 18:45 at the earlier and likely after 19:05 hours. That being the case, there would have been no left-sided weakness to have been picked up by the nursing staff prior to that time. Furthermore, it is very important to note that Mr. Hayes' left hand grips were still present a matter of minutes before he was re-assessed at 19:30 hours after having been found in a clearly comprised condition. That lends clear support for how rapidly his neurological function was deteriorating and equally lends support for the fact that had the motor strength test been conducted earlier, the left-hand grip would still have been present and not absent as is key to Nurse Werry's opinion. She does not say that nurses are able to pick up subtle neurological deficits, but says that if absent hand grips had been present earlier, they would have been detectable on a formal motor strength test. She says that if the patient was unable to move his toes that could have been picked up at a formal motor strength testing. However, clearly Mr. Hayes was not in a position of being unable to move his toes at 18:30 hours when he was standing by the side of the bed when found by Nurse Mowat. Nurse Werry conceded that fact. It is Dr. Keyes' evidence that if the patient had subtle weakness, then that would have been most obvious when the patient was doing large motor movements with the left side of his body. Specifically, he would not have been able to get out of bed using his arms, or, alternatively, if he was trying to stand on his left leg, he would not have been able to bear weight on his leg, or would have lost his balance or fallen if he tried to stand up.

**345**  And:

It is Dr. Keyes' evidence that the first neurological sign one would expect with a bleed in the right temporal region of the brain would be a decrease in the patient's level of consciousness. Dr. Cameron speculates that there might be some left-sided weakness which proceeded that, but concedes that given the area of the brain where the bleed occurred he would expect a decrease in the patient's cognitive functions as a first sign. Given that the uncontradicted evidence is to the effect that the patient's level of consciousness did not deteriorate until some time after 18:45 hours, that means that there would not have been any detectable neurological symptoms of this bleed prior to that time because the bleed did not occur until after 18:45 hours at the earlier.

**346**  Ms. Woods submitted that Snell v. Farrell need not be referred to for guidance. Here there is no evidence of any cause and effect between the Hospital's alleged ***negligence*** and the brain damage suffered by Mr. Hayes. On the other hand, there is convincing evidence from Dr. Keyes that this bleed happened suddenly and spontaneously and catastrophically some time after 19:05 hours. It is Dr. Keyes' evidence that if Mr. Hayes was suffering from his intra-cranial hemorrhage at 18:30 hours, he would not have been able to stand by the bed.

**347**  Ms. Woods emphasised that Dr. Cameron does not tell us that the bleed was present prior to 18:45 hours. He does not say that left-sided weakness would have been detectable on some formal motor strength testing prior to 18:20 hours. Yet it is absolutely key to the Plaintiff's case that it be established on the balance of probabilities that some kind of detectable left-sided weakness was present at 18:20 hours or before, because that was when the last neuro vital check was required by the protocol. No evidence was proffered on this point; and without any evidence to support the existence of the bleed prior to 18:20 hours, which is essential in order to tie Mr. Hayes' claims into the alleged act of ***negligence*** on the part of the nursing staff, there is simply no possibility that the plaintiff can hope to succeed on the issue of causation.

**348**  In light of the conclusions that I have reached, I have decided not to consider the other issues between the parties, other than to comment briefly on some of them. In my opinion there is no evidence before me that anything that Nurse Petryk did or omitted to do materially, or otherwise, contributed to Mr. Hayes' injuries. Those injuries were, in my view, inevitable once the bleeding began, given the nature of the thrombolytic intra-cranial hemorrhaging, as frequently described above.

**349**  I did not think that Mr. Smith advanced the lack of consent, and independent duty owed by the Defendant Hospital, issues with any vigour. In any event, Mr. Hayes has not satisfied me, on a balance of probabilities, that he was not informed of any material risks or special or unusual risks, or that as a reasonable person he would not have proceeded with the thrombolytic therapy in the form of TNK and the ASSENT I trial. Given his condition, it is most unreasonable to suggest that he would not have undergone thrombolytic therapy. I am satisfied that he would have done so with TPA, and that he would have undergone the same risks.

**350**  I am also satisfied on the evidence that Mr. Hayes was fully informed of the risks by Dr. MacDonald and by the terms of the written form which he considered and eventually signed. And one may wonder why those responsible for the obtaining of the informed consent, and for the contents of the form itself, were let out of the trial, if in fact they failed in their duties to him. And in this regard in my opinion the Hospital owed no independent duty to Mr. Hayes, with regard to the obtaining of his informed consent or the contents of the form. In any event, even if some negligent act or omission on the part of the Defendant Hospital relating to informed consent or the contents of the form could be proven, Mr. Hayes still could not recover because there is no causal connection between such conduct and the intra-cranial hemorrhage which he suffered.

**351**  Finally, I do not propose to deal with the question of damages on an alternative basis. However, I must say that it is clear to me that once the intra-cranial bleeding began the neurological deficits suffered by Mr. Hayes were inevitable because of the very rapid accumulation of blood within the area of the brain in which the hemorrhage occurred. Thus, even if some act or omission constituting ***negligence*** on the part of Nurse Petryk, and some contribution to causation, could be established by Mr. Hayes, and which, as I have said, is most unlikely, the damages which would be attributable to the negligent conduct would not be other than nominal.

SUMMARY

**352**  I am satisfied that in caring for Mr. Hayes, and in particular, in assessing him while in her care, Nurse Petryk acted in conformity with the standard practice to be expected of a prudent and diligent nurse in the care of a thrombolytic patient in the CCU, and to be expected of any nurse in the same circumstances; a practice established by the evidence of Dr. Keyes and Nurse MacKay, and one which itself was not fraught with obvious risks, adopting the words used by Sopinka, J., speaking for a strong majority of the Supreme Court of Canada in Ter Neuzen v. Korm. I am also satisfied, in the circumstances, if there is a difference, that Nurse Petryk's conduct was also in conformity with the standard of care required of her by the Defendant Hospital's Protocol.

**353**  Further, assuming some ***negligence***, some breach of duty of care required of her by the standard practice or the Protocol, for example, in her method of assessing Mr. Hayes' hand and foot strengths, Mr. Hayes has failed to establish on a balance of probabilities that such negligent conduct caused or contributed to the cause of the intra-cranial hemorrhaging and resulting injuries suffered by him. As I said earlier, I am satisfied that nothing that Nurse Petryk, or any other nurse, did or did not do can be associated with the intra-cranial hemorrhage. It has been said that causation is essentially a practical question of fact which can best be answered by ordinary common sense. Here, a weighing of the evidence and the application of common sense clearly determined that causation cannot be established.

**354**  The action is accordingly dismissed.

HOOD J.

\* \* \* \* \*

CORRIGENDUM

Released: July 18, 2001

[1] With respect to my Reasons for Judgment released July 16, 2001, the citation number on the first page should be changed from "2000 BCSC 1669" to read "2001 BCSC 1047".

HOOD J.

**End of Document**

[***Hercules Forwarding Inc. v. Ski-Hi Scaffolding Ltd., [2015] B.C.J. No. 2215***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H6V-87H1-JCJ5-245X-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.A. Skolrood J.

Heard: September 11, 2015.

Judgment: October 14, 2015.

Docket: S084018

Registry: Vancouver

**[2015] B.C.J. No. 2215** | 2015 BCSC 1859

Between Hercules Forwarding Inc., Plaintiff, and Ski-Hi Scaffolding Ltd., Spruce Terminals Inc., Westminster Consultants Ltd., Rland Solutions Inc., Sualc Management Inc. and Hexion Specialty Chemicals Canada Inc. Produits Chimiques Specialises Hexion Canada Inc., Defendants

(62 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Third party procedure — Availability — Notice — Leave — Application by defendant Ski-Hi Scaffolding for leave to file and serve third party claim allowed — Plaintiff commenced claim against defendants, all of whom previously owned plaintiff's contaminated property, for costs of remediation — Third party notice set out causes of action in contribution and indemnity, *negligence* and negligent misrepresentation — Claims in third party notice were sufficiently connected to plaintiff's claim — Delay in commencing third party notice was explained by plaintiff's delay in moving action forward — Best that matter be considered as part of plaintiff's action rather than as separate action.**

|  |
| --- |
| Application by the defendant Ski-Hi Scaffolding Ltd for leave to file and serve a third party notice. The plaintiff commenced an action claiming that a property owned by it was contaminated with various substances and it sought recovery of the costs of remediation. Ski-Hi was a former owner of the property, which it purchased from one of the other defendants. The other named defendants were also previous owners of the property. In conjunction with the sale of the property to Ski-Hi in 2005, the seller retained the third party to provide a preliminary site investigation report concerning the environmental condition of the property. The third party reported that the results of the investigation indicated that there was no significant soil and groundwater contamination and that the site was suitable for commercial/industrial use. While the report was prepared for the seller, the third party was aware that it would be used by Ski-Hi in connection with its purchase of the property and consented to Ski-Hi's use and reliance on the report. Ski-Hi claimed that the third party was negligent in failing to indentify and report the presence or potential of hazardous substances on the property. Ski-Hi sought declarations that the plaintiff's loss was caused in whole or in part by the ***negligence*** of the third party and that it was entitled to contribution or indemnity from the third party and other relief.  HELD: Application allowed.  Pursuant to Rule 3-5(4), Ski-Hi required leave to file and serve its third party notice because more than 42 days had elapsed since the notice of civil claim was first filed. Ski-Hi's third party notice set out causes of action that, if established, would support a claim for contribution and/or indemnity under the Environmental Management Act and the Contaminated Sites Regulation and in ***negligence*** and negligent misrepresentation. The claims sought to be advanced by Ski-Hi were sufficiently connected to the matters raised by the plaintiff in its claim as to bring the claims within Rule 3-5(1)(b). Ski-Hi's delay in commencing the third party notice was explained by the plaintiff's delay in moving the action forward. While two of the persons who were involved in the preparation report were no longer employed by the third party, the principal in charge of the project was. It was best that the matter be considered as part of the plaintiff's action rather than as a separate action. |

**Statutes, Regulations and Rules Cited:**

Contaminated Sites Regulation, [*B.C. Reg. 375/96, s. 35*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RC11-JN14-G11K-00000-00&context=)(3)

Court Order Interest Act, *R.S.B.C. 1996, c. 79*,

Environmental Management Act, [*S.B.C. 2003, c. 53, s. 45*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FN1-JSXV-G1MM-00000-00&context=)(1), s. 47(1)

***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=)

Supreme Court Civil Rules, *B.C. Reg. 168/2009, Rule 3-1*, Rule 3-1(2)(a), Rule 3-5(1), Rule 3-5(1)(b), Rule 3-5(4), Rule 3-5(11)

Waste Management Act, [*R.S.B.C. 1996, c. 482*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-FJM6-60VK-00000-00&context=),

**Counsel**

Counsel for the Plaintiff: A.C Akelaitis, G.A. Letcher.

Counsel for the Defendant, Ski-Hi Scaffolding Ltd.: K.M. Low.

Counsel for the Proposed Third Party, Keystone Environmental Ltd.: R.E. Bereti, A.R. Way.

The Defendants, Spruce Terminals Inc., Westminster Consultants Ltd., Rland Solutions Inc., Saulc Management Inc. and Hexion Specialty Chemicals Canada Inc. Produits Chimiques Specialises Hexion Canada Inc.: No Appearance.

**Reasons for Judgment**

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

**Introduction**

**1**  The defendant Ski-Hi Scaffolding Ltd. ("Ski-Hi") applies for leave to file and serve a third party notice on Keystone Environmental Ltd. ("Keystone").

**2**  Ski-Hi's notice of application initially sought similar relief in respect of a number of other parties, all of which are named defendants. I am told that those parties have consented to being named as third parties. Keystone is the one entity not already a party to the action that Ski-Hi seeks to add as a third party. Keystone opposes the application.

**3**  The plaintiff, Hercules Forwarding Inc. ("Hercules"), supports the application. The remaining parties take no position.

**The Action**

**4**  The action was originally commenced by writ of summons and statement of claim filed on June 6, 2008. An amended notice of civil claim was subsequently filed on November 6, 2014.

**5**  The action involves claims by Hercules that property owned by it, located at 151 Spruce Street, New Westminster, BC (the "Property"), is contaminated with various substances and it seeks recovery of the costs of remediation in accordance with the *Environmental Management Act,* *S.B.C. 2003, c. 53* [*EMA*].

**6**  Ski-Hi is a former owner of the Property, which it purchased in October of 2005 from the defendant Spruce Terminals Inc. ("Spruce"). The other named defendants are parties who have previously owned or occupied the Property.

**7**  Ski-Hi filed a statement of defence on September 15, 2008.

**8**  No steps were taken in the litigation until January 17, 2014 when Hercules filed a notice of intention to proceed. On March 18, 2014, Hercules filed a notice of change of solicitor.

**9**  On October 7, 2014, a representative of Ski-Hi was examined for discovery. On December 18, 2014, a representative of Spruce was examined for discovery.

**10**  On March 27, 2015, Ski-Hi filed a notice of change of solicitor, appointing its current counsel.

**11**  No trial date has been set.

**Keystone's Involvement**

**12**  In conjunction with the sale of the Property from Spruce to Ski-Hi, Spruce retained Keystone in June 2005 to provide a preliminary site investigation report concerning the environmental condition of the Property (the "Keystone Report").

**13**  The executive summary of the Keystone Report included the following statement:

The results of the investigation indicated that no significant contamination was apparent in the Site soil and groundwater, and that the Site was therefore suitable for commercial/industrial use.

**14**  While the Keystone Report was prepared for Spruce, Keystone was aware that it would be used by Ski-Hi in connection with its purchase of the Property. Keystone consented to Ski-Hi's use and reliance on the Keystone Report. This consent was communicated to Ski-Hi in a letter dated October 12, 2005 from Kenneth Evans, a principal of Keystone. In that same letter, Mr. Evans also advised Ski-Hi that:

All other limitations and conditions stipulated in the report and in the general terms and conditions attached to the agreement between Spruce Terminals Inc and Keystone Environmental Ltd. are applicable to the use of the report by Ski-Hi Scaffolding Ltd.

**15**  One of the limitations referred to by Keystone is found in section 1.3 of the Keystone Report:

This report has been prepared solely for the internal use of Spruce Terminals Inc. pursuant to the agreement between Keystone Environmental Ltd. and Spruce Terminals Inc. A copy of the general terms and conditions associated with this agreement is attached in Appendix E. Any use which other parties make of this report, or any reliance on or decisions made on it, are the responsibility of such parties. Keystone Environmental ltd. accepts no responsibility for damages, if any, suffered by other parties as a result of decisions made or actions based on this report.

**16**  The general terms and conditions referred to in section 1.3, include the following provision:

1. Limited Use of Report

Any report prepared as part of the work will be prepared solely for the internal use of CLIENT. Unless otherwise agreed by keystone and CLIENT, parties agree that third parties are not to rely upon the report.

**17**  Again, these limitations on the use of the report were modified to permit Ski-Hi to use and rely on the Keystone Report.

**Ski-Hi's Proposed Third Party Claim**

**18**  Ski-Hi's draft third party notice sets out the relief sought in the following terms:

1. A Declaration that the plaintiff's loss was caused in whole or in part by the ***negligence*** or fault of the Third Parties;
2. A Declaration that the Claiming Party is entitled to contribution and/or indemnity pursuant to the *EMA* and the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, as amended, to the extent of the degree to which the Third Parties are found liable by the Court to have been at fault for any liability the Claiming Party may be under to the plaintiff for any amount that may be due to the plaintiff from the Claiming Party;
3. Judgment against the Third Parties for any amount that may be found due from the Claiming Party to the plaintiffs, including interest under the *Court Order Interest Act,* *R.S.B.C. 1996, c. 79*;
4. Judgment against the Third Parties for the amount of costs that the Claiming Party may be adjudged liable to pay to the plaintiff and for the amount of the Claiming Party's own costs of defending this action and of the proceeding against the Third Parties;
5. Post-judgment interest pursuant to the *Court Order Interest Act*, *supra*; and
6. Such further and other relief as this Honourable Court deems just.

**19**  Under the "Legal Basis" section of its draft third party notice, Ski-Hi cites ss. 45(1) and 47(1) of the *EMA* and alleges that Keystone is a "person responsible for remediation" within the meaning of the statute. In paras. 6 - 9 (Legal Basis) of the draft third party notice, Ski-Hi mentions other third parties as responsible parties but does not specifically reference Keystone. Ski-Hi further cites s. 35(3) of the *Contaminated Sites Regulation,* [*B.C. Reg. 375/96*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5K1-F5KY-B02G-00000-00&context=) [*CSR*] which provides:

For the purpose of section 47 of the Act, any compensation payable by a defendant in an action under section 47(5) of the Act is a reasonably incurred cost of remediation for that responsible person and the defendant may seek contribution from any other reasonable person in accordance with the procedures under section 4 of the ***Negligence*** *Act.*

**20**  Ski-Hi further alleges that Keystone provided assistance respecting work at the Property in a negligent fashion, and it alleges the following particulars of Keystone's ***negligence***:

1. Failing to identity [sic] and report on the presence or the significant potential of hazardous substances and other contaminants on the Property when it knew or ought to have known that others would rely on the Keystone Environmental Report and the statements contained therein in purchasing the Property;
2. Failing to property [sic] investigate and assess the environmental condition of the Property and failing to meet the standard of care of a reasonably competent environmental consultant;
3. Making negligent misstatements in the Keystone Environmental Report; and
4. Such further and other particulars of ***negligence*** and fault as they become known to the defendant and may be proved at trial.

**Legal Framework**

**21**  Third party claims are governed by Rule 3-5 of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009*. Rule 3-5(1) states:

1. A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that
2. the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,
3. the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or
4. a question or issue between the party and the person
5. is substantially the same as a question or issue that relates to or is connected with
6. relief claimed in the action, or
7. the subject matter of the action, and
8. should properly be determined in the action.

**22**  Pursuant to Rule 3-5 (4), Ski-Hi requires leave to file and serve its third party notice because more than 42 days have elapsed since the notice of civil claim was first filed.

**23**  In *Gordon v. Krieg,* [*2011 BCSC 1248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-626W-00000-00&context=) at para. 33 [*Gordon*], Mr. Justice Betton endorsed the list of factors to be considered by the court on an application for leave to bring a third party claim, as set out by the court in *Clayton Systems 2001 Ltd. v. Quizno's Canada Corp.,* [*2003 BCSC 1573*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B08X-00000-00&context=), [*27 B.C.L.R. (4th) 247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B08X-00000-00&context=) at para. 9:

... prejudice to the parties, expiration of a limitation period, the merits of the proposed claim, any delay in the proceedings, and the timeliness of the application.

**24**  It is also useful to note the description of third party claims provided by the Court of Appeal in *McNaughton v. Baker,* [*[1988] 4 W.W.R. 742*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-6050-00000-00&context=), [*25 B.C.L.R. (2d) 17*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-6050-00000-00&context=) (C.A.) [*McNaughton*], where Madam Justice Mclachlin, as she then was, said at 745 - 746:

Third party proceedings are a form of pleading by which a defendant asserts a claim against someone other than the plaintiff in the event the defendant is found liable to the plaintiff. Originally, the claim was confined to contribution or indemnity: see *Australian Newsprint Mills Ltd. v. Can. Union Line Ltd.* [*(1952), 6 W.W.R. (N.S.) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-F06F-223W-00000-00&context=), [*7 W.W.R. (N.S.) 94*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JCJ5-2438-00000-00&context=) (B.C.S.C.). The type of claims that could be raised by third party proceedings was broadened in 1961 by amendments, confirmed in the present R. 22(1). In addition to claims for contribution and indemnity, third party proceedings may be brought for claims for relief or a remedy relating to or connected with the original subject matter of the action, as in cases where the proposed third party claim involves a question or issue substantially the same as a question or issue arising in the claim between the plaintiff and defendant: see *Webber v. Lowrie* [*(1978), 8 B.C.L.R. 131*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-62DN-00000-00&context=), [*90 D.L.R. (3d) 682*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-62DN-00000-00&context=) (C.A.).

Third party pleadings function as a special type of statement of claim. Indeed, the claim they embody could be brought by separate action. But to avoid a multiplicity of proceedings, the rules permit the claim to be made in the action which has been commenced against the defendant. The object of permitting third party proceedings to be tried with the main action is to provide a single procedure for the resolution of related questions, issues or remedies, in order to avoid multiple actions and inconsistent findings, to provide a mechanism for the third party to defend the plaintiff's claim, and to ensure the third party claim is decided before a defendant is called upon to pay the full amount of any judgment. The avoidance of a multiplicity of proceedings is fundamental to our rules of civil procedure. This has been the case since the reforms effected by the Judicature Acts in the nineteenth century. As Cotton L.J. stated in *Searle v. Choat* (1884), 25 Ch. D. 727: "the whole tenor of the *Judicature Acts* is to require all proceedings as far as possible to be taken in one action".

**25**  Elsewhere in her decision, Madam Justice McLachlin underscored the point that the courts take a liberal approach to pleadings and that third party claims will only be struck (or in this case leave to file denied) where it is "absolutely beyond doubt" that the claim has no likelihood of succeeding (see p. 750).

**26**  Where a third party claim involves a claim for contribution under the ***Negligence*** *Act,* the Supreme Court of Canada held in *Giffels Associates Ltd. v. Eastern Construction Co.,* [*[1978] 2 S.C.R. 1346*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-2532-00000-00&context=) at 1354, [*84 D.L.R. (3d) 344*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-2532-00000-00&context=) [*Giffels*], that a pre-condition to a defendant's right to claim contribution from a third party is that the third party be liable to the plaintiff. See also *Orange Julius Canada Ltd. v. Surrey (City of)*, [*2000 BCCA 467*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22PT-00000-00&context=) at paras. 45-66, (*sub nom. Laing Property Corp. v. All Season Display Inc.*) [*190 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22PT-00000-00&context=).

**The Parties' Positions**

**27**  Ski-Hi submits that its draft third party notice sets out three independent causes of action against Keystone:

1. A statutory claim for contribution under the *EMA* and the *CSR*;
2. A claim for contribution based on the breach by Keystone of a duty of care owed by it to Hercules with respect to the negligent preparation of the Keystone Report; and
3. A direct claim in ***negligence*** and/or negligent misrepresentation resulting from Ski-Hi's use of and reliance on the Keystone Report, with the express consent of Keystone.

**28**  As noted, Hercules supports Ski-Hi's application. It submits that the *Giffels* principle does not preclude claims for indemnity based on independent causes of action which is the situation here. It submits further that it is clear that the claims involving Keystone are connected to the claims advanced in the amended notice of civil claim and thus are properly the subject of a third party notice pursuant to Rule 3-5(1)(b).

**29**  Keystone takes the position that, properly construed, the draft third party notice sets out two causes of action:

1. a claim for contribution and indemnity pursuant to s. 4 of the ***Negligence*** *Act* for any damages that Ski-Hi may be found liable to pay to Hercules; and
2. a claim for contribution and indemnity under the *EMA* and *CSR* on the basis that Keystone is a responsible person under the *EMA.*

**30**  Keystone submits that the ***Negligence*** *Act* claim is bound to fail because there is no basis on which it could be found liable to Hercules. In support of this position, Keystone relies on the limitation and disclaimer provisions in the Keystone Report, referred to above, which purport to specifically prohibit the use of the report by third parties and to disclaim any liability for damages resulting from such use. Keystone says that it never consented to Hercules using the Keystone Report and that it owed no duty of care to Hercules, given its express disclaimer.

**31**  With respect to the claim under the *EMA,* Keystone submits that leave to file and serve the third party notice should be denied given the inordinate delay on the part of Ski-Hi in bringing the third party claim, and the prejudice to Keystone resulting from that delay. Keystone notes in particular that two key employees involved in preparing the Keystone Report are no longer employed by Keystone.

**Discussion**

**32**  I am satisfied that Ski-Hi's draft third party notice sets out causes of action against Keystone that, if established, would support a claim for contribution and/or indemnity from Keystone outside of s. 4 of the ***Negligence*** *Act.* Specifically, the draft third party notice again alleges that Keystone is a "responsible person" within the meaning of the *EMA* and as such, Ski-Hi's claim for contribution is based on the provisions of the *EMA* and the *CSR.* While I think that it is fair to characterize that claim as novel, I am not prepared to find at this preliminary stage that it is bound to fail.

**33**  Similarly, I am satisfied that the draft third party notice sets out a claim against Keystone in ***negligence*** and negligent misrepresentation. On this point, Keystone complains that the pleading is deficient in that it does not plead that Keystone owed Ski-Hi a duty of care.

**34**  Pursuant to Rule 3-5(11), Rules 3-1 and 3-3 apply to a third party notice as if it were a notice of civil claim. Rule 3-1 sets out the basic requirements for a notice of civil claim, including in 3-1(2)(a), "a concise statement of the material facts giving rise to the claim".

**35**  In my view, the draft third party notice pleads material facts sufficient to identify and support a claim in ***negligence***. With respect to the duty of care owed by Keystone, while it is true that the notice does not specifically plead such a duty, it does allege in the "Statement of Facts" section that "Keystone provided written consent to Ski-Hi to use the Keystone Environmental Report in consideration of purchasing the Property from Spruce Terminals". Such knowledge and consent on the part of Keystone would in my view be sufficient to support a duty of care.

**36**  Moreover, as I read the prayer for relief in the draft third party notice, it claims damages from Keystone which it says results from Keystone's alleged ***negligence***. In other words, the relief claimed is not limited to a claim for contribution and indemnity.

**37**  I would add that, in my view, a claim for contribution and indemnity under the ***Negligence*** *Act* is not in any event bound to fail.

**38**  As noted above, Keystone takes the position that it owed no duty of care to Hercules because of the limitation of liability and disclaimer provisions in the Keystone Report. It cites a number of cases in which disclaimers were found to be sufficiently clear and broad to negate any duty of care owing to third party users, including *Hedley Byrne & Co. v. Heller & Partners,* [1963] 2 All E.R. 575 (H.L.), *Wolverine Tube (Canada) Inc. v. Normanda Metal Industries Ltd.* [*(1995), 26 O.R. (3d) 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JX3N-B187-00000-00&context=), [*87 O.A.C. 191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JX3N-B187-00000-00&context=) (C.A.), and *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.,* [*[1993] 3 S.C.R. 206*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M39F-00000-00&context=), [*107 D.L.R. (4th) 169*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M39F-00000-00&context=).

**39**  For its part, Ski-Hi submits that the provisions relied on by Keystone do not on their face exclude liability in ***negligence*** and as such, it is not clear that Keystone did not owe a duty of care to Hercules. Ski-Hi cites the Court of Appeal decision in *Zippy Print Enterprises Ltd. v. Pawliuk* (1994), [*[1995] 3 W.W.R. 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0D7-00000-00&context=), [*100 B.C.L.R. (2d) 55*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0D7-00000-00&context=) (C.A.) where the court said at para. 34:

The usual rule in relation to clauses excluding liability is that if liability can be based on ***negligence*** or on some other ground, and if the clause does not specifically state that liability for ***negligence*** is excluded, then liability for ***negligence*** is not excluded. See *Alderslade v. Hendon Laundry Ltd.*, [1945] 1 All E.R. 244 (C.A.), and *Cavell Developments Ltd. v. Royal Bank of Canada* [*(1991), 78 D.L.R. (4th) 512*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-F8KH-X16W-00000-00&context=) [ [*54 B.C.L.R. (2d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-F8KH-X16W-00000-00&context=), [*[1991] 4 W.W.R. 266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-F8KH-X16W-00000-00&context=)] (B.C.C.A.).

**40**  Ski-Hi also relies on the Supreme Court of Canada decision in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.,* [*[1995] 1 S.C.R. 85*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3GT-00000-00&context=), [*121 D.L.R. (4th) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3GT-00000-00&context=), where the Court acknowledged that

contractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants (at para. 43).

**41**  Ski-Hi submits by analogy that liability in this case may extend to Keystone by virtue of its alleged ***negligence*** in preparing the Keystone Report, despite the absence of any privity of contract between Keystone and Hercules.

**42**  I agree with Ski-Hi that this issue is at least arguable and is not bound to fail. Accordingly, I would not decline leave on this ground.

**43**  Lastly, I am also satisfied that the claims sought to be advanced by Ski-Hi in the draft third party notice are sufficiently connected to the matters raised by Hercules in its amended notice of civil claim as to bring the claims within Rule 3-5(1)(b).

**44**  On this point, there is some similarity in the facts of this case to those in *Gordon*. There, the plaintiff's home suffered structural damage due to settling of the property. She sued the vendor from whom she had purchased the house, the vendor's realtor, and the home inspector she retained in connection with the purchase. Certain of the defendants sought leave to file and serve a third party notice on a company involved in the original site preparation and construction.

**45**  The application was initially denied by a Master. In allowing the appeal, Mr. Justice Betton described the relationship of the plaintiff's claims to the proposed third party claims as follows at paras. 35-36:

The plaintiff is alleging damages that are reflected in the costs of remedying the defects in her home that arise and may continue to arise from settling. She says that the defendants involved in the sale should have disclosed the problems, and those connected with the inspection should have identified the problems and the extent of them.

Those defendants in turn say that the proposed third party, Interior Testing, caused those problems to exist, based on their conduct in and around the time of the site preparation and construction. The connection between those two -- those claims and proposed claims is in the measure of the damages resulting from the actions of the defendants or third parties.

**46**  Mr. Justice Betton held that there was a sufficient connection between the two sets of claims to warrant the issuance of a third party notice.

**47**  In the case at bar, as is typical of cost recovery claims under the *EMA,* Hercules' claim extends back in time with a view to imposing liability on previous owners and occupiers of the Property for the costs of remediating the environmental condition of the Property. Keystone played a role in the chain of possession of the Property by preparing a report for the specific purpose of the sale of the Property from Spruce to Ski-Hi. The claims sought to be advanced by Ski-Hi in its draft third party notice relate to the role played by Keystone. In my view, those claims are directly related to the claims advanced by Hercules and fall within Rule 3-5(1)(b).

**48**  Having found that Ski-Hi's draft third party notice falls within Rule 3-5, I nonetheless retain the discretion to decline to grant leave to file and serve the third party notice based on the factors identified by Mr. Justice Betton in *Gordon,* as set out at paragraph 22 above.

**49**  Keystone submits that I should exercise that discretion to deny leave because of the undue delay on the part of Ski-Hi in bringing this application and the resulting prejudice to Keystone. It cites the decision of Master Caldwell in *Hadland v. Reems,* [*2015 BCSC 115*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-F900-G4KN-00000-00&context=), where it was held that in the face of significant delay in bringing a third party claim, "clear and compelling explanation and excuse" is required by the defendant seeking to bring the claim (at para. 27). Keystone says that Ski-Hi has failed to provide any explanation or excuse for its delay in waiting seven years from the commencement of the litigation, and ten years from the time Keystone prepared the Keystone Report, to advance its third party claim.

**50**  Ski-Hi submits that there has been no delay on its part, noting that its current counsel was only retained in March 2015 and this application was filed in June 2015.

**51**  That however does not answer Keystone's fundamental concern, which is that Ski-Hi was named as a defendant in the action in June 2008 and filed a defence in September 2008. Ski-Hi knew at that time that Keystone had prepared the Keystone Report and would have been aware of a possible third party claim against Keystone, yet it took no steps to advance its third party claim until June 2015.

**52**  Keystone cites *First National Properties Ltd. v. Northland Road Services Ltd.,* [*2008 BCSC 569*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3DH-00000-00&context=), [*70 C.L.R. (3d) 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3DH-00000-00&context=) [*First National*] in support of its contention that it has been prejudiced by the delay. There, the defendants applied to dismiss the plaintiff's claim for environmental remediation costs (under the then *Waste Management Act,* [*R.S.B.C. 1996, c. 482*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-FJM6-60VK-00000-00&context=)) on the ground that the claim was statute-barred or, alternatively, for want of prosecution.

**53**  Madam Justice D. Smith found that the claim was not statute barred, but she did dismiss it for want of prosecution on the basis of a delay in commencing the action and a further delay between the commencement of the action by writ of summons and the filing of a statement of claim. A central factor in Madam Justice Smith's determination was the nature of the cost recovery claim established under the statute. She said at para. 74:

The presumptive prejudice caused by the plaintiff's inordinate and inexcusable delay is significant. It began with the creation of a new cause of action on April 1, 1997, which extended the time in which First National could bring this action. The ***Act*** provides for the imposition of liability in a remediation cost-recovery action that is absolute, retroactive, and joint and several against a broad spectrum of potential payors. This is powerful legislation that creates a "polluter pay" responsibility, regardless of fault or time, for the purpose of implementing the policy objective of cleaning up contaminated sites. The legislation also extends to both corporate and individual "responsible persons" alike. In these circumstances, I am of the view that plaintiffs who seek to rely on the advantages provided by the liability provisions of the ***Act*** have a parallel obligation to proceed with their cost-recovery actions in a diligent and expeditious manner in order to minimize the risk of prejudice to the defendants' ability to effectively respond to their claim.

**54**  Madam Justice Smith held further that there was a presumption of prejudice flowing from the plaintiff's delay:

First National contends the defendants' claims of prejudice are non-specific. However, it is reasonable to infer that First National had to have been aware of the prejudice it was creating by its lack of diligence in pursuing the action. It is reasonable to presume that evidence relevant to the issues in dispute would have degraded significantly or have been lost because of First National's delay. This is confirmed by the specific aspects of the defendants' claims of prejudice. Material witnesses are no longer available. In these circumstances I am satisfied the plaintiff has not established an absence of prejudice to the defendants by the inordinate and inexcusable delay.

Rule 1(5) provides for the just, speedy and inexpensive determination of every proceeding on its merits. The passage of six years since the commencement of the action, with no possibility that it will be ready to proceed to trial in the near future, the lack of availability of material witnesses, the expectation of failing memories over the length of time from when the allegation first arose, and the inability of the defendants to retain relatively contemporaneous experts to address the claim of ongoing contamination, creates a significant imbalance in favour of the plaintiff that is a direct result of the plaintiff's failure to pursue its claim in a timely manner. In my view, a just determination of the dispute is no longer assured (at paras. 77-78).

**55**  *First National* is not directly on point because there it was the plaintiff's delay that led to the ultimate dismissal of its action. As reflected in the above passages, where a plaintiff chooses to litigate, it is reasonable to expect that it will prosecute its claims in a timely manner in order to avoid a prejudicial imbalance resulting from undue delay.

**56**  Here, there was considerable delay on the part of Hercules in moving the action forward. Apart from filing the initial pleadings in 2008, it took no steps to advance the litigation until early 2014. While Ski-Hi has filed no evidence to this effect, given the procedural history, it is reasonable to infer that it similarly took no steps to pursue its third party claim during that period of time given that it was unclear if Hercules would in fact be proceeding with the underlying action.

**57**  On the question of prejudice, Keystone relies on the Affidavit No. 2 of Mr. Evans who deposes that he was the "Principal in Charge" in connection with the preparation of the Keystone Report. According to Mr. Evans, that meant that he was responsible for carrying out a final review of the Report. However, the primary work involved in conducting the investigation and in drafting the Report was done by a Mr. Pirzada, who was the project manager, and a Ms. Lightfoot, who was the primary author. Mr. Evans further deposes that neither of those individuals is currently employed by Keystone and that, to the best of his knowledge, Ms. Lightfoot now resides in New Zealand.

**58**  Of note, Mr. Evans does not allege any specific prejudice apart from the fact that the two individuals are no longer employed by Keystone. However, Keystone submits that prejudice of the type identified by Madam Justice Smith in *First National* may be presumed by virtue of the passage of time.

**59**  In my view, while the fact that Mr. Pirzada and Ms. Lightfoot are no longer employed by Keystone may create challenges for Keystone in addressing Ski-Hi's claims, the obstacles are not insurmountable, particularly since the principal in charge of the project, Mr. Evans, is still employed by Keystone and gave evidence on this application.

**60**  Moreover, as Keystone acknowledges, if Ski-Hi's application is denied then it would be open to Ski-Hi to pursue its claims against Keystone in separate litigation. Thus, Keystone will be required to mount a defence in any event. In my view, that defence is best considered as part of Hercules' action in which all of the key players involved with the Property will be present, rather than in a separate action even further removed in time. This finding accords with the objective identified by Madam Justice McLachlin in *McNaughton* of permitting related claims to be heard together and thereby avoiding a multiplicity of proceedings.

**Summary and Conclusion**

**61**  In summary, I find that this is an appropriate case in which to exercise my discretion to permit Ski-Hi to pursue its third party claim. Ski-Hi is therefore granted leave to file and serve a third party notice in the form attached as amended Schedule "A" to its notice of application.

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

R.A. SKOLROOD J.

**End of Document**

[***Kitsul v. Slater Vecchio LLP, [2016] B.C.J. No. 1174***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K1C-F351-DXWW-23F4-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

M.M. Koenigsberg J.

Heard: May 2-5, 2016.

Judgment: June 8, 2016.

Docket: S135991

Registry: Vancouver

**[2016] B.C.J. No. 1174** | 2016 BCSC 1039

Between Dustin James Kitsul, Plaintiff, and Slater Vecchio LLP, Defendant

(25 paras.)

**Case Summary**

**Legal profession — Barristers and solicitors — *Negligence* — In conduct of action — Action by the plaintiff Kitsul against the defendant law firm Slater Vecchio for *negligence* dismissed — The plaintiff's claim arose from a motor vehicle accident which occurred while he was driving to work — The Worker's Compensation Appeals Tribunal found that the plaintiff was in the course of his employment, entitling him to worker's compensation and barring his tort action — The plaintiff had not met the threshold to establish *negligence* by the defendant in representing him before the WCAT — The defendant's submission before the WCAT had demonstrated knowledge of the tribunal's policies and the relevant jurisprudence — Workers Compensation Act, s. 10(1).**

**Professional responsibility — Self-governing professions — Liability — Standard of proof — Professions — Legal — Barristers and solicitors — Action by the plaintiff Kitsul against the defendant law firm Slater Vecchio for *negligence* dismissed — The plaintiff's claim arose from a motor vehicle accident which occurred while he was driving to work — The Worker's Compensation Appeals Tribunal found that the plaintiff was in the course of his employment, entitling him to worker's compensation and barring his tort action — The plaintiff had not met the threshold to establish *negligence* by the defendant in representing him before the WCAT — The defendant's submission before the WCAT had demonstrated knowledge of the tribunal's policies and the relevant jurisprudence — Workers Compensation Act, s. 10(1).**

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| Action by the plaintiff client Kitsul against the defendant law firm Slater Vecchio for ***negligence***. The plaintiff retained the defendant in 2008 with respect to an action for a 2005 motor vehicle accident. The plaintiff's claim arose from a motor vehicle accident which occurred while he was driving to work in a truck owned by his employer. His application to the Workers' Compensation Board (WCB) for benefits was denied when the WCB concluded that the accident did not arise in the course of the plaintiff's employment. Prior to the trial, the defendant to the tort action appealed the WCB decision to the Worker's Compensation Appeals Tribunal (WCAT), which found that the plaintiff was injured in the course of his employment, entitling him to worker's compensation. As a result, the plaintiff's tort action was barred by s. 10(1) of the Workers Compensation Act. The plaintiff claimed that the defendant law firm was negligent in its handling of his personal injury claim, and in their representation of him before the WCAT. He argued that the defendant law firm's counsel's submissions before the WCAT showed ignorance of the WCAT's policies and the relevant jurisprudence. The defendant law firm claimed that the plaintiff had not met the high threshold to establish ***negligence***, and that the plaintiff was relying on hindsight in claiming that the defendant law firm was negligent. Both parties proffered expert evidence as to the legal issues and applicable policies and WCAT jurisprudence interpreting the policies.  HELD: Action dismissed.  The plaintiff had not established any ***negligence*** on the part of the defendants with respect to the handling of his file or its representation of him before the Board. The plaintiff's claim that the defendants were ignorant with respect to the Board's policies and the relevant jurisprudence were unfounded. There was no way for the Court to say that the defendant's approach to the plaintiff's case before the WCAT was wrong. The defendant law firm had demonstrated knowledge of the policies and relevant jurisprudence in its submissions. |

**Statutes, Regulations and Rules Cited:**

Worker's Compensation Act, R.S.B.C. 1996, c. 492, s. 10(1), s. 257

**Counsel**

Counsel for the Plaintiff: Donald G. Crane.

Counsel for the Defendant: Grant Ritchey.

**Reasons for Judgment**

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| **M.M. KOENIGSBERG J.** |

**Introduction**

**1**  This is an action for solicitor's ***negligence***. It arises from the defendant law firm's handling of the plaintiff's personal injury action. Specifically, it arises because the defendants to the personal injury action succeeded when they brought an application to the Workers' Compensation Appeal Tribunal ("WCAT") seeking to have the plaintiff's tort claim barred by s. 10(1) of the *Workers Compensation Act*, *R.S.B.C. 1996, c. 492* [*WCA*], because his injuries arose out of and in the course of employment. WCAT's finding meant the plaintiff was covered by workers compensation, and denied the ability to continue to pursue his tort action.

**Background and Facts**

**2**  The plaintiff was injured in a motor vehicle accident in November, 2005. At the time he was driving to work in a flatbed truck owned by his employer, Trans Western Electric Ltd. He had one passenger, a fellow employee in the vehicle, and it was that co-worker who had been given permission to make use of the company vehicle. The two were on their way to work when they were rear ended by a tractor trailer truck. After the accident, the plaintiff made an application to the Workers' Compensation Board ("WCB") for benefits, but his claim was denied because the WCB concluded that his commute to work that morning was not in the course of his employment.

**3**  The plaintiff then sought to recover via tort action. In 2008, the plaintiff retained the defendant law firm to represent him in the personal injury action. During the course of that action and shortly before trial, the defendant to the personal injury action brought the aforementioned application pursuant to s. 257 of the *WCA*, seeking to deny the court's jurisdiction over the action in accordance with s. 10(1). As noted, the application succeeded and the tort action was barred.

**4**  The plaintiff in this action claims that the defendant law firm conducted the defence to the s. 257 application as if ignorant of the relevant law, policies and jurisprudence of the WCAT, and thus lost him his opportunity to proceed with his tort action, which, if rightly conducted, would have been assured of success. The plaintiff argues there was one simple and straight forward approach that should have been taken by the defendant law firm when defending the s. 257 application. He argues that had this approach been followed he would have been assured of success and eligible to proceed with his tort claim. Thus, he says, the arguments and submissions made by the defendant law firm to the WCAT constituted such a marked departure from what a reasonable and competent lawyer would submit that it rises to the level of ***negligence***.

**5**  The defendant acknowledges that clearly the plaintiff's position was not accepted by the Vice Chair of the WCAT. The defendant submits, however, that the plaintiff here is relying on hindsight to say that the position taken by the law firm was obviously wrong. Further, and more importantly, it denies that the plaintiff's position in this trial is the only obviously right way to argue this case before the WCAT, and it submits that even if the position taken by the law firm was an error in judgment, that is not sufficient to meet the high threshold required for a finding of ***negligence***.

**6**  The defence says the law firm's submissions before WCAT were competent, thorough and reasonable.

**7**  For the reasons set out below, I agree with the defendant. I dismiss the plaintiff's action and find there is no basis for any finding of ***negligence*** in this case.

**The Law and Analysis**

**8**  A succinct statement of the approach a court should take to determine if a lawyer has breached the standard of care is set out in *Startup v. Blake and MacIsaac & Co.*, [*2001 BCSC 8*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2SW-00000-00&context=). Kirkpatrick J. (as she then was), at paragraph 68, stated:

The standard to which Mr. Blake will be held is that expected of a reasonably competent and diligent solicitor in Victoria in 1996: see *Stronghold Investments Ltd. v. Renkema*, [*[1984] 3 W.W.R. 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2T3-00000-00&context=) at 58 (B.C.S.C.) where the court referred to a passage from *Millican*, [*[1964] A.J. No. 103*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93D1-F81W-219M-00000-00&context=) *supra*, at 218:

The standard of care and skill which can be demanded from a lawyer is that of a reasonably competent and diligent solicitor. It is not enough to prove that the lawyer has made an error of judgment or shown ignorance of some particular part of the law; it must be shown that the error or ignorance was such that an ordinarily competent lawyer would not have made or shown it.

It is extremely difficult to define the exact limits by which the skill and diligence which a lawyer undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between the reasonable skill and diligence which appears to satisfy his undertaking. It is a question of degree, and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed.

**9**  This statement was followed more recently in *Chaster (Guardian ad Litem of) v. LeBlanc*, [*2007 BCSC 1250*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X424-00000-00&context=), aff'd [*2009 BCCA 315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0CM-00000-00&context=), where Hinkson J. (as he then was) said:

[101] The standard of care to which Mr. LeBlanc will be held is that of a reasonably competent and diligent counsel in Vancouver from 1995 to 1998: see *Startup v. Blake*, *supra*.

[102] Mr. LeBlanc's standard of care is not to be judged with the benefit of hindsight, but is to be judged in light of the knowledge he possessed, or reasonably ought to have possessed, at the time of the ***negligence*** alleged against him. He is not to be found negligent for errors of judgment so long as they were not made negligently: see *LaFleur v. Murphy*, [*2002 BCSC 986*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-24TV-00000-00&context=).

**10**  The plaintiff relies on *Central Trust Co. v. Rafuse*, [*[1986] 2 S.C.R. 147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23BN-00000-00&context=), which addresses what could be interpreted as a higher standard of care when a law firm holds itself out as a specialist, which he claims is the case here because the defendant law firm is a specialist in personal injury law. I agree with that portion of the plaintiff's written argument setting out the standards for a specialist, that are described and cited in *Rafuse*. I therefore find that the following passages from *Rafuse* apply:

1. A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. See *Hett v. Pun Pong* [*(1890), 18 S.C.R. 290*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3N1-FCYK-23NX-00000-00&context=), at p. 292. The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor. See Mahoney, "Lawyers -- ***Negligence*** -- Standard of Care" (1985), 63 *Can. Bar Rev.* 221. Hallett J., in referring to the standard of care as that of the "ordinary reasonably competent" solicitor, stressed the distinction between the standard of care required of the reasonably competent general practitioner and that which may be expected of the specialist. It was on the basis of this distinction that he disregarded the evidence of one of the expert witnesses concerning the practice in real estate transactions involving corporations.
2. The requirement of professional competence that was particularly involved in this case was reasonable knowledge of the applicable or relevant law. A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his "working knowledge", without the need of further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points. The duty in respect of knowledge is stated in 7 Am Jur 2d, Attorneys at Law para. 200, in a passage that was quoted by Jones J.A. in the Appeal Division, as follows: "An attorney is expected to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." See Charlesworth and Percy on ***Negligence*** (7th ed. 1983), pp. 577-78 to similar effect, where it is said: "Although a solicitor is not bound to know the contents of every statute of the realm, there are some statutes, about which it is his duty to know. The test for deciding what he ought to know is to apply the standard of knowledge of a reasonably competent solicitor." The duty or requirement of professional competence in respect of knowledge is put by Jackson and Powell, Professional ***Negligence*** (1982), at pp. 145-46 as follows: "Although a solicitor is not bound to know all the law,' he ought generally to know where and how to find out the law in so far as it affects matters within his field of practice. However, before the solicitor is held liable for failing to look a point up, circumstances must be shown which would have alerted the reasonably prudent solicitor to the point which ought to be researched", citing Bannerman Brydone Folster & Co. v. Murray, [1972] N.Z.L.R. 411. In that case, where a solicitor undertook on very short notice to prepare the necessary document to give effect to an oral agreement providing that a mortgagee would have an option to purchase, the New Zealand Court of Appeal held that it was not ***negligence*** to have failed to perceive that making the option to purchase a condition of the mortgage rendered it void or unenforceable as a clog on the equity of redemption. The point was referred to as a rather old and obscure principle which had not been the subject of judicial commentary for many years and was mainly a subject of academic interest. It is clear, however, that the determining considerations in the Court's conclusion were the time available to the solicitor and the fact that the client was already committed to the transaction in the form that proved defective. See Turner J. at p. 427. The decision is nevertheless instructive concerning the duty of a solicitor to perceive problems and to warn the client of them. For a statement of the solicitor's duty "to identify problems and to bring their effect to the attention of the client", with reference to cases in which this duty has been applied, see Dugdale and Stanton, Professional ***Negligence*** (1982), p. 203.

**11**  At paragraph 61 of his written submission the plaintiff summarizes his position:

In the present case, the plaintiff's lawyers knew where and how to find the relevant law. Their ***negligence*** lies in their failure to have taken the necessary care in order to understand the law, as it was set out in the RSCM policies, and interpreted in the WCAT jurisprudence.

**12**  Each side proffered an expert witness report. Each expert was accepted as qualified to provide expert opinion evidence. F. Andrew Schroeder was retained by the plaintiff, and appeared and was cross-examined by the defendant. Robert C. Brun was retained by the defendant and provided a written opinion but was not required for cross-examination. There was only one significant difference in the opinions provided.

**13**  Mr. Schroeder's opinion is set out in paragraphs 9-12 of his report:

1. Section 257 applications occur with some regularity in motor vehicle personal injury litigation.
2. The worker/worker issue can be of critical importance. Section 10 of the *WCA* bars civil suit in a worker/worker accident. From the plaintiff's point of view, restriction to WCB benefits means loss of pain and suffering damages, a cap on wage loss, past and future, and significant restrictions on a proper loss of earnings pension. From the defendant's point of view, if worker/worker defence is established, the defendant (ICBC) escapes liability.
3. It is my opinion that when faced with a s. 257 application in a motor accident case, a reasonably competent barrister, and particularly, a reasonably competent barrister with a specialty in motor vehicle litigation, acting for a plaintiff, would do the following:
4. Review and understand the applicable RSMC policies. For an accident which occurred in 2005, involving a plaintiff who was commuting to work in an employer-owned vehicle, the following policies would be of particular relevance:

**#18.00 Travelling To and From Work**

The general position is that accidents occurring in the course of travel from the worker's home to the normal place of employment are not compensable. But where a worker is employed to travel, accidents occurring in the course of travel are covered. This is so whether the travel is a normal part of the job or is exceptional.

**#18.20 Provision of Transportation by Employer**

An employer may directly or indirectly provide transportation for its employees' journeys to and from work. In situations where this involves providing a specific vehicle such as, for example, a crew bus, in which the journeys are made, compensation coverage is generally extended to injuries occurring while travelling in this employer-owned vehicle. In some situations, the employer may let the worker choose her or his own mode of transportation, but pay for all or part of the costs of this transportation. The employer may also pay the worker a wage for the time spent in travelling. While these factors must be considered, the basic question to be determined is whether or not the claimant is routinely commuting to or from work. The fact that coverage does not extend to include routine commuting could override the fact that the worker is being paid a travel allowance or a wage to cover the commuting. This is distinct from the crew bus situation described above which can be deemed to be an extension of the employer's premises.

**#18.21 Provision of Vehicle by Employer**

...

This rule does not apply when the employer provides the worker with a vehicle for the purpose of work and allows personal use outside of work hours. An injury occurring while travelling in that vehicle to and from work will not be compensable just because the employer provided the vehicle. Nor would such an injury be compensable where the vehicle is the worker's own just because it is taken to work in order to be used in the course of employment.

1. Understand that the RSCM policies are binding on WCAT Vice-Chairs.
2. Research the WCAT jurisprudence on these and other applicable policies, especially where the meaning of the policy is unclear, or may appear to be ambiguous. The WCAT web site provides access to a searchable database of the WCAT decisions on s. 257 cases, as well as others.
3. Appreciate that in a case involving one or more workers travelling to work in an employer-owned vehicle, the issue of "personal use" in Policy #18.21 would be highly important to the outcome.
4. Make all reasonable efforts to find and present evidence that personal use of the employer vehicle was permitted.
5. Appreciate and understand the concept of the "deemed extension of the employer's premises" in Policy #18.20
6. It is my view that these are the steps that a barrister in the position of those at the defendant firm, acting with reasonable care, skill and knowledge, would take in the circumstances of this case.

**14**  Both parties agree that the aforementioned policies of the WCAT are relevant. However, the plaintiff says that only those policies are relevant, while the defendant says that several others are equally relevant because they demonstrate possible other factors warranting consideration and demonstrating that alternative approaches were plausible and reasonable in the circumstances.

**15**  In cross-examination, Mr. Schroeder confirmed that previous WCAT decisions discussing the relevant policies demonstrate the existence of ambiguities, nuance and alternative approaches available to counsel, including in relation to the concepts of personal use in #18.21.

**16**  Mr. Brun, in his opinion, addressed all of Mr. Schroeder's points relating to what a reasonably competent barrister would review and understand when faced with a s. 257 application. To develop his opinion, Mr. Brun reviewed the Vice Chair's decision and associated reasons, the evidence available to counsel and the lengthy and thorough submissions of Slater Vecchio before the Vice Chair. Based on these "facts" Mr. Brun then provided this opinion:

1. In his opinion of February 23rd, 2015, Mr. Andrew Schroeder correctly states at paragraph 11(i), the standard of care requires that a reasonably competent barrister, when faced with a Section 257 application would review and understand the applicable Rehabilitation Services Claims Manual "RSMC" policies.
2. Mr. Schroeder states that policies #18.00, #18.20 and #18.21 would be of particular relevance in the present case. I agree with this statement and I would observe that these three policies are all referred to in the submissions prepared by the lawyers acting on behalf of Mr. Kitsul.
3. Mr. Schroeder asserts that a reasonably competent barrister would appreciate the RSCM policies are binding on WCAT Vice-Chairs, which generally is correct however, it is also true that they enjoy a large discretion as to their particular application to the facts in each case. Further the *Act* specifically provides that Vice-Chairs are not bound by previous decisions (Section 250(1)).
4. Mr. Schroeder says a reasonably competent barrister would research WCAT jurisprudence especially where the meaning of the policy is unclear or ambiguous. The Section 257 submissions prepared by the lawyers refer to a number of reported WCAT decisions, so this seems not to be an issue in the present case.
5. Lastly, Mr. Schroeder asserts that the reasonably competent lawyer would understand that the issue of "personal use" *would* be highly important as regards the application of policies #18.21 and 18.20. This may or may not be so. Looking at the facts set out above in paragraphs 12 and 13, the personal use exception is but one of many issues that a barrister would have to consider in the proper presentation of the case. The application of the personal use exception to the "crew bus" policy requires a factual analysis of the terms and conditions of a workers' permitted use and a consideration of the type of vehicle. The provision of a standard "company car" to a travelling worker engages a different analysis under #18.21 than does the supply of a flat bed work truck such as the one involved in this incident. The application of these policies does not benefit from a "one size fits all" analysis. Whether the evidence supports an argument that the "personal use" exception applies is a matter properly to be determined by counsel after consideration of the facts, RSMC policies and applicable jurisprudence.

**17**  I considered and reconsidered the written opinions, oral submissions and written submissions before coming to my conclusion. The plaintiff's written submissions, at paragraphs 34 to 36, were certainly clear, and even boldly stated:

1. The conclusion expressed at paragraph 70 is incorrect. No counsel who had taken the care to read and understand the policy scheme would ever have made such a submission. The conclusion in paragraph 70 does not follow from the premise set out in paragraphs 68 and 69, and it reflects a complete failure of the part of the lawyers to have taken the requisite care to understand the policy. The plain meaning of policy #18.21 is that commuting to work in a company vehicle may or may not attract WCB coverage, depending on whether or not personal use of the vehicle is also permitted. That is, if the company vehicle is for the dedicated purposes of work, and travel to and from the workplace, it will be deemed to be an extension of the employer's premises, and coverage will be triggered. On the other hand, if personal use is permitted, the general principle in #18.00, that commuting does not attract coverage, will apply.
2. The fatal error on the part of the plaintiff's lawyers was their failure to recognize that RSCM item #18.20, and related provisions, would be applied by the WCAT Vice-Chair. The lawyers apparently took the term "crew bus" literally, and concluded that since the flat-deck truck was not a crew bus, that the policy was inapplicable.
3. This error in the part of the lawyers reflects a complete lack of care and attention, and amounts to a marked departure from the standard of care expected of lawyers in their position.

**18**  Plaintiff's counsel went so far as to state at trial that competent plaintiff's counsel would concede that the flatbed truck, in the circumstances, was a "crew bus", and then argue that the limited personal use allowed by the employer would exempt the worker from coverage, pursuant to the only reasonable interpretation of Policy #18.21. In other words, the plaintiff's position in this trial is that "any" personal use of an employer-supplied vehicle for commuting to and from work is sufficient to deny coverage under the *WCA*.

**19**  Before cross-examination this position seemed to accord with Mr. Schroeder's written opinion.

**20**  This position does not accord with certain WCAT decisions referred to by defendant's counsel in which certain limited personal use, in addition to commuting to and from work, has been found, in the circumstances of those cases, to be insufficient to surpass the threshold required to deny *WCA* coverage under Policy #18.21.

**21**  However, I am satisfied that Mr. Brun's approach is much to be preferred in light of the evidence available and counsel's review of the relevant policies and WCAT jurisprudence. There is no basis for the court to say that there was only one sure way to be successful for the plaintiff. Even at the outset of all these proceedings the WCB concluded that the accident did not occur in the course of employment because the plaintiff was commuting to work at the time. Since this outcome was one reached by the WCB on the evidence before it, I cannot agree with the plaintiff now that no counsel would ever have made such a submission. I am satisfied that a reasonable and competent lawyer might very well have argued that the plaintiff was commuting to work at the time and was therefore not in the course of employment. I am also satisfied that on taking this approach, a reasonable and competent lawyer might have approached the personal use exemption to the "crew bus" policy in the same way done by Slater Vecchio, given the facts of the case and the circumstances surrounding the use of the vehicle, the fact that the plaintiff was the one driving and based on WCAT jurisprudence, which highlights nuances and ambiguities in the classification of vehicles as a "crew bus" for the purposes of the relevant policies.

**22**  I find the position of the plaintiff that there was only one interpretation of the policies at issue, which a reasonable and competent lawyer could take, to be inconsistent with at least the few WCAT decisions to which I was referred by the defendant. Further, I find unfounded, the plaintiff's counsel's assertions that the defendant's counsel's submissions to the WCAT demonstrate ignorance of the WCAT policies at issue and the associated jurisprudence.

**23**  The thorough written submissions to the WCAT submitted on behalf of the plaintiff by the defendant law firm demonstrated knowledge of the policies and the ability to research the relevant jurisprudence. Whether the position was a mistake, even an obvious one, can only be suggested in hindsight. A mistake or error in judgment does not amount to ***negligence***.

**24**  It is unnecessary to consider the issue of causation as raised in this case.

**25**  Costs may be spoken to.

M.M. KOENIGSBERG J.

**End of Document**

[***Logan v. Canada Safeway Ltd., [2006] B.C.J. No. 3028***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2XK-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Satanove J.

Heard: October 30 - 31, and November 1 - 3 and 6 -

7, 2006.

Judgment: November 23, 2006.

Vancouver Registry No. S041593

**[2006] B.C.J. No. 3028** | [*2006 BCSC 1733*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1M3-00000-00&context=) | [*153 A.C.W.S. (3d) 745*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1M3-00000-00&context=)

Between Jody Ann Logan (aka Jody Ann Yariwon), Plaintiff, and Canada Safeway Limited and Jane Doe, Defendants

(52 paras.)

**Case Summary**

**Tort law — *Negligence* — Standard of care — Action in *negligence* against defendant grocery store dismissed — Plaintiff alleged defendant's employees over packed plaintiff's grocery bag, causing it to break and injuring plaintiff's foot — Plaintiff had not established that items alleged were packed in the same bag and that the bag broke due to any *negligence* on the part of defendant or its employees.**

|  |
| --- |
| Action in ***negligence*** against defendant grocery store -- Plaintiff alleged one of the plastic bags filled with groceries she had purchased broke, thereby letting the groceries fall out and injure her right foot -- Plaintiff alleged defendant failed to train staff properly to pack groceries, was negligent in not using double bags for heavier items and that the bag was over packed -- HELD: Action dismissed -- Cashiers that packed plaintiff's groceries were sufficiently trained -- Plaintiff had not established that items alleged were packed in the same bag and that the bag broke due to any ***negligence*** on the part of defendant or its employees -- Court accepted evidence of cashier as to how plaintiff's bags were packed -- Reasonable inference to be drawn from the grocery receipt was that the milk, which spilled out of the broken bag, was not packed with the pop as alleged by plaintiff. |

**Counsel**

Counsel for the Plaintiff: Kathleen M.M. Baldwin

Counsel for the Defendant, Canada Safeway Limited: Ivar Lee

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| **SATANOVE J.** |

**1**   The plaintiff alleged that on May 11, 2003, she was transferring from a Safeway shopping cart to her minivan some plastic bags of groceries that she had just purchased at the Tsawwassen Safeway store when one of the plastic bags broke and the groceries fell out, causing injury to her. She alleged that the groceries fell on her right foot, and in reaction she moved and twisted her left ankle. She grabbed at the side of the cart to keep herself from falling and hit her left palm and wrist against it.

**2**  The plaintiff claimed that Safeway was liable in ***negligence*** for the following reasons:

1. Hiring inexperienced employees to pack groceries;
2. Failing to properly train employees with respect to the packing of plastic grocery bags;
3. Failing to supervise employees adequately with respect to the packing of plastic grocery bags;
4. Failing to establish, or alternatively, to follow a proper system and/or guidelines to be followed by all employees with regards to packing plastic grocery bags;
5. In not using double bags for heavier grocery items packed in the plaintiff's Safeway shopping bags;
6. In not providing assistance to help the plaintiff transport the bags of bought groceries from the Safeway shopping cart to her motor vehicle when they knew or ought to have known that the Safeway bag was improperly or inappropriately packed; and
7. In putting to many grocery items in the Safeway bag when they knew or ought to have known such would result in danger or injury to the plaintiff.

**3**  The plaintiff also sued the plastic bag manufacturer, Advance Polybag Inc., but settled that claim before trial for $15,000 and expressly waived the right to recover from Safeway any portion of the plaintiff's loss attributable to the fault, tort, ***negligence***, or breach of contract of Advance Polybag Inc.

**4**  To complicate matters, the plaintiff also suffered injuries in a subsequent motor vehicle accident that took place on April 5, 2004. The plaintiff admitted that the injuries from the motor vehicle accident are a contributing factor to her non-pecuniary damages and loss of capacity to earn income.

**5**  The defendant conceded that the plaintiff experienced some sort of accident in the Safeway parking lot which resulted in groceries from a broken plastic bag falling on her foot and causing her injuries. However, the defendant denied any ***negligence*** on its part. The defendant further denied that the severity of the plaintiff's injuries and extent of her losses were attributable to the Safeway accident. The defendant relied on evidence of pre-existing and subsequent injuries that contributed to the plaintiff's condition and losses.

**LIABILITY**

**6**  The key issue on liability is whether the Safeway employee over packed the grocery bag that broke.

**7**  The other particulars of ***negligence*** were clearly not made out on the evidence. Ms. Ross and Ms. Ellis, who were the cashiers involved in packing the plaintiff's groceries, were sufficiently experienced cashiers. Mr. Thompson, store manager, gave evidence with respect to the training, system and guidelines for employees on how to pack plastic grocery bags properly. Before a cashier is allowed to start work on the floor, he or she receives twenty hours of computer and video training that includes techniques for bagging groceries. The trainees are instructed that an over filled bag is uncomfortable for a customer to carry and a potential hazard, not because it will break necessarily, but because a customer might injure him or herself lifting a bag that is too heavy. Although the bags have the capacity to hold sixteen pounds of groceries, trainees are taught to put no more than eight to ten pounds of groceries in a bag. Special consideration applies in the case of elderly customers.

**8**  Mr. Thompson had no recollection of the actual training provided to Ms. Ross and Ms. Ellis, but it is Safeway's policy to place employees on a three month probation period before being hired permanently. Both Ms. Ross and Ms. Ellis passed their probationary period and there was no record of any complaint against either of them.

**9**  Ms. Ross was no longer working at Safeway and did not testify. Ms. Ellis testified about the computer simulation, video and hands on training that she received when she started working at Safeway. She could not recall the specifics of what she was taught about bagging groceries, but over time and with experience she became familiar with how much should go into a single bag. By May 2003 she had been working eighteen or nineteen months at Safeway and had bagged thousands of bags of groceries. She had never received a complaint about how she packed her bags; in fact she received compliments for putting appropriate things on top, not squashing the groceries or breaking eggs. She took pride in her work.

**10**  The plaintiff alleged as a particular of ***negligence*** that the defendant had not provided assistance to help the plaintiff transport her bags to the car. Given the evidence of Ms. Ellis this was a most unfair accusation. She distinctly recalled how she offered car service to the plaintiff several times that evening. It was Mother's Day, the store was not busy, and Ms. Ellis thought it would be a treat for the plaintiff to receive the service. When the plaintiff refused, Ms. Ellis made a "pouty face" after which she felt slightly silly because she had never done that before.

**11**  The plaintiff did not deny that she was offered car service. She said she did not remember anyone asking if she wanted assistance taking her groceries out to the car, but she always declined because she could do it on her own.

**12**  The last two particulars of ***negligence*** pleaded by the plaintiff concerned the failure to use double bags and putting too many grocery items in the bag that broke, when the Safeway employee knew or ought to have known that such would result in danger or injury to the plaintiff.

**13**  The plaintiff testified that two 2-litre bottles of pop, a 2-litre carton of milk, and a three pound tub of margarine all fell out of the single broken bag. There was no direct evidence of the weight of these items, but the parties were operating under the premise that these items weighed about eighteen to twenty pounds in total. Both Ms. Ellis and Mr. Thompson readily admitted that if all these items were placed in a single bag, it would be a hazard in the sense of being heavy and inconvenient. Ms. Ellis said she would not have wanted to carry such a heavy bag herself.

**14**  Ms. Ellis did not try to justify packing all four items in one bag, because she was adamant that she had not done so. She placed the two bottles of pop in a single bag by themselves. The margarine and milk were probably placed together because they were refrigerator items, but not in the bag with the pop. She was very certain about this. Not only was her practice never to put more than two 2-litre bottles of pop in one bag, but that evening she recalled how she bagged the items and she made a written statement to this effect on the same evening about forty-five minutes after the plaintiff had reported her accident to the Assistant Manager of the store.

**15**  Ms. Ellis testified that it was not busy on the evening of May 11 so she decided to close her checkout and help Ms. Ross to bag. She often did this if she was not busy. She remembered assisting Ms. Ross with the plaintiff's order. Just before coming over to Ms. Ross' station she announced that she was coming over to help and she did. She calculated the two bottles of pop to weigh between eight or nine pounds and would not bag anything heavier than that, regardless of the strength of the customer. If it were an older customer, she would put only one bottle in the bag. That evening the plaintiff never asked her to double bag anything. It is not her practice to double bag two 2-litre bottles of pop, but she does not place anything else with them.

**16**  On cross-examination she admitted that she could not remember exactly at what point she came over to Ms. Ross' checkout and that Ms. Ross could have been as much as halfway through the order. She did not agree that Ms. Ross packed the first four bags, but conceded that it was possible. However, regardless of what Ms. Ross had packed or not packed before Ms. Ellis came over, Ms. Ellis insisted that she packed the bottles of pop and that they were packed in a bag with nothing else in it.

**17**  The plaintiff testified that she chose Ms. Ross' checkout because it was the shortest line and had an empty conveyor belt. She emptied the groceries from her cart. She pushed the cart up directly in front of the scanner. Ms. Ross started to bag things, then towards the end of the order someone else came along to help.

**18**  The plaintiff said she pushed her cart down to the end of the stand so the second person could put the rest of the bag into the cart. Ms. Ross had already filled the back of the cart and the second cashier was putting bags in front. She paid for the groceries, left the store and went to the van.

**19**  She started to load the van. When she came to the last bag she put her right hand through the handle, lifted it up and over the cart and turned towards the van. After she took what she believed was one step, a hole tore in the side of the bag and the contents started to spill out.

**20**  She had grasped with her right hand both handles of the bag and had a firm grip as she was lifting it up. There was nothing unusual about the bag or how she lifted it. Whatever came through the side of the bag, she was still holding the bag but only one handle was attached. One handle had broken and the contents landed on her foot and rolled. The milk carton landed on the ground and opened and splashed milk all over. The margarine container slipped down the side. There were two bottles of pop; one had rolled off to the left and one rolled underneath the van.

**21**  She picked up the items that had fallen to the ground and put them in her shopping cart along with the broken bag. She went back into the store and a customer service representative replaced the items. Apparently the broken bag and damaged groceries were thrown out.

**22**  On cross-examination, the plaintiff denied that she had not been paying attention to how the two employees were bagging the groceries. On her examination for discovery she agreed she had not been looking at all and had not been paying attention when the employees were bagging her purchases. Then at trial she admitted that she was not paying attention to the actual bagging and could not say what items went into each bag, but it was her belief that Ms. Ross packed the bag that broke because it was in the same place when the cart was pushed along to Ms. Ellis. She admitted that Ms. Ross could have left some items out for Ms. Ellis to pack later.

**23**  She said she did not remember noticing anything unusual about the weight of the bag when she lifted it. She used only one hand to lift. At trial she said she could not recall the order of how the groceries landed, they all came out together. On examination for discovery she said the margarine landed first. She told Dr. Adams in September 2003 that groceries fell from the bag and a container of milk exploded after landing on the ground. She did not mention any margarine to him.

**24**  In addition to the above inconsistencies in her evidence on liability, the plaintiff was also inconsistent in some of her evidence regarding her injuries.

**25**  At trial she said she had difficulty packing to move because of her injuries from the car accident but also that her wrist would have hindered her. She would have had to receive help because she had a cast on her hand. At discovery she said that any difficulties she encountered with moving were strictly as a result of injuries from the car accident.

**26**  She said her limitations from the Safeway injury did not resolve before her car accident. But she told Dr. Anderson in 2005 that she had no physical limitations regarding the running of the day care.

**27**  She told Dr. Anderson that she had bruising on her ankle on the medial side, but experienced pain on the lateral side. On discovery she said she had bruising on both the medial and lateral side.

**28**  In Dr. Marais' report of November 9, 2004 he said he was told by the plaintiff that her left ankle had possibly worsened by pushing hard on the brake in the car accident. In her examination for discovery, the plaintiff denied saying that. At trial she said she did say this to Dr. Marais, she had been mistaken on discovery.

**29**  I find Ms. Ellis' version of how the groceries were packed on the night in question to be more probable than the plaintiff's. Firstly, Ms. Ellis was a more reliable witness than the plaintiff. She was a very genuine and straightforward witness who was candid about what she recalled and what she did not recall. Her evidence was consistent and did not smack of reconstruction, unlike the plaintiff's evidence.

**30**  Secondly, Ms. Ellis' evidence made more sense from a logical perspective. Why would a conscientious, trained employee like Ms. Ellis need to pack eighteen to twenty pounds of groceries in one bag, contrary to her standard practice, contrary to Safeway's policy, and contrary to what was comfortable for her to lift? It was not busy that evening, she was not under pressure, she was aware it was Mother's Day and had wanted to "treat" the plaintiff. Ms. Ellis herself had to lift the bag of groceries off the conveyor belt into the grocery cart, which she admitted she would not like to do if it had weighed so much.

**31**  The plaintiff relied on the order in which the grocery items appeared on the receipt to support her theory that Ms. Ross had been the one who over packed the bags. The receipt showed that the tub of margarine was scanned as the first item, followed by the two bottles of pop. However, the milk did not appear until after eggs, white bread, kaiser buns and raspberry cocktail were scanned. There was no evidence about these items and in which bag they were packed. The reasonable inference to be drawn from the grocery receipt is that the milk, which I accept spilled out of the broken bag, was not packed with the pop.

**32**  In conclusion I find that the plaintiff has not established that the items alleged were packed in the same bag. Further, the plaintiff has not established that the bag broke due to any ***negligence*** on the part of Safeway or its employees. For this reason, the plaintiff's claim against Safeway fails and must be dismissed.

**33**  As is our practice in personal injury cases where liability has not been made out, I will give my opinion of the plaintiff's damages, had she been successful in establishing ***negligence*** by the defendant.

**QUANTUM**

**Injuries**

|  |  |  |
| --- | --- | --- |
| **a.** | **Left Ankle** |  |

**34**  As stated above, the plaintiff was not clear on the exact part of her left ankle or foot which was bruised, swollen and painful after the Safeway incident. However, the medical records indicate that she was diagnosed by her family doctor shortly after as having a sprained ankle. She was referred to Dr. Van Dyke, an orthopaedic surgeon, who shortly after left the country without treating the plaintiff. Her pain continued and after bouncing between Vancouver and Victoria doctors, she finally underwent a private MRI scan. The MRI showed a tear to her peroneus brevis tendon (PBT) and Dr. Anderson removed it surgically on December 15, 2005.

**35**  Dr. Anderson testified that the plaintiff's PBT was probably torn before the Safeway incident, but not enough to make it symptomatic. The kind of ankle twisting described by the plaintiff was consistent with further injury to the PBT, creating scar tissue that prevented it from moving and sliding as it should. In his opinion, if the plaintiff continued to stretch out the scar tissue and walk through the pain, she should recover and any remaining problems should be minimal. She may need cortisone injections to help settle things down.

**36**  There was no reliable medical evidence to indicate that the plaintiff's ankle was further injured in the subsequent motor vehicle accident and I do not find the motor vehicle accident to be a materially contributing factor to the plaintiff's ankle injury.

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| **b.** | **Left Wrist** |  |

**37**  I do not find the motor vehicle accident, or the accident in 1998, to have contributed to the plaintiff's left wrist injury either. After the Safeway incident the plaintiff developed carpal tunnel syndrome and was operated on by Dr. Brady, orthopaedic surgeon, on May 20, 2004. She has fully recovered now, but still experiences discomfort from overuse of her left hand.

**38**  Both Dr. Brady and Dr. Gropper, an orthopaedic specialist in hands, explained that carpal tunnel syndrome is multi-factoral and can be a result of inflammation, degeneration, hereditary tightness, overuse and trauma. Dr. Gropper's opinion was that injury to the wrist was not a direct cause, but a contributing cause to the carpal tunnel syndrome. In Dr. Gropper's opinion, which I accept, the Safeway incident likely accelerated the plaintiff's condition by twenty to twenty-five percent.

**Non-Pecuniary Damages**

**39**  The plaintiff claims fifty to sixty thousand dollars for pain and suffering arising out of her injuries from the Safeway incident. The defendant submits that her damages are in the range of twenty-five thousand dollars due to the plaintiff's pre-existing condition with respect to both injuries.

**40**  In my view, the injury to the plaintiff's ankle is an example of the thin skull doctrine. Notwithstanding the ankle's pre-existing condition, it was asymptomatic and there was no evidence that it would have become symptomatic in the future, but for the Safeway incident.

**41**  On the other hand, the plaintiff's wrist injury was an example of the crumbling skull doctrine. There was a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the Safeway incident. (***Athey v. Leonati***, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at para. 35).

**42**  Therefore, I would not reduce the plaintiff's award for the pre-existing condition of her ankle, but I would reduce it for the pre-existing condition of her wrist. I would also discount some of the plaintiff's pain and suffering as being caused by her back injury from the motor vehicle accident and not from her ankle or wrist injuries.

**43**  In addition to the surgery to her wrist and ankle, the plaintiff suffered a decrease in her enjoyment of recreational activities such as dancing, walking, and kids sporting events. She continues to have difficulty walking on uneven surfaces or standing on her feet for lengthy periods of time. Her wrist still aches from over use.

**44**  Taking into account all of the above factors, I would have awarded the plaintiff $40,000.00 for non-pecuniary damages if I had found the defendant liable for her injuries.

**Loss of Capacity to Earn Income**

**45**  It was obvious from the evidence of Ms. Jody Fischer, occupational therapist, that the majority of plaintiff's occupational limitations were related to injuries from the car accident, not the Safeway incident. However, Ms. Fischer did find that the plaintiff was limited in the extensive repetitive use of her left hand and limited in the amount of standing or walking she could do without pain.

**46**  The plaintiff had a grade 11 education and no specific vocational training. She submitted that she was no longer able to do jobs such as waitressing or jobs that required extensive typing.

**47**  The defendant said that the plaintiff had failed to prove a loss of earning capacity due to injuries from the Safeway incident. After the incident she was able to continue operating her day care and only ceased operating it because of the car accident injuries. She worked as a motel operator notwithstanding her wrist and ankle complaints, but had to leave this employment because of chronic low back pain.

**48**  Although there seems to be a fair range of employment opportunities that would have still been open to the plaintiff but for her injuries in the car accident, I find there has been some reduction in the plaintiff's ability to earn income from all types of employment as a result of her wrist and ankle injuries. As stated before, there must be some discounting due to the likelihood of her experiencing carpal tunnel syndrome in the future regardless of the Safeway incident. If I had found the defendant liable, I would have allowed the plaintiff $15,000.00 for loss of capacity to earn income in the future and I would have allowed her past income loss of $3,000.00 during the time she was recovering from her surgery.

**Special Damages**

**49**  Counsel have agreed that the plaintiff incurred special damages in the amount of $878.00 and if I had found the defendant liable I would have awarded this amount.

**Deduction of the Settlement Amount from Advance Polybag Inc.**

**50**  If I had found the defendant liable, I would have deducted the settlement of $15,000.00 paid to the plaintiff by Advance Polybag Inc. from any damages that I awarded. The payment was directly related to the plaintiff's claim against both defendants. She was claiming for damages suffered by their joint torts. She could not recover more than the quantum fixed by the court at the end of trial. (***Dixon v. British Columbia*** [*(1979), 12 B.C.L.R. 110*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JT99-216D-00000-00&context=) (S.C.) at 123 affirmed on appeal [*(1980), 24 B.C.L.R. 382*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1BM-00000-00&context=) (C.A.) and ***Tucker v. Asleson*** [*(1993), 78 B.C.L.R. (2d) 173*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M387-00000-00&context=) at para. 116 (C.A.)).

**CONCLUSION**

**51**  I have found that the defendants were not liable for the plaintiff's injuries which she suffered in the Safeway incident. If I had found them liable I would have awarded the plaintiff the following amounts:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 1. |  | Non-pecuniary damages. | $40,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 2. |  | Past income loss. | $3,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 3. |  | Loss of capacity to earn income in the future. | $15,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 4. |  | Special damages. | $878.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 5. |  | Less deduction for settlement monies. | -$15,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL: | $43,878.00 |  |

**52**  As I have dismissed the plaintiff's claim, the defendant is entitled to party and party costs and disbursements.

SATANOVE J.

**End of Document**

[***Matyash v. Aulakh, [2014] B.C.J. No. 2185***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G06K-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C.E. Hinkson C.J.S.C.

Heard: July 14-21, 2014.

Judgment: August 25, 2014.

Dockets: M075581, M075582, M075619

Registry: Vancouver

**[2014] B.C.J. No. 2185** | 2014 BCSC 1607 | 244 A.C.W.S. (3d) 747 | 39 C.C.L.I. (5th) 93 | 2014 CarswellBC 2525

Between Tatyana Matyash, Plaintiff, and Bhura Singh Aulakh, Personal Representative of Gurtej Singh Aulakh (Deceased), Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Transportation and Highways and City of Surrey, Defendants And between Oleg Matyash, Plaintiff, and Bhura Singh Aulakh, Personal Representative of Gurtej Singh Aulakh (Deceased), Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Transportation and Highways and City of Surrey, Defendants And between Pawandeep Singh Aulakh and Sukhsej Singh Aulakh, Infants by their Litigation Guardian, Nachhattar Kaur Aulakh, Plaintiffs, and Insurance Corporation of British Columbia, City of Surrey, Greater Vancouver Transportation Authority, doing business as Translink, Her Majesty the Queen in Right of the Province of British Columbia, by her Representative, the Ministry of Transportation, Tatyana Matyash, John Doe #1, John Doe #2, Defendants

(67 paras.)

**Case Summary**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Evidence and proof — Determination of liability for motor vehicle accident — Driver of Aulakh vehicle was liable — Semi-truck came into contact with Aulakh vehicle as both travelled in different northbound lanes, causing driver of latter to lose control, with result that it crossed median into oncoming southbound lane into path of Matyash vehicle — Since there was no evidence as to whether contact between semi-truck and Aulakh vehicle occurred in lane in which latter was travelling, prima facie cases of *negligence* by driver of Aulakh vehicle established by Matyash plaintiffs were not negated.**

**Counsel**

Counsel for Plaintiffs, T. Matyash and O. Matyash (M075581, M075582): M.D. Fahey.

Counsel for Defendants, B. and G. Aulakh, and British Columbia (M075581 and M075582): L. Bell.

Counsel for Plaintiffs, P. and S. Aulakh (M075619): R.K. Dewar and K. Morris.

Counsel for Defendant, Insurance Corporation of British Columbia (M075619): R.K. Hartshorne and R. Langille.

Counsel for Defendant, Surrey (City) (M075619): P.C.M. Huynh.

**Reasons for Judgment**

|  |
| --- |
| **C.E. HINKSON C.J.S.C.** |

**1**   On January 2, 2006, a motor vehicle accident occurred between two vehicles at what I will call the south end of the Pattullo Bridge in Surrey, British Columbia. One of the vehicles was a silver 1997 Chevrolet Cavalier driven by Gurtej Aulakh (the "Aulakh Vehicle"), and the other vehicle was a blue 2000 Pontiac Grand Am driven by Tatyana Matyash (the "Matyash Vehicle").

**2**  Three of the four occupants of the Aulakh Vehicle died at the scene of the accident, and the fourth died shortly thereafter. Tatyana and Oleg Matyash assert that they were injured in the motor vehicle accident. No evidence was given as to whether the two of their children who were in the back seat of the Matyash Vehicle were injured in the accident.

**3**  Three actions were commenced as a result of the motor vehicle accident: the first in which Tatyana Matyash is the plaintiff; the second in which her husband Oleg, a passenger in the Matyash Vehicle, is the plaintiff; and the third, in which Pawandeep Singh Aulakh and Sukhsej Singh Aulakh (collectively, the "Aulakh Plaintiffs"), whose parents and paternal grandparents were the occupants of the Aulakh Vehicle, are plaintiffs. Both of the Aulakh Plaintiffs are infants, and as such the third action was commenced by their litigation guardian, Nachhattar Kaur Aulakh.

**4**  The claims brought by the various plaintiffs against Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Transportation and Infrastructure, the City of Surrey, the Greater Vancouver Transportation Authority doing business as Translink, John Doe #1, and John Doe #2 were not proceeded with, nor was the Aulakh Plaintiffs' claim against Tatyana Matyash.

**5**  The three actions were heard at the same time pursuant to the order of a Master dated October 12, 2012. The sole issue to be determined is liability for the motor vehicle accident. Despite the Master's order, as I will explain below, certain expert evidence was admitted only in the action brought by the Aulakh Plaintiffs.

**Background**

**6**  The witnesses were inconsistent as to whether the road on the Surrey side of the Pattullo Bridge runs east-west or north-south (the bridge itself runs northwest to southeast). Rather than confusing matters by quoting this aspect of each witness' evidence verbatim, I will adapt their evidence and describe the direction of travel off the Pattullo Bridge into Surrey as southbound and the direction of travel from Surrey onto the Pattullo Bridge as northbound.

**7**  Prior to the collision, the Aulakh Vehicle had been travelling northbound approaching the Pattullo Bridge, and the Matyash Vehicle had been travelling southbound coming off the Pattullo Bridge.

**8**  The collision between the Aulakh Vehicle and the Matyash Vehicle occurred in the leftmost southbound lane for traffic coming off the Pattullo Bridge into Surrey after the Aulakh Vehicle crossed the median and entered that oncoming lane.

**The Positions of the Parties**

**9**  The Aulakh Plaintiffs contend that before the Aulakh Vehicle crossed into the left southbound lane, a large semi-truck and trailer came into contact with the Aulakh Vehicle, causing its driver to lose control and spin into oncoming traffic. They contend that the ***negligence*** of the driver of the semi-truck was the sole cause of the motor vehicle accident.

**10**  Neither Tatyana nor Oleg Matyash have made a claim against ICBC as a nominal defendant for any alleged ***negligence*** on the part of the driver of the semi-truck. They and the Insurance Corporation of British Columbia, as a nominal defendant in the action brought by the Aulakh Plaintiffs, contend that prior to leaving the northbound lanes going onto the Pattullo Bridge, the driver of the Aulakh Vehicle was driving at an excessive speed, and lost control of his vehicle, causing it to cross the roadway into the oncoming left southbound lane. They say that the ***negligence*** of the driver of the Aulakh Vehicle was the sole cause of the motor vehicle accident.

**11**  In the alternative, Tatyana and Oleg Matyash contend that as the Aulakh Vehicle crossed the highway into the path of the Matyash Vehicle, liability for the ensuing collision should be inferred against the driver of the Aulakh Vehicle, unless that inference is negated.

**12**  If they do not succeed on either of their first two contentions, Tatyana and Oleg Matyash contend that liability for the motor vehicle accident should be apportioned equally between the driver of the semi-truck and the driver of the Aulakh Vehicle.

**Issues to be Determined**

**13**  The issues to be determined in order to resolve liability for the motor vehicle accident are:

1. Did a semi-truck come into contact with the Aulakh Vehicle before it left the northbound lanes of traffic heading onto the Pattullo Bridge?
2. Did contact between a semi-truck and the Aulakh Vehicle cause Mr. Gurtej Aulakh to lose control of his vehicle?
3. If a semi-truck contacted the Aulakh Vehicle, where in the northbound lanes of traffic did that contact occur?

**The Witnesses**

**14**  The Aulakh Plaintiffs called 4 witnesses at trial:

1. Brian Robert Devers;
2. Palbinder Singh Brar;
3. Sukhdev Singh Brar; and
4. Dr. Amrit Toor.

**15**  Tatyana and Oleg Matyash both gave evidence in their respective cases.

**16**  The Insurance Corporation of British Columbia called one witness, Mr. David Montague Little.

**The Lay Witnesses**

**17**  Mr. Devers was a professional truck driver for some 30 - 35 years. He was on his way home from watching a hockey game when he witnessed the motor vehicle accident. He explained that the Pattullo Bridge has two northbound and two southbound lanes. He described the lanes as narrow. It was his recollection that the accident occurred at approximately 4:30 p.m. He gave evidence that January 2, 2006 was a Monday, and that the traffic was lighter than usual, as many businesses were closed that day. He described the traffic as light to moderate and the lighting conditions as dusk; not dark, but not light either.

**18**  He stated that it was not raining at the time of the accident, but that the roads were wet.

**19**  Just before the accident, Mr. Devers was proceeding southbound in his 3/4 ton pickup truck in the right hand lane on the Pattullo Bridge at approximately 50 - 55 km/h. He was passed on the bridge by the blue Matyash Vehicle. He gave evidence that he saw contact between a northbound semi-truck and trailer and a northbound car, after which the car began to spin out and crossed the median and entered left southbound lane, where it was struck broadside by the Matyash Vehicle. He did not agree that the northbound car fishtailed on its own, which I take to mean without making contact with the semi-truck.

**20**  Mr. Devers testified that the semi-truck was in the curb lane and the Aulakh Vehicle in the lane to its left before the contact. Mr. Devers said that it looked like the two touched, and that the contact was broadside. He was unable to say which lanes the semi-truck and the Aulakh Vehicle were in when they made contact. In particular, he could not say whether the semi-truck had strayed into the left lane, or if the Aulakh Vehicle had crossed over into the right lane.

**21**  Mr. Devers was unable to estimate the speed of the northbound vehicle or the semi-truck, but did not think that either they or the driver of the Matyash Vehicle were exceeding the speed limit.

**22**  He said that the driver of the Matyash Vehicle had no chance to avoid the collision.

**23**  Mr. Palbinder Singh Brar gave his evidence with the assistance of an interpreter. He was employed at the time of the accident as a stucco worker and was driving home from work in a GMC Suburban. His brother, Sukhdev Singh Brar, and Darsen Singh Sandhu were passengers in that vehicle. The Brar Suburban was proceeding southbound in the curb lane of the Pattullo Bridge. Mr. Palbinder Singh Brar said that he had driven across the Pattullo Bridge many times before the accident and described the lanes of travel on the Bridge as particularly narrow. He said that the Matyash Vehicle was in the lane to the left of his Suburban.

**24**  Mr. Palbinder Singh Brar described the weather conditions at the time as fine. He said that it had been raining, but was not at the time of the accident. He also said that the lighting conditions were "a little bit of light; 15 - 20% light; not completely dark." He explained that there are three northbound lanes approaching the Pattullo Bridge, but testified that the curb and center lanes merge into one lane, leaving two northbound lanes on the Bridge itself.

**25**  Mr. Palbinder Singh Brar said that the traffic wasn't "too much" for either north or southbound vehicles. It was his evidence that a white semi-truck was in the curb lane before the bridge, where there were still three northbound lanes, and there was a brown vehicle in the center lane. While he did not initially describe the movement of the semi-truck, in his later evidence in chief he said that as the semi-truck made a lane change to its left, it swung to the left and its left back side came into contact with the right side of the car, causing the car to spin into the oncoming southbound traffic where it was struck by the Matyash Vehicle. He said that he could not say which lane the car or the semi-truck were in when they came into contact. He gave evidence that the semi-truck did not stop after it contacted the Aulakh Vehicle.

**26**  Mr. Sukhdev Singh Brar, like his brother, gave his evidence through an interpreter. He gave evidence that as the Brar Suburban was travelling down from the crest of the Pattullo Bridge in the curb lane, he saw a white semi-truck coming from the other side of the Bridge and a gold car beside it. He initially described the gold car as occupying the left northbound lane, but later conceded that he was unable to say which lanes the white truck and the gold car were in. Mr. Sukhdev Singh Brar said that the semi-truck was changing lanes to its left and that the car was on the left side of the semi-truck. He was also unable to say what part of the trailer came into contact with which part of the car, but in cross examination said that the truck had to have been ahead of the car.

**27**  He said that the two vehicles hit, and that the car then spun two or three times toward the southbound lanes of travel and was hit by a car in the left southbound lane.

**28**  Mr. Sukhdev Singh Brar gave evidence that it was raining at the time of the collision but that the roads were fine, and were not slippery.

**29**  Mr. Matyash gave evidence that was entirely at odds with that of Mr. Devers and the Brar brothers. It was Mr. Matyash's evidence that he was riding as a passenger in the vehicle driven by his wife, Tatyana, as they proceeded south in the left hand lane of the Pattullo Bridge toward Surrey. He said that it was a little after 4:00 p.m. when the accident occurred. He described the lighting as getting dark and said that the roads were wet.

**30**  It was Mr. Matyash's evidence that as the Matyash vehicle proceeded down and off the Pattullo Bridge, he saw a vehicle coming northbound towards the Bridge, in the center of the three northbound lanes some 200 - 300 metres away. He said that the vehicle was going much faster than the other vehicles travelling in that direction. He conceded that the other traffic was travelling at 50 - 60 km/h, and said that the vehicle he noticed was going three times that fast.

**31**  Mr. Matyash said that the vehicle he noted changed lanes quickly and passed a semi-truck on the right of the truck, and then changed lanes, cutting in front of the semi-truck. He said that the car fishtailed, and then lost control, sliding toward the vehicle in which he was riding, and that ultimately the vehicle he was riding in struck the other car.

**32**  In cross examination, Mr. Matyash was given several opportunities to modify his estimate of the speed of the car that his vehicle hit, but without exception reiterated what he had said on that matter in his evidence in chief.

**33**  While Ms. Matyash testified at trial, she did not see the events that took place before the Aulakh Vehicle suddenly appeared in front of her, in her lane of travel.

**The Expert Witnesses**

**34**  As I alluded to above, expert evidence was admitted only in the action brought by the Aulakh Plaintiffs. This was because notice of the evidence of Dr. Toor was not served on counsel for Tatyana and Oleg Matyash until the week preceding the trial, and an objection to its admissibility in their actions was upheld.

**35**  The evidence of Mr. Little was called in rebuttal to that of Dr. Toor. In the result, I ruled that it was admissible only in the action in which Dr. Toor's evidence was admitted.

**36**  Dr. Toor was qualified as a mechanical engineer with a specialty in accident reconstruction. While he attended the scene of the motor vehicle accident, he took no measurements there. He did examine the Aulakh Vehicle on two occasions. His written report included what I accept was an error in his description of the direction of rotation of the Aulakh Vehicle before and as it entered the left hand southbound lane coming off the Pattullo Bridge.

**37**  Based on what he considered both old and new damage to the area, it was Dr. Toor's opinion that the Aulakh Vehicle likely sustained an impact force on its right rear region.

**38**  Dr. Toor also concluded from the location and parallel nature of the tire marks in the median between the north and southbound lanes that the cause of the loss of control of the Aulakh Vehicle was neither hydroplaning, yaw nor over steering, thus leaving contact between the Aulakh Vehicle and a vehicle to its right as the cause of the loss of control of the Aulakh Vehicle.

**39**  Mr. Little was qualified as a professional engineer and an expert in accident reconstruction. He agreed with Dr. Toor that the Aulakh Vehicle was at an oblique angle when hit by the Matyash Vehicle. He disagreed that the tire marks on the median were parallel, and said that they were thus inconsistent with a lack of rotation by the Aulakh Vehicle at that point.

**40**  In cross examination, he conceded that the police markers that he relied upon in tracing the tire marks were misleading, and that the tire marks were parallel as Dr. Toor had concluded.

**41**  Mr. Little disagreed with Dr. Toor that there was damage to the Aulakh Vehicle that could be attributed to contact with a semi-truck. He reluctantly conceded that there was no water in any of the police photographs (the only evidence available to him on the issue) that could have caused the driver of the Aulakh Vehicle to lose control.

**42**  Given the misconception of the tire marks by Mr. Little, and his reluctance to concede that pooling of water played no role in the cause of the loss of control by the driver of the Aulakh Vehicle, I approach his evidence with caution. I do, however, accept his view that the damage noted by Dr. Toor was not caused by impact between the semi-truck and the Aulakh Vehicle. I have reached this conclusion based primarily on the evidence of the lay witnesses, none of whom described contact between those two vehicles that could have caused such damage.

**Discussion**

**43**  Mr. Devers was a careful and credible witness. Although there were some minor inconsistencies between his statement to the police, taken at the time of the accident, and his evidence at trial, I attribute them to the eight years between the accident and the trial, and do not consider them to detract in any way from Mr. Devers' credibility. Indeed, counsel for the Matyashes conceded that Mr. Devers was a credible witness.

**44**  Mr. Palbinder Singh Brar's statements to the police and to the Insurance Corporation of British Columbia differed in some ways from his evidence at trial. Neither of those statements was obtained with the assistance of an interpreter. In my view, Mr. Palbinder Singh Brar's proficiency in the English language is such that it was pointless to take a statement from him without the assistance of an interpreter. I attribute any inconsistencies between his prior statements and his evidence at trial to the fact that he did not appreciate the English version of statements that he signed, and not to any dishonesty or lack of credibility on the part of this witness.

**45**  Finally, it was suggested to Mr. Palbinder Singh Brar that he could not have seen what he claims to have. He was extensively cross examined. I did not find the cross examination of this witness effective to undermine his credibility, but rather found him to be cooperative and thoughtful, though hindered to a modest amount by the fact that he was giving his evidence through an interpreter.

**46**  In my view, the evidence of Mr. Sukhdev Singh Brar was not successfully challenged in cross examination either, and I accept his evidence as far as it goes.

**47**  I have no hesitation in rejecting the evidence of Mr. Matyash. While his counsel categorized his evidence as hyperbole, I find that Mr. Matyash could not have witnessed what he described. I further find that the evidence of the other lay witnesses accurately described, so far as they were able, what in fact occurred prior to the impact between the Aulakh Vehicle and the Matyash Vehicle.

**48**  While the evidence of Tatyana Matyash did not assist in the resolution of the liability issues in this case, I do accept that she gave a truthful account of her recollections.

**49**  As far as the claim of the Aulakh Plaintiffs is concerned, the evidence of the expert witnesses does not persuade me to come to a different conclusion than I reached on the evidence of the lay witnesses alone.

**50**  On the evidence of the lay witnesses, I find that Tatyana Matyash bears no fault for the motor vehicle accident, as was initially alleged by the Aulakh Plaintiffs.

**51**  Relying on the reasoning in *Fontaine v. British Columbia (Official Administrator)*, [*[1998] 1 S.C.R. 424*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WJ-00000-00&context=), [*46 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WJ-00000-00&context=), and *Nason v. Nunes*, [*2008 BCCA 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2HR-00000-00&context=), [*82 B.C.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2HR-00000-00&context=), Tatyana and Oleg Matyash contend that I am obliged to draw an inference that the driver of the Aulakh Vehicle was negligent, based upon the fact that he crossed into an oncoming lane occupied with traffic.

**52**  I am unable to extract any such obligation from those authorities. In *Fontaine*, Mr. Justice Major, writing for the Court, explained at para. 24 that:

24 Should the trier of fact choose to draw an inference of ***negligence*** from the circumstances, that will be a factor in the plaintiff's favour. Whether that will be sufficient for the plaintiff to succeed will depend on the strength of the inference drawn and any explanation offered by the defendant to negate that inference. If the defendant produces a reasonable explanation that is as consistent with no ***negligence*** as the *res ipsa loquitur* inference is with ***negligence***, this will effectively neutralize the inference of ***negligence*** and the plaintiff's case must fail. Thus, the strength of the explanation that the defendant must provide will vary in accordance with the strength of the inference sought to be drawn by the plaintiff.

**53**  He concluded at para. 35 that:

35 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: see *Gauthier & Co*., supra, at p. 150. The position advanced by the appellant would virtually subject the defendant to strict liability in cases such as the present one.

**54**  In *Nason*, at paras. 4 - 5, Madam Justice Newbury, for the Court, described the approach taken by the trial judge in dismissing a claim where a driver lost control of his vehicle:

[4] Russell J. dealt with the question of the defendant driver's ***negligence*** beginning at para. 51 of her reasons, which are indexed as [*2007 BCSC 266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S453-00000-00&context=). She noted that the plaintiffs were relying on the "presumption" stated in Redlack v. Vekved [*(1996), 82 B.C.A.C. 313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S10D-00000-00&context=) (lve. to app. refused, [*[1996] S.C.C.A. No. 608*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-F8D9-M23S-00000-00&context=)) and Savinkoff v. Seggewiss [*(1996), 25 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1SV-00000-00&context=), [*[1996] 10 W.W.R. 457*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1SV-00000-00&context=) (BCCA), that a driver is negligent if his or her vehicle goes off the road. The plaintiffs also argued that the defendant "should have been aware of the possible ice conditions, and should have driven slowly and with greater caution than he did." However, the trial judge distinguished Savinkoff and other cases which applied it, on the basis that Mr. Nunes had in fact foreseen the risk of slippery conditions on the bridge and had taken reasonable steps to avoid it. (Para. 52.) In particular, she found that:

... the evidence suggests that the defendant took all reasonable precautions to avoid losing traction: he was using all season tires, he had weight over the rear wheels of the pickup, he had slowed his speed coming down the hill, and the plaintiffs themselves had no concerns with the way he was driving. There is no evidence that greater precautions, such as using snow tires or driving even more slowly, would have been advisable when the air temperature in Osoyoos was above freezing. Further, there is no evidence that such further precautions would have prevented the MVA. Therefore, I find that the plaintiffs have not proven that Nunes failed to meet the required standard of care in all of the circumstances.

As to the plaintiffs' suggestion that Nunes was negligent in gearing down instead of braking, which I infer from their reliance on the (inadmissible) expert report suggesting that Nunes ought to have been able to stop his truck on the bridge had he applied the brakes, I note two things. First, as I stated above, there is no evidence that the reasonably prudent driver would consider braking as preferable to gearing down when trying to recover control of a fishtailing truck. Second, the law does not demand a standard of perfection from drivers who must react quickly to a developing situation: see *Couturier (Guardian ad litem of) v. Rud*, [*[1990] B.C.J. No. 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-21M3-00000-00&context=) at para. 22 (C.A.) (QL). Although there is no expert evidence before me, attempting to slow a fishtailing vehicle by gearing down rather than braking, while at the same time steering in the same direction as the skid, seems to be within a range of reasonable reactions to a sudden loss of control of a vehicle. There is certainly no evidence before me that it is an unreasonable thing to do. [At paras. 57-8.]

[5] Having found that Mr. Nunes had taken reasonable care in the operation of his truck, Russell J. noted that the "real force" of the plaintiffs' argument in favour of ***negligence*** lay in the assertion that a presumption of ***negligence*** arises if a motor vehicle leaves the roadway. She agreed with the defendant that this presumption had been dealt with by the Supreme Court of Canada in Fontaine v. British Columbia (Official Administrator), [*[1998] 1 S.C.R. 424*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WJ-00000-00&context=), [*46 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WJ-00000-00&context=), the well-known case involving two hunters who were found dead in their truck, which had gone off a road and come to rest in a river bed. There was evidence that the area had experienced severe storms. The two lower courts denied recovery to the widow of the passenger in the truck on the basis that the defence had provided an explanation as to how the accident could have occurred without ***negligence*** on the driver's part. This result was upheld by the Supreme Court of Canada, but the Court took the opportunity to decide that the "doctrine" of res ipsa loquitur should be treated as "expired" and "no longer used as a separate component in ***negligence*** actions". (Para. 27.)

**55**  While I am not obliged to draw an inference of ***negligence***, I may do so if such an inference is support by an assessment of all the evidence adduced. The proper approach to be taken in such circumstances was discussed by the Court in *Nason* at para. 8 as follows:

[8] As I read these passages, even when *res ipsa loquitur* was alive and well, it applied only where the evidence was circumstantial, and in Canada, it created at most the drawing of an inference at the end of the plaintiff's case that permitted, but did not require, the trier of fact to decide in favour of the plaintiff if no further evidence was adduced. But, since the maxim was seen as "more confusing than helpful" the Court in ***Fontaine*** decided it should no longer be applied as an element of ***negligence*** actions in Canada. (Para. 27.) Instead, the Court provided a simpler formulation of the correct approach that refers only to the end of the trial: the trier of fact should, Major J. said, weigh all the evidence, both direct and circumstantial, to determine whether the plaintiff has established [on a balance of probabilities] a *prima facie* case. If he has, the defendant must "negate" that evidence, failing which the plaintiff will succeed. (This of course is true of the process that the trier of fact in most civil cases must follow.) Applying this to the facts of *Fontaine*, the Court concluded that the trial judge had not erred in finding that the fact the hunters' vehicle had left the roadway, taken together with evidence of the road and weather conditions, constituted only 'neutral' evidence. (Para. 29.) [Emphasis added.]

**56**  In my opinion, based on all the evidence adduced at trial, aside from the expert evidence, the Matyash plaintiffs have established *prima facie* cases of ***negligence*** on the part of Gurtej Aulakh because his vehicle should not have crossed the median and entered the left southbound lane. However, if there was contact between the semi-truck and the Aulakh Vehicle which can be attributed to the driver of the semi-truck, then the plaintiffs' *prima facie* cases will be negated. This issue, therefore, is at the heart of all three claims before me.

1. **Contact between the Semi-truck and the Aulakh Vehicle**

**57**  On the evidence of the lay witnesses set out above, I find that the driving lanes onto the Pattullo Bridge are particularly narrow, and that a semi-trailer travelling in the northbound lanes leading onto the Pattullo Bridge came into contact with the Aulakh Vehicle.

1. **The Loss of Control by the Driver of the Aulakh Vehicle**

**58**  I further find on the evidence of the lay witnesses, set out above, that the contact between the semi-truck and the Aulakh Vehicle caused the driver of the Aulakh Vehicle to lose control of the vehicle, with the result being that it crossed the median into the oncoming left southbound lane, into the path of the Matyash Vehicle.

1. **Where did the contact between the Semi-truck and the Aulakh Vehicle occur?**

**59**  The central issue, in my view, is whether or not the contact between the Aulakh Vehicle and the semi-truck occurred in the lane in which the Aulakh Vehicle was travelling. If contact occurred because the semi-truck entered the lane in which the Aulakh Vehicle was travelling, the driver of that vehicle would bear responsibility for the accident. If the contact occurred because the Aulakh Vehicle strayed into the lane in which the semi-truck was travelling, then Gurtej Aulakh would bear responsibility for the accident.

**60**  The onus of proving which lane the contact occurred in rests on the Aulakh Plaintiffs. Unless there are special circumstances, which do not apply here, these plaintiffs must prove that "but for" the negligent act of the driver of the semi-truck, the accident would not have occurred: *Resurfice Corp. v. Hanke*, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=) at para. 21, [*[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=).

**61**  As all of the occupants of the Aulakh Vehicle succumbed to their injuries from the motor vehicle accident, their evidence as to which lane the contact between their vehicle and the semi-truck occurred is unavailable.

**62**  The investigating police officers did not investigate in which lane the contact between the Aulakh Vehicle and the semi-truck occurred.

**63**  Mr. Little was not asked to investigate which lane the contact between the Aulakh Vehicle and the semi-truck occurred in, and by the time of his retainer, Dr. Toor could not meaningfully investigate the matter.

**64**  None of the lay witnesses were able to give evidence of which lane the contact between the Aulakh Vehicle and the semi-truck occurred.

**65**  While there was evidence from the lay witnesses that the semi-truck was merging from the northbound curb lane into the center northbound lane, it would be sheer speculation to conclude that in doing so, it entered the lane occupied by the Aulakh Vehicle rather than concluding that it was the Aulakh Vehicle that failed to stay within its narrow lane.

**66**  I am therefore compelled to the conclusion that the Aulakh Plaintiffs have failed to prove ***negligence*** against the driver of the semi-truck. It follows that their claim must be dismissed. Further, it also follows that the *prima facie* cases of ***negligence*** established by Tatyana and Oleg Matyash have not been negated. As a result, I find that the deceased driver of the Aulakh Vehicle, Mr. Gurtej Aulakh, is liable for their injuries.

**67**  Unless counsel have submissions to make, the defendants in the action brought by the Aulakh Plaintiffs will have their costs at Scale B, as will Tatyana and Oleg Matyash for their respective actions.

C.E. HINKSON C.J.S.C.

**End of Document**

[***Mayne v. Mayne, [2013] B.C.J. No. 425***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G221-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Chilliwack, British Columbia

C.J. Bruce J.

Heard: February 7, 2013.

Judgment: March 8, 2013.

Docket: S023092

Registry: Chilliwack

**[2013] B.C.J. No. 425** | 2013 BCSC 391

Between Henry John Mayne, Plaintiff, and Marion Hilda Mayne, Defendant

(39 paras.)

**Case Summary**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Equal apportionment — Motor vehicles — Determination of liability in H Mayne's action against his spouse for damages for *negligence* — After backing out of the garage, H Mayne left the parties' vehicle in neutral with the engine running and returned to the house — The vehicle rolled backward and M Mayne, sitting in the passenger seat, accidentally put the vehicle in drive rather than park — The vehicle struck H Mayne and injured his leg — H Mayne created the risk by negligently leaving the vehicle operating — M Mayne panicked unreasonably and created a greater risk of harm — Liability was apportioned 50/50.**

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 189*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5GBY-CM31-JYYX-633M-00000-00&context=)(1)(b), s. 190, s. 191(2)

***Negligence*** Act, [*RSBC 1996, CHAPTER 333, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B066-00000-00&context=), s. 2

**Counsel**

Counsel for the Plaintiff: W.M. Finch, Q.C., P. Loewen, A/S.

Counsel for the Defendant: S. Birch.

**Reasons for Judgment**

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| --- |
| **C.J. BRUCE J.** |

**INTRODUCTION**

**1**  This is a summary trial proceeding to determine liability in an action for damages arising out of the alleged ***negligence*** of Mrs. Mayne. Mr. Mayne's action in ***negligence*** against his spouse, Mrs. Mayne, stems from a motor vehicle accident that occurred on September 24, 2010, when Mrs. Mayne took control of the parties' vehicle, struck Mr. Mayne, and caused serious injury to his leg. Neither party objected to the matter being heard as a summary trial as the material facts are not seriously in dispute.

**2**  The issue is whether the actions of Mrs. Mayne, in all of the circumstances, were negligent. There is no dispute that she owed Mr. Mayne a duty of care. If Mrs. Mayne is found liable, this Court must also determine if Mr. Mayne contributed to the accident such that liability should be apportioned pursuant to ss. 1 and 2 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*.

**FACTS**

**3**  Mr. Mayne was 85 years old when the accident occurred; his wife was 81 years old. The parties resided in a seniors' community in Chilliwack that consisted of rows of townhouses connected by quieted roadways (containing speed bumps) within the gates of the community. All of the roads within the community are private; access is only permitted to residents and their guests. The speed limit on the roads within the community is 15 km/h. The roadway where the parties' townhouse is situated is straight, flat and paved. Traffic along this roadway is infrequent.

**4**  There are townhouses on each side of the parties' roadway. Each of the townhouses has an attached garage with a paved drive leading from the roadway to the garage entrance. The parties' driveway is 7 feet, 11 inches long and joins the roadway via a small curb at its foot. The roadway is 21 feet, 3 inches wide from curb to curb. Directly across from the parties' driveway is the front lawn and hedge of the townhouse situated on the other side of the roadway. The parties' driveway has a very slight downward slope from the garage entrance.

**5**  The parties own a 2002 Buick with an automatic transmission. The gear shift is located on the steering column. Park is at the top of the column, reverse and neutral are mid-way down, and drive 1 and 2 are at the bottom of the column. The emergency brake is a foot pedal on the left side of the gas pedal on the far left of the driver's foot well. Both the parties regularly drive the Buick and it was in good repair at the time of the accident.

**6**  At around noon on September 24, 2010, the parties left their townhouse to drive to Abbotsford. They exited their residence through the garage door and entered the Buick. Mr. Mayne was going to drive and Mrs. Mayne sat in the front passenger seat and put on her seatbelt. Mr. Mayne backed the Buick out of the garage and stopped at the point where the hood was half in the garage and half out. The rear wheels of the Buick protruded onto the roadway less than a foot. Mrs. Mayne asked her husband to return to the residence to get the mail key as she wanted to check the mail before going to Abbotsford. Mr. Mayne left the Buick and, although he thought he had put the gear shift into park, the vehicle was left in neutral with the engine running. When Mr. Mayne closed the door of the Buick it remained stationary notwithstanding the emergency brake was off. It took Mr. Mayne a few seconds to jog into the residence through the garage door and fetch the mail key that was kept close to the door for easy access. When Mr. Mayne came back into the garage he could not see the Buick because some cabinets obstructed his view. Once he walked past the cabinets he saw the Buick speeding towards him and could not react quickly enough to get out of its way. The Buick pinned him near the back wall of the garage and struck his left leg. Mrs. Mayne stopped the vehicle and immediately called an ambulance.

**7**  Mr. Mayne did not see the Buick roll backwards; however, a few seconds after he left the vehicle, and while Mrs. Mayne sat in the passenger seat, the Buick began to roll backward into the roadway. She became very concerned that the Buick would strike the house across the street and do serious damage. She could not get out of her seat quickly because the seatbelt and the console that separated the passenger seat from the driver's seat made it difficult for her to climb into the driver's seat. As a consequence, Mrs. Mayne reached over her left shoulder with her right arm and used her right hand to move the gear shift into park. Unfortunately, she moved the Buick into drive and it lurched forward and pinned Mr. Mayne to the back wall of the garage. She frantically removed her seatbelt, climbed into the driver's seat and put on the brake. Mrs. Mayne deposed that she acted in the heat of the moment due to the imminent danger she perceived to the neighbour's home.

**VIDEO EVIDENCE**

**8**  Mr. Mayne prepared two short video presentations depicting the Buick rolling backwards out of the driveway and onto the roadway to show what would have happened had Mrs. Mayne taken no steps to move the Buick into park. The video presentations also show the pace at which the vehicle would have rolled backwards. There is no evidence that the video enactments are inaccurate. The weather and road conditions were the same as on the day of the accident. Nothing had changed regarding the physical surroundings. Mr. Mayne deposed that he placed the Buick in the same position as it was on the day of the accident when he left it to obtain the mail key. Mrs. Mayne deposed that she did not know the precise place where the Buick was left but agreed that the location chosen by her husband is correct to the best of her recollection. Mr. Mayne sat in the driver's seat and put the gear shift into neutral; he then let the Buick roll backwards. It rolled very slowly into the roadway and came to a momentary stop at the curb on the other side of the road. The Buick then rolled forward due to the momentum from the curb stop and rolled into the curb on the other side of the road at the driveway to the parties' townhouse. There it stopped and remained stationary.

**9**  Mr. Mayne argues the video presentations are admissible because they are relevant, accurate, and a fair reconstruction of what would have happened had Mrs. Mayne not taken control of the Buick. He argues the probative value of the video presentation outweighs any prejudice to Mrs. Mayne: *R. v. Walizadah*, [*2007 ONCA 528*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF01-JS0R-20CV-00000-00&context=) at para. 38; and *R. v. Skeete*, [*2012 ONSC 1215*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFN1-K0HK-233T-00000-00&context=) at para. 17.

**10**  Mrs. Mayne argues the video evidence is not relevant, should have been filed as expert evidence, and is impermissible hindsight reasoning: *Davidson v. British Columbia* [*(1995), 11 B.C.L.R. (3d) 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0XJ-00000-00&context=) at para. 24 (S.C.); and Lewis Klar, *Remedies in Tort,* Release 5, Vol. 2 (Toronto: Carswell, 2012) at 16.I-140.33. Mrs. Mayne also argues that the video presentation does not depict the circumstances she found herself in and, in particular, the emergency she perceived.

**11**  The authorities relied upon by Mr. Mayne indicate that the admissibility of this type of evidence depends on whether its probative value outweighs any prejudice to the other party. In balancing probative value and prejudicial impact, the court should consider the video's accuracy, fairness and whether what the video portrays can be verified under oath: *Skeete* at para. 17 and *Walizadah* at para. 38.

**12**  In this case, there are no inaccuracies apparent in the video presentation. While counsel for Mrs. Mayne speculated that there may be differences in the condition of the vehicle from the date of the accident, there was no evidence to support his assertions. While the video does not attempt to recreate what Mrs. Mayne did in response to the emergency she perceived, it does show the speed at which it is probable that the Buick rolled backward. While it is somewhat prejudicial, as it suggests in hindsight Mrs. Mayne should not have panicked from the possibility of property damage to the neighbour's home, its probative value with regard to the likely speed of the backward movement of the Buick is significant and outweighs this prejudice. This is a judge alone trial. Thus there is no risk that a jury will place greater weight on the video presentations than is warranted in the circumstances. Based on these considerations, I find the evidence is admissible.

**ARGUMENT**

**13**  Mr. Mayne argues that Mrs. Mayne's actions in attempting to control the Buick, and putting it in drive rather than park, constitute ***negligence***. As he has raised a *prima facie* case of ***negligence***, the onus shifts to Mrs. Mayne to establish that she was not negligent or that Mr. Mayne was partly at fault.

**14**  Mr. Mayne argues that the standard of care of a reasonable person is applicable to Mrs. Mayne's actions and she has failed to prove that a lower standard of care applies. The only circumstance that might excuse her conduct is if she was faced with "the agony of a collision"; that is, a person who finds themselves in an emergency situation and has insufficient time to react is not held to a standard of perfection.

**15**  Mr. Mayne says that the fundamental factor in this defence is that the person cannot be expected to respond without error to an urgent, fast moving, unexpected and dangerous circumstance. The authorities applying this doctrine require that there be proof of urgency and limited choice: *Comeau v. Doucet* [*(1980), 32 N.B.R. (2d) 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW51-FCK4-G00S-00000-00&context=) at para. 18 (C.A.); *LaPlante v. LaPlante* [*(1992), 93 D.L.R. (4th) 249*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M16B-00000-00&context=) (B.C.S.C.); and *Noble et al v. Beroud and Hogan* [*(1985), 37 Man.R. (2d) 313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DH1-JCJ5-22V8-00000-00&context=) at paras. 20-21 (Q.B.), aff'd [*(1986), 42 Man.R. (2d) 25*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DF1-JWR6-S3WB-00000-00&context=) (C.A.).

**16**  Mr. Mayne argues that Mrs. Mayne has failed to prove there was any real emergency that required her to react as she did. She was not faced with an urgent, fast paced and dangerous situation. Mrs. Mayne offered no evidence as to how fast the Buick was rolling and did not present any evidence as to how far away the neighbour's house was from the roadway. There is no evidence of how quickly she reacted to the situation. There is no evidence of how she mistakenly placed the vehicle in drive. In short, while Mrs. Mayne says she reacted in the "heat of the moment" there is no evidence of what made the circumstances an emergency.

**17**  Mr. Mayne argues that the photographic evidence and the video presentations show that the pitch of the driveway has only a slight incline and, as a consequence, the Buick would have rolled only very slowly down it. There is no evidence of pedestrians in the area at the time. Mr. Mayne argues that Mrs. Mayne panicked and overreacted to the situation thereby causing him significant damage.

**18**  The defence argues that Mrs. Mayne was a rescuer and thus subject to a less stringent standard of care. Mr. Mayne argues this doctrine does not apply because this doctrine only addresses a case where the plaintiff sues for damages arising out of their attempt to rescue another.

**19**  Lastly, Mr. Mayne argues that if he is found partly liable for the accident because of the failure to engage the emergency brake, his liability is only minor and should not amount to greater than 10%.

**20**  Mrs. Mayne argues that Mr. Mayne is 100% liable for the accident and that any mistake she may have made was excusable because she was responding to an emergency and had no time to react. Mrs. Mayne argues that Mr. Mayne violated the standard of care by failing to place the vehicle in park and engage the emergency brake when he left the vehicle with the engine running. He was also in violation of the parking regulations found in the *Motor Vehicle Act*, [*R.S.B.C. 1996, c. 318, ss. 191*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0J0-00000-00&context=)(2), 190, 189(1)(b). See also *Noble (Guardian ad litem of) v. Bhumber* [*(1996), 20 B.C.L.R. (3d) 244*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G25B-00000-00&context=) (C.A.); and *Toy v. Argenti* [*(1979), 17 B.C.L.R. 365*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JK4W-M030-00000-00&context=) (S.C.). Because the accident would not have happened if he had placed the vehicle in park, Mr. Mayne is liable.

**21**  Mrs. Mayne argues that she was not negligent in all of the circumstances. It was reasonably foreseeable that she would take steps to stop the Buick from rolling backward. She was immediately concerned that the vehicle would damage the house across the street. She was alone in a rolling vehicle without a driver. She was strapped into the passenger seat and had little time to react to the dangerous situation caused by Mr. Mayne.

**22**  Mrs. Mayne argues she was a rescuer attempting to prevent property damage. As a rescuer, mistakes are forgiven because the person is responding to an emergency to their best abilities. Further, she argues the following facts lessen the standard of care applicable to her in the circumstances: (1) she is 81 years old and her reaction times have slowed down and her judgment has declined; (2) she was in a seatbelt and is right hand dominant making it difficult to reach over her left arm to change gears; (3) she could not access the brake from the passenger seat; (4) there was no advance notice that the Buick was in neutral; (5) there was no time to think and this was the first time she had been presented with such a situation; and (6) she was in a state of panic and the vehicle advanced forward rapidly because it idles high and the entire scenario took seconds.

**23**  In addition, Mrs. Mayne argues she acted in the agony of the moment and in such circumstances one cannot be expected to act with perfection: *Buksh v. Franco*, [*[1995] B.C.J. No. 1331*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FG12-62J7-00000-00&context=), [*1995 CarswellBC 2214*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FG12-62J7-00000-00&context=) at paras. 22 -27 (S.C.); *Corothers v. Slobodian*, [*[1975] 2 S.C.R. 633*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B0DC-00000-00&context=) at 648; and *Horsley v. MacLaren*, [*[1972] S.C.R. 441*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B01P-00000-00&context=) at 450-451; and *Comeau* at para. 18.

**24**  If this Court finds that Mrs. Mayne is liable in ***negligence***, she submits that liability should be apportioned 90% to Mr. Mayne: *Aberdeen v. Langley (Township)*, [*2007 BCSC 993*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XT-00000-00&context=) at paras. 54-67, rev'd in part [*2008 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RY-00000-00&context=).

**DECISION**

**25**  Mrs. Mayne's liability for the damages caused to Mr. Mayne depends upon whether she can properly be regarded as negligent in her attempt to stop the Buick from rolling down the driveway backwards and in error placing it in drive. From the objective point of view of a reasonable person, there is no doubt that Mrs. Mayne's conduct fell below the standard of care expected when someone takes control of a motor vehicle. A mistake of this magnitude cannot be classified as an error of judgment particularly when the park gear was at the top of the steering column and the drive gear was at the bottom. Further, Mrs. Mayne was familiar with the Buick and had driven it regularly since it was purchased by the parties in 2002. Thus she would have known where on the steering column the gears were located. In addition, it was reasonably foreseeable that placing the vehicle in drive would cause damage to anything or anyone in its path.

**26**  The question is whether the standard of care expected of Mrs. Mayne was reduced in the circumstances. Mrs. Mayne argues that she was a "rescuer" who sought to protect the property of her neighbour. By intervening in the ***negligence*** of her husband to save this property, the law does not expect the same high standard of care as it imposes on others not acting to protect persons or property. While the rescue doctrine applies to someone who attempts to save property, as well as those who seek to rescue someone in danger, I am not satisfied that this doctrine applies to Mrs. Mayne's circumstances.

**27**  The rescue doctrine requires the court to weigh the risk assumed by the rescuer to his own safety against the value of the property in peril: *Toy* at 370-372, citing with approval *Steel v. Glasgow Iron and Steel Co. Ltd.*, [1944] S.C. 237 at 248-249, 268. In the case at hand, Mrs. Mayne did not assume any risk to herself that may be weighed against the value attached to the property she feared would be damaged by the Buick. In addition, Mrs. Mayne is not suing for injuries she suffered as a result of taking on any risk of harm to save property in danger. Further, if one considers the risk of harm to Mr. Mayne created by her attempt to "rescue" property as bringing Mrs. Mayne within the parameters of this doctrine, I would have to find that the risk was far too great compared to the value of the property at stake to excuse her from ***negligence***.

**28**  In my view, the more relevant defence to the action in ***negligence*** by Mr. Mayne is the so called "agony of collision" doctrine. Where a person is faced with an emergency and is forced to react quickly to a situation created by the ***negligence*** of another person, he is not held to the same standard of care as a person in a non-emergency situation. This type of case is articulated by Lewis Klar, Q.C., *Tort Law,* 3d ed. (Toronto: Thomson Carswell, 2003) at 319:

The sudden emergency, "agony of collision", or "agony of the moment" doctrine, illustrates the basic proposition that the standard of care is that degree of care which would have been taken by the reasonable person *in like circumstances.* Since ***negligence*** law does not guarantee the safety of others, but only assures them that they will be compensated for injuries caused by unreasonable conduct, errors in judgment which do not qualify as being negligent are permitted. The significance of the sudden emergency doctrine is that it will permit a person who is faced with a sudden emergency to make a choice which would not have been acceptable in a non-emergency situation, and in retrospect, was not the best choice of those available. Since this will, in some cases, throw the unfortunate consequences of the emergency onto the shoulders of an innocent victim, the courts will not lightly recognize the sudden emergency doctrine as a defence in a ***negligence*** suit. ... [T]he emergency must have been one which could not have reasonably been anticipated.

**29**  The onus of proof rests with Mrs. Mayne to establish that she met the standard of care of a reasonable person "in the circumstances." She owed a duty of care to Mr. Mayne by taking control of the vehicle and, having established a *prima facie* case of ***negligence***, the burden of proof shifts to Mrs. Mayne to establish a defence to her actions. To make out this defence, Mrs. Mayne must show that she made a mistake "in an emergency" because the situation created by Mr. Mayne's failure to leave the vehicle secure was of "such real danger and the agony of the threatened [consequences] was so great" as to excuse the error: *Comeau* at para. 18.

**30**  What must be shown by Mrs. Mayne is also articulated in *Fridman on the Law of Torts in Canada,* vol. 1 at 299-300 and adopted by Cowan J. in *LaPlante* at 253:

In Fridman on the *Law of Torts in Canada*, vol. 1 at pp. 299 - 300, the learned author deals with circumstances which are present here. He states:

The issue of ***negligence*** or no ***negligence*** may also be affected by what has been termed "the agony of the moment", or "the agony of collision". An act forced on a defendant by the emergence of a situation over which he had no control and which he did not create by his ***negligence*** may not amount to a failure to maintain the appropriate standard of care. Everything depends on whether the defendant reacted instantaneously to a difficult situation, and did so in a manner that was not inherently unreasonable given the circumstances and the necessity for some immediate action on his part.

He then goes on to say:

In a moment of extreme peril and difficulty, perfect presence of mind, accurate judgment and promptitude under all circumstances are not to be expected. The danger that produces the reaction must be imminent and unforeseen. When this is the case, conduct that might otherwise be deemed negligent will not attract liability.

**31**  Having regard to the circumstances of this case, I am unable to find that Mrs. Mayne has satisfied the onus of proof regarding the defence of "agony of the moment". There was only a nominal risk of harm to the neighbour's home and Mrs. Mayne panicked and took unreasonable and dangerous steps to stop the backward rolling vehicle. While Mrs. Mayne did not expect the Buick to roll backward, having no foreknowledge of Mr. Mayne's failure to engage the emergency brake or to leave the vehicle in park, she nevertheless severely overreacted to the perceived danger. Given the very slight slope of the driveway, and viewed in light of the video presentation showing the likely speed of the Buick as it rolled backward, it is apparent that things were not happening quickly at all. The Buick was travelling ever so slowly albeit in a backward direction. There was no one in the area and the roadway was devoid of other traffic. The neighbour's home was a considerable distance away. The Buick would have to travel out of the driveway, over the first curb, cross the roadway and negotiate the next curb, and travel through the lawn and the hedges of the neighbour's home before it would have come into contact with a structure.

**32**  In these circumstances, Mrs. Mayne had time to consider what to do. She could have easily unbuckled her seatbelt to make it easier to reach over and place the vehicle in park. She could have simply taken the key out of the ignition. There was no imminent danger from any objective point of view.

**33**  The court must not make armchair judgments based on hindsight; however, clearly Mrs. Mayne panicked in a situation that would not have panicked a reasonable person in the same circumstances. Counsel argued that her age should be a factor. At 81, her reaction times and her judgment would be impaired. However, the law cannot countenance a lower standard for elderly drivers. Mrs. Mayne had a drivers' licence and regularly operated the Buick. As a consequence, the court must presume that she possessed sufficient competence to operate a motor vehicle safely.

**34**  For these reasons, I find that Mrs. Mayne was negligent when she took control of the Buick and struck Mr. Mayne.

**35**  The question remains whether Mr. Mayne was contributorily negligent. In my view, it was negligent to leave the Buick in neutral when it was still running. Placing the vehicle in park or engaging the emergency brake were precautions expected of a reasonable person in the circumstances. Having examined the statutory provisions cited by Mrs. Mayne, I cannot conclude that Mr. Mayne violated any regulatory prohibition dictated by statute. However, had he taken basic safety precautions, the accident would not have occurred. Thus both parties' ***negligence*** contributed to the injuries suffered by Mr. Mayne.

**36**  Apportionment of liability under the ***Negligence*** *Act* is based on a consideration of the degree to which each party is at fault and not on the degree to which each party's fault caused the loss: *Aberdeen* at para. 58. This is referred to as the relative blameworthiness approach whereby the court measures the amount by which each party's actions fell short of the required standard of care. The relevant factors in this assessment are described in *Aberdeen* at paras. 62-63:

[62] Thus, fault is to be determined by assessing the nature and extent of the departure from the standard of care of each of the parties. Relevant factors that courts have considered in assessing relative degrees of fault were summarized by the Alberta Court of Appeal in *Heller v. Martens*, [*[2002] A.J. No. 638*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JYYX-63KP-00000-00&context=), *supra*, at para. 34 as follows:

1. The nature of the duty owed by the tortfeasor to the injured person ...
2. The number of acts of fault or ***negligence*** committed by a person at fault ...
3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose ***negligence*** comes as a result of the initial fault ...
4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy ... Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis ...
5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy ...

...

[63] Many of the above-noted factors are discussed in Chiefetz, *Apportionment of Fault in Tort*, *supra*, at pp. 102-104. Considering that, I conclude it would be appropriate to add the following as relevant factors:

1. the gravity of the risk created;
2. the extent of the opportunity to avoid or prevent the accident or the damage;
3. whether the conduct in question was deliberate, or unusual or unexpected; and
4. the knowledge one person had or should have had of the conduct of another person at fault.

**37**  Applying these factors to this case, I find that Mr. and Mrs. Mayne were equally at fault for the accident. Mr. Mayne created the risk by negligently leaving the vehicle operating without taking any safety precautions. On the other hand, the risk of harm was relatively nominal. Mrs. Mayne took action in response to an unexpected event; however, she overreacted and panicked unreasonably thereby creating a far greater risk of harm. She had an opportunity to avoid this harm but failed to act reasonably in the circumstances. Each party owed identical duties of care to the other party at the time of the events and but for the actions of both parties the accident would not have occurred. In these circumstances, the parties are equally at fault and liability should be apportioned 50/50.

**38**  Costs should be borne equally by the parties in view of their divided success.

**39**  The parties are invited to file written submissions regarding whether I am seized of the damage assessment portion of this action in the event this matter is not settled prior to trial. Where the parties are in agreement that I should hear this matter, please make arrangements directly through the registry. There is no need for written submissions if that is the case.

C.J. BRUCE J.

**End of Document**

[***Uy v. Dhillon, [2019] B.C.J. No. 1295***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5WKG-GCH1-JBDT-B126-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

F.V. Marzari J.

Heard: June 3-7 and 10-13, 2019.

Oral judgment: June 14, 2019.

Dockets: M158435, M156431

Registry: Vancouver

**[2019] B.C.J. No. 1295** | 2019 BCSC 1136

Between Johnberlyn Uy, Plaintiff, and Daljit Singh Dhillon, Day & Ross Inc., Her Majesty the Queen in Right of the Province of British Columbia, as Represented by the Ministry of Transportation and Highway and VSA Highway Maintenance Ltd., Defendants And between Ma Cezza De Leon, Plaintiff, and Daljit Singh Dhillon, Day & Ross Inc. and Johnberlyn Uy, Defendants, and Johnberlyn Uy, Day & Ross Inc. and Daljit Singh Dhillon, Third Parties

(194 paras.)

**Case Summary**

**Tort law — *Negligence* — Contributory *negligence* — Motor vehicles — Actions by Uy and De Leon for a finding of *negligence* against the defendant Dhillon for a motor vehicle accident allowed — Uy was driving a car on the Coquihalla Highway and De Leon was his passenger — Dhillon was a commercial driver driving a freightliner tractor hauling two trailers — Dhillon's tractor-trailer combination encroached on Uy's lane of travel suddenly and without warning, causing Uy to steer aggressively to the right — Uy lost control of the car, and it rotated clockwise, hitting the tractor-trailer — Dhillon was liable for the accident and Uy was not contributorily negligent.**

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| --- |
| Actions by Uy and De Leon for a finding of ***negligence*** against the defendant Dhillon in relation to a motor vehicle accident. In the early morning hours of January 31, 2014, Uy was driving a car on the Coquihalla Highway and De Leon was his passenger. Dhillon was a commercial driver driving a freightliner tractor hauling two trailers. At the time of the accident, the highway had a light coat of a mixture of compact snow and sand. The road lines were not visible as a result of the mixture of sand and snow. The collision caused Uy's vehicle to sustain substantial intrusion damage to the driver's side of the vehicle cabin, causing Uy to suffer a severe traumatic brain injury. He had no memory of the collision or the time before the collision. There was no question that Uy's vehicle struck the rear end of Dhillon's tractor-trailer after a loss of control. The only issue was the cause of the loss of control. The plaintiffs took the position that Dhillon's tractor-trailer encroached without warning into their lane of traffic, cutting them off and requiring Uy to take evasive actions that led to the loss of control and the collision. Dhillon took the position that he was well established in his lane of travel prior to the accident and that the collision must have been the result of Uy losing control of his car in the winter conditions.  HELD: Actions allowed.  Prior to the accident, Dhillon was travelling between 30 to 40 kilometres per hour and Uy was travelling between 70 to 80 kilometres per hour. The speed limit was 110 kilometres per hour. Dhillon was in the process of changing lanes to overtake another commercial vehicle at the time of impact. His tractor-trailer combination encroached on Uy's lane of travel suddenly and without warning. In order to evade the sudden unexpected hazard, Uy steered aggressively to the right. He lost control of the car, and it rotated clockwise, hitting the rear left corner of the tractor-trailer and causing his injuries. There was nothing careless or negligent in Uy's spontaneous evasive manoeuvre. There was nothing he could have reasonably done to avoid the collision. Dhillon was liable for the accident and Uy was not contributorily negligent. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, R.S.B.C. 1996, c. 316, s. 144, s. 151(a), s. 151(c), s. 158(1), s. 159, s. 162(1), s. 162(2), s. 162(3)

Rules of Court, Rule 14-1(18)

**Counsel**

Counsel for the Plaintiff Johnberlyn Uy: S.L. Kovacs, C.L. Linegar.

Counsel for the Defendants and Third Parties, Day & Ross Inc. and Daljit Singh Dhillon: R. Rogers, C.N. Taliunas, J. Steele.

Counsel for the Plaintiff, Ma Cezza De Leon: T.K. Gloux.

Counsel for the Defendant and Third Party, Johnberlyn Uy: D. Lavoie.

**Oral Reasons for Judgment**

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| **F.V. MARZARI J. (orally)** |

**INTRODUCTION**

**1**  These two actions arise out of an accident between a car and a tractor-trailer combination that occurred in the early morning hours of January 31, 2014, on the Coquihalla Highway in B.C.

**2**  Mr. Uy was the driver of the car, and Ms. De Leon was his passenger. They are both plaintiffs in their own actions.

**3**  Mr. Dhillon was the driver of the tractor-trailer combination, which was registered to Day & Ross and who also insured those vehicles. There is no issue before me that Day & Ross are proper defendants and would be liable for any ***negligence*** found on Mr. Dhillon's part.

**4**  Liability for the accident is the sole issue before me.

**5**  There is no question that Mr. Uy's vehicle struck the rear-end of Mr. Dhillon's tractor-trailer after a loss of control. The only issue is what the cause of the loss of control was. The plaintiffs say that Mr. Dhillon's tractor-trailer encroached without warning into their lane of traffic, cutting them off and requiring Mr. Uy to take evasive actions that led to the loss of control and the collision. Mr. Dhillon says that he was well established in his lane of travel prior to the accident and that the collision must have been the result of Mr. Uy losing control of his car in the winter conditions and colliding with the rear of his trailer.

**6**  Mr. Uy bears the onus of establishing Mr. Dhillon's ***negligence*** in his claim. He seeks to establish 100% liability to Mr. Dhillon and Day & Ross. In her claim, Ms. De Leon says Mr. Dhillon was entirely responsible for the accident but in the alternative has also named Mr. Uy as a defendant in the event that this court finds Mr. Uy responsible or contributorily negligent as argued by the defendants. Mr. Dhillon and Day & Ross have named Mr. Uy as a third party in Ms. De Leon's claim, and Mr. Uy has similarly cross claimed against the defendants.

**LAW**

**7**  Whether Mr. Dhillon was negligent or not and whether Mr. Uy contributed to his own and Ms. De Leon's injuries will largely turn on the facts established in the evidence at this trial. As stated above, the parties have different interpretations of the physical evidence and different accounts of the moments leading up to the accident. This case will largely turn on my findings of facts based on that evidence.

**8**  I will nevertheless briefly review the law that is applicable before moving on to a consideration of the facts.

**9**  Mr. Uy and Ms. De Leon bear the onus of establishing that Mr. Dhillon was negligent and that it was his ***negligence*** that caused the collision.

**10**  If Mr. Dhillon is found to be negligent, I must also consider whether Mr. Uy was also negligent so as to contribute to the injuries that he and Ms. De Leon suffered as a result of the collision. Mr. Dhillon and Day & Ross bear the burden of establishing any such contribution on a balance of probabilities, although they benefit from a presumption arising from the fact that Mr. Uy rear ended Mr. Dhillon.

**Duty of Care and Standard of Care**

**11**  It goes without saying that both parties owed a duty of care to the other in this case and were expected to comply with the provisions of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 316* [*MVA*]. While lack of compliance with the *MVA* is not necessarily commensurate with a breach of the standard of care by the driver, it can be a significant factor.

**12**  Section 144 of the *MVA* prohibits a person from driving a motor vehicle on a highway without due care and attention and without reasonable consideration for other persons on the highway. This is related to the common law principle that every motorist owes a duty of care to other motorists around them, and the standard of care is to pay due care and attention and to reasonably consider other persons using the highway.

**13**  Beyond that general duty, a number of more specific *MVA* provisions and common law duties are said to arise in this case, including those related to rear-end collisions, the changing of lanes or overtaking of vehicles, and special *MVA* requirements for commercial vehicles, which I will now go through.

**The Standard of Care for Commercial Vehicles**

**14**  The parties are agreed that no expert evidence is required to establish the standard of care of Mr. Dhillon as a commercial truck driver, or Mr. Uy, in these circumstances, and I agree.

**15**  As stated by Madam Justice Rowles in *Wang v. Horrod*, [*1998 CanLII 5428*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-22SB-00000-00&context=) (B.C.C.A.), with respect to the standard of care of commercial drivers, though about a different type of commercial vehicle, at para. 69:

Much of the competent driving of a bus is the same as the competent driving of any other motor vehicle - the driver should obey the rules of the road as laid down in Part 3 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318*, keep a proper lookout, be aware of the conditions of the road, and so forth.

**16**  While expert evidence may be admissible in relation to the operation of a commercial vehicle in relation to the application of the rules of the road, it is not necessary: see *MacEachern v. Rennie*, [*2010 BCSC 625*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-631C-00000-00&context=) at 549.

**17**  The defendants did tender an expert report by Mr. Bekesinski as an expert in commercial trucking, and I did allow portions of that report to be entered on the basis of the defendants' submissions that it would be relevant to the issues in this trial. However, his evidence regarding the standard of care of truck drivers does not address safe driving distances, lane changes, overtaking slower vehicles or being passed by faster vehicles. His report is limited to issues not raised by the plaintiff, such as the choice of tire in winter conditions and braking while going downhill.

**18**  Mr. Dhillon gave much more useful information in evidence with respect to his own standard of practice as a commercial truck driver of a large, heavy and long tractor-trailer combination. His evidence was relevant to the issues before me, including his standard practices in passing larger and slower commercial vehicles and being passed by faster and smaller passenger vehicles. His evidence in this regard included that:

1. When changing lanes, he considers that it is necessary to carefully plan ahead and check his mirrors often;
2. Lane changes should be made slowly and subtly with at least 8 to 10 seconds of signalling before any change in lane is made;
3. It is important to avoid over-steering because that can make the trailer swing, and the load can move;
4. The motion of a poorly made lane change can be amplified in the rear trailer, and can even overturn the rear trailer while the tractor and first trailer remain upright; and
5. He always allows 3 to 4 feet between himself and another vehicle he is passing, especially a commercial vehicle.

**19**  Mr. Dhillon testified that lane changes can therefore be dangerous to himself and others, and that he considers these dangers when making lane changes. He was adamant in his evidence that he would have followed all of these procedures in this case.

**20**  I am satisfied that the issues before me do not require expert evidence to establish the standard of care of either driver. In particular, the standard of care as it relates to motorists avoiding rear-end collisions, changing lanes and overtaking other vehicles and driving in conditions where the road lines are not visible are all areas where I am able to determine the appropriate standard of care without the assistance of an expert.

**21**  I will now address the law and the standard of care applicable to each of these areas.

**Rear-End Accidents**

**22**  Section 162(1) of the *MVA* states that a driver of a vehicle must not follow another vehicle too closely, having due regard for the speed of the vehicles and the amount and nature of traffic on and the condition of the highway.

**23**  In *Ayers v. Singh*, [*1997 CanLII 3410*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21CC-00000-00&context=) (B.C.C.A.), Mr. Justice Lambert stated at paragraph 12 that the standard of care of a vehicle that is following another is that it must have regard for the safety of the other vehicles on the road and the standard of care arises from s. 162. As confirmed in *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=), the duty of the vehicle that is following includes a requirement that the driver "allow for emergencies that may arise, such as a sudden stop or unanticipated manoeuvre by a vehicle ahead."

**24**  As a result, in a rear-end collision, an inference of ***negligence*** is usually drawn if there is no explanation as to how the collision could have occurred in the absence of the following driver's ***negligence***: see *Wright v. Mistry*, [*2017 BCSC 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MYY-YHT1-FGCG-S1WD-00000-00&context=) at paras. 16-18.

**25**  The law in this respect was neatly summarized by Madam Justice Griffin in *Varga v. Kondola*, [*2016 BCSC 2406*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MKR-T2S1-F27X-60WC-00000-00&context=), at paragraphs 87 to 88 as follows:

[87] Ms. Varga also relies on the proposition that an onus exists on a driver of a vehicle that rear-ends another to demonstrate the absence of ***negligence***, as noted in *Wallman v. Doe*, [*2014 BCSC 79*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1D9-00000-00&context=):

[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=).

[88] One way in which a driver of a rear-ending vehicle may discharge the onus of showing he was not negligent is to show that the driver of the front vehicle suddenly changed lanes in front of him, not allowing sufficient time to stop, as in *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 paras. 15-16, and *Bingul v. Youngson*, [*2016 BCSC 1868*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M0F-RTK1-JBT7-X1XB-00000-00&context=) at para. 55.

**26**  These cases raise both the responsibility of Mr. Uy to drive with due attention to the conditions and the drivers around him (including the unexpected), and the question of whether Mr. Uy has discharged his onus by establishing that the driver in front of him, Mr. Dhillon, suddenly changed lanes in front of him, not allowing him sufficient time to stop or evade the collision.

**27**  I will turn now to the law regarding the changing of lanes and overtaking of vehicles.

**Changing Lanes and Overtaking Vehicles**

**28**  Section 151(a) of the *MVA* prohibits a driver from changing lanes if it is unsafe to do so or if it will affect the travel of another vehicle. Subsection 151(c) prohibits a driver from changing lanes without first signalling his intention to do so.

**29**  Section 159 of the *MVA* governs passing on the left regardless of the presence of lane markings and provides that:

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.

**30**  Section 161(2) and (3) of the *MVA* specifically require that the driver of a commercial combination of vehicles must not follow within 60 metres of another commercial motor vehicle or a combination of vehicles, and must leave sufficient space between his or her vehicle and another vehicle or a combination of vehicles to enable the vehicle to enter and occupy that space without danger.

**31**  In *Brook v. Tod Estate*, [*2012 BCSC 1947*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X35C-00000-00&context=), this Court reviewed the law in relation to the standard of care of a driver while changing lanes to overtake another vehicle:

[22] There is a duty imposed on drivers by s. 151(a) of the *Motor Vehicle Act* not to change lanes unless that movement can be safely made and without affecting the travel of other vehicles. Even if that subsection did not exist, the common law duty to take reasonable care to conduct one's self so as to void injury to one's neighbour would apply...

**32**  The court found in that case that the driver who had changed lanes was liable, despite her evidence that she had checked her mirrors and had not seen the other vehicle approaching in the lane to her left until the last moment, saying at paragraph 33 "I do not accept Mr. Tod's presence in her blind spot excuses her failure to see his car. She had a legal obligation to be aware of the traffic near her."

**33**  In other words, when a driver is deciding to overtake another vehicle, he or she must be reasonably certain it is safe to do so. If there is uncertainty, the obligation of the overtaking motorist is to wait until it is reasonably safe: see *Ali v. Fineblit*, [*2015 BCSC 1494*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GW7-N221-JW5H-X0MH-00000-00&context=), at para. 21.

**Lanes Obscured by Snow**

**34**  The *MVA* is clear on what a motorist's duties are in terms of changing lanes to overtake a vehicle, including signalling and ensuring it is safe to enter the lane to the left. This case presents the more difficult question of the obligations of drivers when the lane markings are not visible.

**35**  This Court considered this issue in *Wellington v. Hopkins*, [*2000 BCSC 1072*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22DR-00000-00&context=), which involved a head-on collision between a tractor-trailer and a pickup truck in white-out conditions where neither the centre lane nor the fog lines were visible. Mr. Justice Burnyeat reviewed the case law and set out the obligations of drivers of vehicles when the centre line on a road cannot be seen, which I find to be equally applicable in this case where lane dividers were not visible. Specifically this court found that where lane markings are obscured by snow, a driver is entitled to follow the tire tracks (and expect that another driver will follow their own tracks), and the provisions of s. 158(1) of the *MVA* still apply:

For the purposes of determining whether a driver is driving in accordance with the provisions of s.150(1) when it is not possible ascertain the exact centre of the "roadway", the driver of the vehicle must confine the course of his or her vehicle to the right hand half the travelled portion of a roadway. Accordingly, the questions that must be determined in this case will relate to the travelled portion of the highway and not to the question of where the vehicles were in relation to the centre line marked on the highway.

**36**  In this case both motorists could not see the lane demarcations, and the lanes of travel were not identifiable. In these circumstances the broader duty described in s. 151(a) and (c) and 159 of the *MVA* still applies. Drivers are still prohibited from moving out of their own path of travel and into another path of travel if it is unsafe to do so or if it will affect the travel of another vehicle.

**ISSUES**

**37**  On the basis of the above case law, it is necessary for me to determine first whether Mr. Uy has established on the evidence that Mr. Dhillon encroached into his lane or path of travel suddenly and without warning causing him to lose control of his vehicle. As I stated above, this largely involved the resolution of factual questions and depends on my interpretation of the physical evidence and my assessment of the credibility of Ms. De Leon and Mr. Dhillon where their accounts differ.

**38**  The main areas of contention that I must resolve on the evidence to reach a conclusion in this regard are:

1. Whether the highway was operating as two lanes or three lanes at the time of the collision;
2. The likely location of the impact;
3. Where each of the involved vehicles were located immediately before the impact; and
4. Ultimately, whether Mr. Dhillon was established in his lane at the time of the collision or whether he was suddenly and without warning moving to the left encroaching on Mr. Uy's primarily lane of travel just prior to the collision.

**39**  In order to reach the factual findings on these more contentious questions, I will first go through the agreed facts and then move on to resolve factual issues that are less contentious but that will assist me in reaching a final conclusion on the key factual questions, including:

1. The events leading up to the collision;
2. The general location of the collision;
3. The road conditions at the time of the collision;
4. The speed of each party:
5. The post-accident location of each vehicle; and
6. The angle of impact.

**40**  From there I will go on to reach conclusions about the liability of Mr. Dhillon and if necessary, consider the defendant's arguments of contributory ***negligence*** and contribution on Mr. Uy's part.

**FACTS**

**Agreed Facts**

**41**  At the outset of the trial, the parties entered into an agreed statement of facts for the purposes of this liability trial. Those facts include:

1. Mr. Johnberlyn ("John") Uy was the driver of the car involved in the collision, a Honda Element, and Ms. De Leon was his front-seat passenger.
2. Mr. Dhillon was a commercial driver driving a freightliner tractor hauling two trailers in a "Super B" configuration. This was also described at trial as a B-train, and I will use that description or simply refer to it as the tractor-trailer combination. The defendant Day & Ross was the registered owner of the tractor and the trailers.

**42**  The collision occurred on a downhill section of the Coquihalla Highway travelling westbound (also described as southbound) from Kamloops towards Hope just past the Zopkios Brake Check, approximately 2 kilometres north of the Great Bear Snowshed. In these reasons I am going to use the term "up road" to describe events and objects in the direction of Kamloops and "down road" to describe events and objects in the direction of Hope in relation to this collision area.

**43**  As a result of the collision, Mr. Uy's vehicle sustained substantial intrusion damage to the driver's side of the vehicle cabin, causing Mr. Uy to suffer a severe traumatic brain injury. Mr. Uy has no memory of the collision or the time before the collision.

**44**  The posted speed limit at the location of the collision was 110 kilometres per hour.

**45**  There are six highway lanes on the Coquihalla at the place of the collision, three in each direction. Opposing lanes of travel at the place of the collision are divided by concrete barriers.

**46**  Snow had accumulated on the shoulder barriers of the highway.

**47**  In the moments leading up to the collision, there was a slower moving Super B combination commercial tractor trailer occupying the far right or curb lane of the highway. Mr. Dhillon elected to overtake the slower moving vehicle, and the collision occurred while Mr. Dhillon was in the process of overtaking the slower-moving Super B.

**48**  Mr. Dhillon felt the collision impact.

**49**  Paramedics arrived at the scene approximately 30 to 40 minutes following the collision, and the first RCMP officer arrived just under an hour after the collision.

**50**  Also included in the agreed statement of facts is the statement taken by Constable Gordon Standcombe from the plaintiff, Ms. De Leon. He spoke with her first at the Chilliwack Hospital shortly after the accident and then took a signed handwritten statement from her on February 13, 2014, which stated in part:

We were driving and we were in the left lane and the truck was in the right lane. When we were [sic] to overtake the truck, I saw the truck ahead of us start to merge into our lane. Then, instead of hitting the back of the truck, John turned to the right to avoid hitting the back end. It was too late, we hit the back of the truck anyway.

**51**  Although this is a prior *consistent* statement, it was entered by agreement and introduced in full by the defendants in cross-examination of Ms. De Leon.

**Evidence at Trial**

**52**  In addition to the above agreed facts, I heard evidence from each of the parties: Mr. Uy, Ms. De Leon, Mr. Dhillon, and a representative of Day & Ross. I also heard evidence from two RCMP officers who attended the accident scene, Constable Verrault and Constable Byers. I heard from Mr. Jackson, the supervisor of VSA Highway Maintenance Services, responsible for clearing and maintaining this portion of the Coquihalla Highway and who attended just after the collision; and Mr. Carter, a private retained accident investigator.

**53**  Finally, I had the benefit of three expert reports, two prepared by mechanical engineers as to the dynamics of the accident, Mr. Dinn and Dr. Toor, and a third by an expert in commercial truck driving, Mr. Bekesinski, whose report I have already commented on. Both Mr. Dinn and Dr. Toor attended for cross-examination. After a ruling I made redacting a portion of Mr. Bekesinski's expert report, he was not required to attend for cross-examination.

**54**  On the basis of this evidence I am able to make the following findings of fact:

***Events Leading Up to the Accident***

**55**  Mr. Dhillon was driving his ordinary route with his ordinary cargo from the Lower Mainland to Kamloops and back again towing two tractor trailers. He made his deliver in Kamloops on the late afternoon of January 30, 2014, and had a few hours of rest before heading back to the Lower Mainland with two trailers of car parts at 12:30 in the morning on January 31, 2014. There is no evidence that Mr. Dhillon was negligent in his pre-trip resting time preparations or inspections.

**56**  Mr. Dhillon was driving a freightliner truck tractor that was pulling two trailers in what he described as a "B train" configuration. He said the first trailer was 33 feet long and the rear trailer was 28 feet long, although those may be approximate, and Mr. Dinn puts them at 30 and 29 feet respectively. The combined length of the tractor with the two trailers and the bridge that joined them was approximately 76-77 feet by Mr. Dhillon's count, and approximately 26 metres by Mr. Dinn's. Each trailer was connected in such a way as to allow it to pivot at its connection point, allowing the tractor-trailer combination to navigate turns. The trailers and tractor were approximately 8 feet or 2.6 metres wide, excluding the tractor's mirrors.

**57**  Mr. Dhillon understood that the trailers he was towing had been checked by the previous driver transferring the trailers in Kamloops. Mr. Dhillon did not open the trailers to check the loads, but trusted the previous driver to have ensured that they were properly loaded. There is no evidence to suggest that they were not properly loaded, although the plaintiffs say that this is because the Defendants failed to comply with their obligations to produce records regarding the loads conveyed in the trailers.

**58**  At examination for discovery, Mr. Dhillon said the trailers were approximately 75% loaded, and at trial he said they were fully loaded. In either case, his evidence was consistent that this was a relatively light load for his tractor, which was capable of hauling a load twice as heavy. Mr. Dhillon agreed that a light load has less traction, but was insistent that it would not be more prone to swinging. He agreed that trailer swing might occur, however, as a result of over-steering, which could result in the rear trailer whipping or even overturning. This would not occur if a driver had good driving techniques, which he says he did. He denied his trailers would have experienced any swing while he was driving or during this trip.

**59**  Just prior to the accident, Mr. Dhillon had stopped at the Zopkios Brake Check at the top of the highest point of the Coquihalla Highway between Kamloops and Hope, as he was required to do. He testified that he checked his brakes, his tires and cleaned his mirrors. I accept this evidence.

**60**  Mr. Uy was also driving southbound on the Coquihalla with his girlfriend, Ms. De Leon. Ms. De Leon was a sponsored worker from the Philippines at the time working at Tim Hortons in Kelowna. She had started seeing Mr. Uy about four months before the accident. Mr. Uy worked in the Lower Mainland, and would drive to Kelowna to see Ms. De Leon two to three times per month.

**61**  On the night in question, Mr. Uy had picked up Ms. De Leon from work at the end of her shift around 11:00 p.m. on January 30th, and they had left Kelowna about an hour later, intending to take part in Chinese New Year celebrations in the Lower Mainland. This was a fairly common trip for the two of them. In the time leading up to the accident, Ms. De Leon recalls telling Mr. Uy funny stories about what had happened at work that day, and they were discussing his plans to find a job in Kelowna so they could be closer. She remembers being very happy.

**62**  Although it was early in the morning, and both drivers had also been driving earlier that day, there is no evidence that either of the drivers involved in this collision were impaired or otherwise predisposed to being inattentive on the road prior to the accident.

***Location of the Accident***

**63**  It is formally agreed that the collision occurred just past the Zopkios Brake Check, approximately 2 kilometres north of the Great Bear Snow Shed southbound on the Coquihalla. The photographs and evidence of the scene of the collision show a runaway lane just beyond and down-road from the collision site where Mr. Dhillon pulled over after the collision.

**64**  Mr. Jackson in his notes estimated the collision site was half a kilometre past the Zopkios Brake Check.

**65**  In his investigation a couple of months later, Mr. Carter drove, videotaped and photographed the route between the brake check and the snow shed and located the collision site on Google Maps satellite imagery as approximately 660 metres from the exit of the brake check area horizontally. In his videos Mr. Carter drove the distance between the brake check and the collision scene in 35 to 45 seconds going approximately 80 kilometres per hour.

**66**  I am satisfied that Mr. Carter accurately located the area of the collision site on the basis of the photographs. The distance would be slightly longer than 660 metres in actuality given the angle and curves of the road, and some allowance needs to be made for inaccuracies in scale.

**67**  While the evidence is not perfect in this regard, I find that the location of the collision was approximately 750 metres past the Zopkios Brake Check area just prior to the first runaway lane going down what is known as "snowshed hill". It was certainly less than 1 kilometre from the brake check.

***Road Conditions***

**68**  There was more than one source of information about the road conditions at the time of the collision, including photographs and the accounts of the various officers and other attendees at the accident scene.

**69**  On the basis of the evidence I make the following findings regarding the road conditions at the time of the accident:

1. The stretch of the Coquihalla where the accident occurred is known as Snow Shed Hill. It is known to be particularly dangerous: it is at the highest point of the pass between Kamloops and Hope, and the hill is an 8% grade which is long and steep.
2. The highway also curves down the hill in an S shape. In the location where the collision occurred, the road was just starting to come out of a curve to the left before straightening out and then curving to the right. Although Mr. Dhillon described the curve as very slight, the photographic evidence and the evidence of Mr. Jackson establishes that it is curved enough to reduce sight lines around its corners to a few hundred metres.
3. Because of its known hazards, highway maintenance has dedicated teams working on this section of the highway, and can bring in an additional truck and crew when required. This extra truck had been added in the 24 hours leading up to the collision due to a snowstorm the previous day.
4. During the previous day's storm, there were six trucks and crews running continuous loops ploughing and sanding the 30-kilometre stretch of highway from Zopkios to Portia and back for a total of 60 kilometres in 45-minute round trips.
5. By 5:00 p.m. the previous evening the storm was largely done, but four trucks continued to plough sand and patrol the stretch of highway throughout the night. By 2:30 a.m. the trucks were not necessarily sanding or ploughing, but continued to patrol. It did not snow again that morning.
6. At the time of the accident, the highway had a light coat of a mixture of compact snow and sand. Mr. Jackson assessed it at the scene as having good traction and as not icy. He explained that the lower temperature at the time (a negative 8 air temperature and a negative 7 road temperature) made ice much less likely as there was no temperature differentials to form ice. The other witnesses who attended the scene in vehicles confirmed in evidence that they did not have any difficulties with traction either.
7. The snow that had fallen was largely removed toward the left side of the highway, with a slightly thicker and rougher coating of snow and sand on the right side of the highway.
8. The road lines were not visible on either portion of the road due to the mixture of sand and snow. I reject Mr. Dhillon's evidence that he clearly saw those lanes. As he later admitted, the photographs show that it would have been impossible to see the lane markings in the day, let alone at night.
9. In the location of the collision there is a concrete barrier on the far right shoulder. This barrier is not continuous and starts in what appears to be a truck pullout shortly before the collision area and then significantly narrows close to the point of impact about 100 metres before widening again into the truck runaway lane.
10. Mr. Jackson, supervisor of the highway maintenance for this area, testified that the distance from the right fog line or the edge of the right lane to this concrete barrier in the area of impact was only half a metre. A few years later Mr. Dinn's photos and instruments suggest it may have been wider, and Mr. Dinn asserted in cross-examination to a question about whether the shoulder narrowed at this point that the shoulder was 2 1/2 metres. That distance, which would almost be a lane width, cannot be determined from the photographs at the time of the accident because the fog lines are not visible. Mr. Dinn's photographs of the highway three years later also do not appear to show a shoulder that is 2 1/2 metres wide next to the 3.65-metre wide lanes shown. In any event, I find Mr. Jackson's evidence is to be preferred in this regard as he had been involved in the day-to-day maintenance of this particular stretch of the Coquihalla for over 20 years, and he described the paved shoulder as being approximately 2 1/2 metres but as being interrupted by the concrete barriers on the side of the highway in this particular location at the time of the accident.
11. There was 4 to 5 feet of deeper snow in a bank extending towards the roadway from the concrete barrier. It was Mr. Jackson's evidence reviewing the photographs on the day of the collision, and I accept it, that this snow bank would have encroached onto the ordinary travelled portion of the road and affected travel. I find this snow bank was encroaching onto the travelled road at the location of the accident by 2 to 3 feet.

***Speed***

**70**  Mr. Dhillon has been consistent in his evidence that he was travelling between 30 to 40 kilometres per hour, passing another slower and longer Super B tractor-trailer combination at the time he felt the impact of Mr. Uy's car on his rear trailer. I accept that evidence. There is no suggestion that this was not an appropriate speed for Mr. Dhillon to be travelling down this stretch of highway in these conditions.

**71**  Mr. Dhillon has been much less consistent about what the likely speed of the Super B tractor-trailer combination he was passing was. In his examination for discovery, Mr. Dhillon stated that the combination he was passing was much slower than he was going, 10 to 15 kilometres per hour with its engine brake on. He stated it was still ahead of him at the time of the accident. In direct evidence at trial he said he was beside the tractor-trailer and it was going 20 to 30 kilometres per hour, and in cross he said that the slower Super B kept changing speeds, speeding up as he passed, and that his speed estimates were just estimates and not reliable. Although his evidence was that his speed was 30 to 40 kilometres an hour, he suggests that it could have taken him three to four minutes to pass the Super B and that it was directly beside him at the time of the collision.

**72**  Mr. Dhillon also said that he was the last in a train of trucks leaving the Zopkios Brake Check to approach and pass the Super B.

**73**  I accept Mr. Dhillon's first estimate of the Super B's speed at 10 to 15 kilometres per hour at examination for discovery as being most consistent with the rest of his evidence that it was very slow, so slow that it was imperative in his mind that he pass it, and that all the other trucks were passing it. I also reject Mr. Dhillon's evidence apparently given for the first time in cross that the Super B was speeding up and slowing down and required minutes to pass. This evidence was inconsistent with his previous evidence at discovery and in direct, and appeared to be motivated by his desire during trial to establish a lengthy period of time that he had been established in the middle lane prior to the accident. I also note that this was not the only change in Mr. Dhillon's evidence at trial to advance that position.

**74**  I also prefer Mr. Dhillon's evidence in examination for discovery that the other Super B tractor-trailer was still ahead of him at the time of the collision for this and other reasons having to do with consistency with other evidence.

**75**  Ms. De Leon testified that in the moments leading up to the accident Mr. Uy was travelling at 70 to 80 kilometres an hour. She was generally conscious of the speed he travelled, often checking it, which she says is a habit of hers to this day. She would tell Mr. Uy if she thought he was going too fast, and she did that from time to time. However, in the time leading up to the accident, she was aware of and comfortable with his speed. There is no evidence to contradict her evidence on this point, and I accept it.

**76**  In his evidence, Mr. Dhillon speculated that Mr. Uy must have been speeding due to the extent of the damage to his car. However, he admitted both in discovery and at trial that he had no way to gauge Mr. Uy's speed and had not been monitoring his progress as Mr. Uy's vehicle approached from behind (or even that he had specifically seen Mr. Uy's vehicle at all). He was also insistent that the speed limit for passenger vehicles in this area was 60 km/hour, which is incorrect. The defendants do not rely on Mr. Dhillon's speculation as to Mr. Uy's speed in any event.

**77**  I therefore find that Mr. Uy was travelling between 70 to 80 kilometres per hour.

**78**  The defendants do say that this speed, 70 to 80 kilometres an hour, was still excessive for these conditions. I will address that issue below. However, I note here that Mr. Jackson testified that 80 kilometres per hour was an appropriate speed for these conditions provided that a vehicle had snow tires. He also confirmed that Mr. Uy's Honda had appropriate snow tires. I note also that the emergency vehicles drove much more quickly than that to arrive on scene, with Constable Verrault stating he had driven the speed limit of 110 kilometres per hour, albeit in an SUV and with the benefit of sirens and flashing lights and the right-of-way.

***Post-Accident***

**79**  Before turning to the accident itself, I will review the evidence of the post-accident scene on the highway, as this provides some insight into the collision itself and is generally less contentious. I rely in this regard on the photographic evidence, much of which was taken by the RCMP or its I-CAR's investigation team. Some of these photographs were taken soon after the accident while it was still dark and some later in the morning once it was daylight.

**80**  I pause to note that some photographic evidence was not produced despite requests. Mr. Dhillon states that he took a series of photos and videos with his phone at the scene after the accident. He showed these photos and videos to Mr. Carter, who was retained privately to investigate the accident on behalf of plaintiff's counsel. Mr. Dhillon states that he provided those photos and videos to the adjuster for his employer, Day & Ross. They have not been produced and the representative of Day & Ross states that he personally has no knowledge of them.

**81**  The absence of these photographs is of some concern. Mr. Dhillon states that he did not move his truck from the lane it was occupying until he was directed to do so an hour and a half later by the RCMP officer. He states that he was in the middle lane at that time and brought his vehicle to a safe stop in that lane over the course of 20 to 30 seconds. However, there are no photographs that show the tractor trailer in any lane of the highway. In all of the photographs in evidence taken by others, the tractor trailer is pulled well over to the side in a portion of the highway shoulder leading to a runaway lane. There is therefore no video or photographic evidence of the stopping location of the tractor trailer immediately after the accident.

**82**  The photographic evidence that is available establishes that Mr. Uy's car had turned 270 degrees clockwise before coming to rest. Mr. Uy's car was stopped well past any identified point of impact, facing perpendicular to the lane of travel with the damaged driver's side up-road and the passenger side down-road (based on the direction of travel). The car was very heavily impacted along the driver's side, primarily in the front half of the car and particularly in the area where Mr. Uy would have been sitting in the driver's seat.

**83**  Also up-road from Mr. Uy's damaged car was scattered debris. This was referred to by the engineering experts as the "debris field." The debris field that can be seen is distributed from about the middle of what is likely the right lane of the highway to the centre of the highway with a fairly abrupt edge on the left side where traffic had been moving through in the hours before the photographs were taken. It is therefore not possible to know how far to the middle or left side of the road the debris might originally have been distributed.

**84**  There was also glass on the rear left corner of the rear trailer of Mr. Dhillon's tractor trailer combination. Mr. Dinn described the damage to the trailer, which I accept, as having the "rear underride protection beams bent inward" and "the left vertical member rotated inward and forward." Neither of these indentations appear to have affected the operation of the trailer, and Mr. Dhillon completed towing it to Hope, where he advises that another tractor pulled the trailers the rest of the way to the Lower Mainland.

**85**  Mr. Uy was taken to the trauma centre at Royal Jubilee in New Westminster in an ambulance, and Ms. De Leon was taken to the Chilliwack Hospital but then proceeded to Royal Jubilee to be with Mr. Uy.

**86**  Approximately two weeks after the accident, Ms. De Leon was interviewed and gave the statement noted above, which she signed. I note that in the police report an officer, who was not called to testify, had made notes of his interview with Ms. De Leon when she first arrived at the Chilliwack Hospital, but Ms. De Leon says those notes are not a correct version of what she said or what happened in significant material respects. I therefore cannot rely upon them.

***The Angle of Impact***

**87**  The evidence establishes, and there is no dispute, that Mr. Uy had lost control of the vehicle prior to impact, and that the vehicle was in yaw, rotating clockwise toward the left corner of Mr. Dhillon's rear trailer just before impact. The engineering evidence is agreed that Mr. Uy's vehicle struck the left corner of Mr. Dhillon's back trailer at an angle of 65 to 70 degrees.

**88**  The engineers also agree based on the tire tracks that led to Mr. Uy's vehicle and its orientation, that his car must have continued in its rotation after impact and must have been in the bare section, or left side of the road, immediately before moving backwards from that bare section of the road and into the right side of the road facing the centre of the highway.

**RESOLUTION OF MORE CONTENTIOUS FACTS**

**89**  That is the extent of the factual findings I am able to make on the basis of the physical evidence in relation to less contentious matters. I must still go on to consider the more contentious questions that ultimately go to causation, and specifically whether Mr. Uy has established that Mr. Dhillon encroached into Mr. Uy's lane of travel, suddenly and without warning, causing Mr. Uy to take evasive action that led to his loss of control and the collision.

**90**  I will first address whether the highway was operating as two lanes or three lanes at the time of the collision and where the parties' vehicles were in relation to those lanes prior to the collision. I will go on to make findings as to where the impact most likely occurred and where the vehicles were at that point.

**91**  On the basis of these factual findings, I will go on to make factual findings on the ultimate question of whether Mr. Dhillon was established in his lane at the time of the collision or whether it is more likely that he was moving to the left at the time of just prior to the collision in such a way as to encroach of Mr. Uy's lane of travel suddenly and without warning.

**The Lanes of Travel In Effect**

**92**  The plaintiffs say that at the time of the collision the highway was effectively operating as a two lane highway and that Mr. Dhillon encroached into Mr. Uy's lane of travel when he attempted to overtake the slower moving Super B. Although the plaintiffs' position is not dependent on whether the highway was operating as a two-lane highway, the resolution of this issue will assist in locating each of the vehicles involved in the moments leading up to the collision.

**93**  Mr. Dinn is a professional mechanical engineer with expertise in motor vehicle accident reconstruction. He reviewed the photographs of the scene from the RCMP file and came to a number of conclusions, some of which are accepted by the plaintiffs, and some of which are challenged.

**94**  His photo modeling of the highway and its configuration were generally accepted by the plaintiff Uy and his responding expert Dr. Toor, including the following findings:

1. The highway at this point is ordinarily three lanes of 3.65 metres width each, but at the time of the accident the roadway lines were not visible due to winter driving conditions and as such the lanes "differed considerably as compared to bare road conditions."
2. There were two distinct portions of road at the time of the accident--one a "travelled bare-like road portion on the left hand side of the road, and a more snow covered portion to the right."
3. The right edge of the travelled portion was located at about the centre of what would ordinarily be the three lanes or the centre of the middle lane.
4. As a result of the winter conditions, the main travelled portion of the highway "was straddling the marked middle and left lanes."

**95**  I have reviewed the RCMP photographs on the day of the accident and agree with this assessment of the lane configuration. In particular, I agree that the main "bare-like" travelled portion of the highway for passenger vehicles as described by Mr. Dinn straddled the marked middle and left lanes and extended into the centre of the middle lane showing what appeared to be barer tracked areas through the snow. I will refer to this barer more travelled path as the "primary path of travel."

**96**  To the left of this primary path of travel the road was still passable, but no lane was defined and there were snow accumulations against the concrete highway divider encroaching on what would have been the far left lane.

**97**  To the right of this primary path of travel the highway was still passable, and despite the encroachment I found to exist on the far right curb lane, there was more than a full lane width available to heavier vehicles, but there were not two full lane widths.

**98**  I also conclude from the photographs both of the collision scene and extending back towards the Zopkios Brake Check, that the right edge of the primary path of travel actually denotes the barer road where traffic was physically travelling. It is not a lane divider, which usually provides some buffer from the edge of the vehicle, but a strong indication of where vehicles were physically present while traveling.

**99**  I recognize that the daylight photographs were largely taken at a time when the right side of the road had been shut down because of the accident, and the left side of the road continued to have one lane of traffic moving through it, including highway maintenance vehicles that may have sanded or ploughed it further. However, even with the cones and markings that would have moved traffic to the left, these photographs still show that the travelled portion of the road on the left was straddling the centre and far left lane.

**100**  I therefore find that the highway at this point was operating as a two-lane highway, one for passenger vehicles in the primary path of travel, and one for trucks to the right. I note that this is also consistent with Ms. De Leon's unled testimony, and is consistent with independent witnesses familiar with the highway that this portion of the highway can operate as a two-lane road when the lane markings are obscured.

**101**  I specifically reject Mr. Dinn's oral evidence at trial (not stated in his report) that even though his report described two travelled sections of road, the road was actually wider because of the lack of visible lanes and still had three active lanes of traffic. This is contradicted by Mr. Jackson that the snow bank to the right of the highway was encroaching on the right lane of travel. The highway certainly could not have been any wider to the left where the left lane ended with a concrete barrier dividing the directions of traffic.

**102**  I find that as cars and trucks passed the Zopkios Brake Check in the early morning of January 31 after the significant snow fall event of the previous day, the lane markings were not visible and passenger cars would have followed the barer primary path of travel straddling the middle and third lanes, while the right lane peeled off into the brake check area for heavy trucks. When the right lane re-established itself emerging from the brake check area, it would have been occupied by the trucks leaving that area in single file.

**103**  Prior to the collision area, it may have been possible that a slower truck could have placed itself on the wider paved shoulder, although I have no evidence of how much snow bank encroachment may have existed in this shoulder area.

**104**  However, I find that at the point of the area of collision, there would have been insufficient room for a commercial truck to pass another commercial truck in the right lane without moving fully into what would ordinarily be the middle lane, and therefore into the primary path of travel of passenger vehicles at that time.

**105**  Given the encroachment into the right lane, and Mr. Dhillon's evidence that he would have provided 3 to 4 feet of space between himself and any commercial vehicle he passed, which seems prudent, I also find it more likely than not that had Mr. Dhillon been abreast of the Super B he was passing at the collision point, that he would have had to have been at least partially in what would ordinarily be the left lane.

**The Location of Impact**

**106**  The parties' experts also differed as to the likely location of impact.

**107**  Mr. Dinn placed it at the location of an arced scuff or "scrub mark" near the lines that would ordinarily have separated the right and middle lanes, 25 metres up road from where the Honda came to rest. Mr. Dinn interprets this mark as being made by Mr. Uy's Honda and indicating the most likely point of impact. Mr. Dinn elaborated in cross-examination that, although the tire marks could not be specifically associated with the Honda's tires, the location of the arcing tire marks emerging from the bare section of the road followed shortly thereafter by the scrub mark was most consistent with the tire marks he would expect as a result of a loss of control leading to a collision and not with other vehicles coming and leaving the collision scene.

**108**  Dr. Toor says that it is not possible from the photographs available and the physical evidence shown in them to determine the point of impact. Any tire marks that may have been located in the primary path of travel would have been lost as that path continued to be travelled by vehicles throughout the night after the accident. He rejects the relevance of the scrub mark relied upon by Mr. Dinn as one that could have been made by any stopping passenger vehicle. More significantly, he says that the identified point of impact is inconsistent with the location of the debris field commencing a number of metres beyond that mark, and the tire tracks of the Honda leading out from the bare primary path of travel to its final resting position 25 metres further down-road. His oral evidence was that the debris field and not the scrub mark was the best evidence of the general area of impact, and that it was not possible to determine the likely location of the impact based on the photographs and physical evidence alone.

**109**  I have seriously considered rejecting Mr. Dinn's opinion of the location of impact, relying as it does upon the location of a tire mark that is not specifically associated to the Honda, and visible in photographs taken hours after the collision in a scene where two ambulances, at least three police cars, highway maintenance vehicles and good samaritans had stopped and left again. The experts and Mr. Carter, a former police officer; and the private collision investigator, all agreed that the police investigation was seriously deficient for the purposes of reconstructing the accident, containing no measurements between various features still visible.

**110**  This could well be a case similar to what was found in *Wellington* where the experts were unable to come to a conclusion and Justice Burnyeat found that it was "impossible to attempt to ascertain what happened by examining marks on the road which may or may not have been present as a result of the accident."

**111**  However, I am prepared to give some weight to the possibility that the impact location is indicated by the scrub mark, and I will consider this evidence in light of all of the other evidence that I find to be credible and reliable.

**112**  I will therefore proceed on the basis that there is a possibility, described by Mr. Dinn, that the impact occurred with Mr. Uy's left front tire at the location where the lines would generally have been dividing the right lane from the middle lane, locating his car at a 65- to 70-degree angle to the trailer at impact and mostly in the middle lane, approximately 25 metres up road from where the Honda eventually landed, having spun into the lane of travel and reversed back across the right lane to its final resting place.

**The Location of the Vehicles at Impact**

**113**  Accepting Mr. Dinn's scrub mark as the point of impact, Mr. Dinn's report would then put the left corner of Mr. Dhillon's rearmost trailer in the middle of what would ordinarily be the centre lane of the highway, which at the time of the collision was the edge of the primary path of travel.

**114**  The arcing tire marks that Mr. Dinn assigns to Mr. Uy's Honda entering into the collision started at the edge of the primary path of travel and turned sharply to the right.

**115**  I have already found that the primary path of travel straddled the left and centre lanes, and I find that Mr. Uy was most likely following these cleared tracks in the sand and snow prior to the collision.

**116**  I also find that he must have steered sharply to the right to come to the proposed point of impact. I accept the evidence of Dr. Toor that Mr. Uy was unlikely to move sharply to the right had he just hit a slippery patch or lost control of his vehicle. Both vehicles were navigating a broad left turn, and Mr. Uy's wheels would have propelled him to the left, and not to the right, in the absence of him steering hard in that direction.

**117**  The more difficult factual issue is the orientation of Mr. Dhillon's trailer.

**118**  Mr. Dinn came to the conclusion, based on the tire marks visible in the RCMP photographs, that he could locate not only the rear left corner of Mr. Dhillon's vehicle, but also the likely location of the tractor and the orientation of the entire 75-foot combination. Specifically he concludes that Mr. Dhillon's entire tractor was in the centre of the southbound lanes (i.e. the middle lane).

**119**  The basis of Mr. Dinn's conclusion as to the likely location of the tractor at the point of impact is a set of dual tire marks leading from what would ordinarily be the middle lane to where Mr. Dhillon pulled his truck off to the side of the road. Those marks start approximately 19 metres down road of the resting location of the Honda, and therefore approximately 44 metres down road from the scrub mark potentially indicating impact. They did not run all the way to the back of Mr. Dhillon's tractor-trailer, but were pointed in that direction. Mr. Dinn describes these dual tractor tire marks as travelling briefly in a parallel direction in what would have ordinarily been the centre lane before turning to the side of the road.

**120**  Mr. Dinn further opines that given the short stopping distance to these tire tracks in the middle lane (essentially a full length of Mr. Dhillon's tractor-trailer combination) that it is likely that the tractor did not deviate significantly to the right or left of its lateral position between impact and stopping.

**121**  I have some difficulty reconciling Mr. Dinn's photo modeling of the tire tracks relied upon with parts of his opinion. For example, he shows the tractor's tire tracks entirely within what would ordinarily be the middle lane of travel, but also shows them to be entirely to the right of the centre of that lane. Mr. Dinn also states, and I have already found this to be correct, that the lanes themselves were ordinarily 3.65 metres wide, and Mr. Dhillon's tractor-trailer combination was 2.6 metres wide. It is not possible that Mr. Dhillon's tractor tires could have been entirely to the right of the centre of the middle lane and still have been entirely in the middle lane. Based on Mr. Dinn's modelling and opinion read as a whole, I find that at the point Mr. Dhillon stopped his tractor after the accident that Mr. Dhillon's tractor would have been fully in the centre lane, and that the left side of his tractor was more likely than not encroaching onto the primary path of travel for other vehicles on the road, including Mr. Uy's path of travel. This is also consistent with Mr. Jackson's brief sketch of the position of the freightliner when he arrived on scene showing the tractor trailer entirely in what would ordinarily be the centre lane.

**122**  Finally, Mr. Dinn rests his final conclusions on an opinion that the tractor-trailer combination was most likely aligned in a straight line and parallel with the lanes of travel. I understand that this opinion is largely derived from the tractor tire marks that he locates at the stopping point after the collision and which he says run briefly parallel before moving to the side of the road after impact.

**123**  However, this opinion is not consistent with Mr. Dinn's conclusion on the location of the impact and his photo modelling, which shows the back of the rear trailer straddling the lane divider between the centre and right lanes, with the tractor itself in the middle lane.

**124**  I have already found that the tractor occupying the middle lane would have been encroaching on the primary path of travel at the time of the accident, which extended to the centre of the middle lane.

**125**  I also do not consider that the photographic evidence, or Mr. Dinn's modeling of it, shows the tractor moving in parallel with the left lane for any distance sufficient to establish its path 44 metres or even 25 metres before these marks were made.

**126**  I therefore reject Mr. Dinn's conclusion that based on the photographic evidence alone it is more likely than not that Mr. Dhillon was travelling straight and parallel to the lanes of travel at the time of impact.

**127**  Rather, I find it more likely on the physical evidence reviewed and relied upon by Mr. Dinn and more supported by Mr. Dinn's conclusions that have greater support in that physical evidence that at the time of impact Mr. Dhillon's tractor was in what is ordinarily the middle lane, while his trailer was still straddling the right and centre lanes, and so was not "parallel" to the lanes of travel. This strongly suggests that Mr. Dhillon was in the process of moving from the right lane to the middle lane at the time of impact.

**128**  I must also consider the agreed-upon fact that Mr. Dhillon was in the process of attempting to overtake a Super B tractor-trailer on the right side of the highway at the time of impact.

**129**  Mr. Dinn was not advised of this fact and did not factor it into his opinion or photo modeling.

**130**  I agree with the plaintiffs that if Mr. Dhillon was actually abreast of that larger Super B at the time of impact, as he stated in his direct evidence, that he would not have been in the middle lane but would have been encroaching on what would ordinarily be the left lane of travel.

**131**  However, the physical evidence Mr. Dinn points to suggests strongly that rather than being abreast of that Super B, Mr. Dhillon was in the process of changing lanes to overtake the Super B at the time of impact and that while his intended position would have been to the left of the Super B with 3 to 4 feet of clearance between himself and that Super B, he was not yet in that position.

**132**  This conclusion is also consistent with Mr. Dhillon's evidence in examination for discovery that the Super B was still ahead of him as he was attempting to overtake it at the time of impact.

**133**  It is also consistent with the evidence of Ms. De Leon that Mr. Dhillon's tractor trailer combination had encroached partway into their lane of travel immediately prior to the collision.

**Suddenly and Without Warning**

**134**  I turn now to the critical question of whether Mr. Dhillon's lane change was sudden and without warning, or whether Mr. Dhillon had been well established in his lane of travel prior to the impact.

**135**  I have said that the physical evidence that I have accepted from Mr. Dinn's report together with the RCMP photographs indicates a possible impact location and final resting place of Mr. Dhillon's tractor-trailer combination with the rear of the trailer straddling the right and middle-lane divider and Mr. Dhillon's tractor entirely in the middle lane. I have also rejected Mr. Dinn's opinion that what may be the tractor's visible tire marks 44 metres from the impact are sufficiently clear and parallel to establish that it is more likely than not that Mr. Dhillon's tractor was entirely aligned with the middle lane as opposed to moving across it in an attempt to pass the Super B (a fact about which he was not informed).

**136**  I note that this is one area of uncertainty that Mr. Dhillon's photographs and videos may have been able to assist with.

**137**  The next question I must consider is whether the information that can be gleaned from the photographs and physical evidence can be reconciled with the witness evidence at trial and what the evidence as a whole establishes with respect to the ultimate question of whether Mr. Dhillon was well established in his lane at the time of the collision or whether Mr. Uy has established that Mr. Dhillon had, suddenly and without warning, encroached on Mr. Uy's path of travel.

**138**  Mr. Uy was unable to remember any details of the accident as a result of the injuries he sustained. It was apparent through his testimony that his loss of memory was sincere and extends well beyond the accident to other parts of his life.

**139**  The extent of Ms. De Leon's injuries were much less, and she has vivid recollections of the accident and the moments before it, although her memory is less certain of the events immediately following.

**140**  With respect to the accident itself, Ms. De Leon testified that Mr. Dhillon's tractor-trailer encroached into their lane ahead of them without signals or warning. She says that Mr. Uy steered very hard to the right to try to avoid the trailer, but Mr. Uy's side of the car collided with the rear of the trailer. She gave this evidence without leading and in various different ways throughout her testimony, and it is clear that her recollection has been largely unchanged since giving her first sworn statement to this effect a couple of weeks after the accident.

**141**  At trial, Mr. Dhillon's evidence in direct was that he had decided to overtake the longer and heavier Super B, had already made his lane change to do so into the middle lane, that the lane markings were clear, and that he was well established in this middle lane for three to four minutes and abreast of the Super B before he felt the impact from behind. He was adamant that he had not recently changed lanes and was not in the process of changing lanes in the moments leading up to the collision, that he was in the middle lane of traffic, and that faster traffic approaching from behind had access to the third lane to his left.

**142**  I must therefore resolve this direct contradiction in the testimony before me.

**143**  Ms. De Leon was the only witness to the collision itself that was able to testify as to what happened. Mr. Uy cannot, and Mr. Dhillon did not see Mr. Uy's car before impact.

**144**  There are a number of matters upon which I did not find Ms. De Leon's evidence to be reliable, particularly in her cross. She did not accurately remember that there was snow on the road. She was asked what lane she was in and when Mr. Uy moved to the left lane to pass Mr. Dhillon, and she was clearly confused by this and her answers were similarly confusing. Although she used the word "overtake" to describe that Mr. Uy's vehicle was about to pass Mr. Dhillon's tractor-trailer on the right, her evidence overall does not support the suggestion that Mr. Uy was changing lanes in order to pass Mr. Dhillon's tractor-trailer combination, but rather that it remained in its lane of travel in anticipation of passing the tractor trailer in the right lane, and that the tractor-trailer encroached into their lane of travel from the right.

**145**  Having considered all of her evidence, I find her evidence that the tractor-trailer appeared without warning to encroach in the lane she and Mr. Uy were travelling in immediately before the accident to be reliable and credible. She was clear and un-shaken in this memory at trial, demonstrating with her hands as well as her words the trailer coming partially into their lane of travel and her recollection of Mr. Uy steering sharply to the right to avoid a collision. There is no inconsistency in her evidence if it understood that her reference to the fact that Mr. Uy was preparing to "overtake" Mr. Dhillon meant passing in the left lane while Mr. Dhillon was in the right. This confusion of language is entirely understandable in the context of English being her second language, and the English language not being abundantly clear in the distinction between these two terms in any event.

**146**  In cross-examination other possibilities were put to her, including that Mr. Uy was following directly behind the tractor-trailer, speeding, and simply lost control of the vehicle. These possibilities were hard for her to comprehend, and I accept that this was because they did not accord with her memory of events.

**147**  Although Ms. De Leon is a party, her financial interests are not affected by which of Mr. Uy or Mr. Dhillon are held to be responsible for the accident. If Mr. Dhillon is not found to be liable, Mr. Uy concedes that she could likely rely on the presumption of liability with respect to unprovoked or spontaneous rear-end collisions to establish liability against him.

**148**  Ms. De Leon presently lives in Mississauga, Ontario, with her new partner and two young children, and she is no longer connected with Mr. Uy. Mr. Uy remained unconscious for weeks after the accident, and she would not have been able to be influenced by him even if he could remember the accident prior to giving her account to the police. Although she is not an entirely independent witness, her evidence was consistent on all material points, and I give her evidence considerable weight.

**149**  On the other hand, Mr. Dhillon was very inconsistent in key aspects of his evidence, changing his evidence on five different material points from his evidence under oath at discovery to trial, and each time in a way that improve his position.

**150**  Most significant of these changes in relation to the question of whether he was established in his lane prior to the collision is the changes to his evidence regarding the amount of time that he was in the passing lane attempting to pass the Super B prior to the accident. On that key evidence his estimate increased from one to two minutes at discovery to three to four minutes in direct and then changed again in direct to two to three minutes. In cross he explained these all as estimates, re-estimated the time at two to four minutes, and ultimately said that he was in the passing lane for "a while".

**151**  I find that none of these estimates are reliable. The location of the collision was less than a kilometre from the exit from the Zopkios Brake Check. Based on Mr. Dhillon's speed of 30 to 40 kilometres, which I have accepted, he would have reached the collision point in less than two minutes.

**152**  Furthermore, Mr. Dhillon's evidence in both examination for discovery and at trial was that he was behind at least four to five other trucks as they left the brake check (in trial he stated he was behind 11 or 12 trucks) and that they all passed the Super B safely before he began the process of passing the Super B. He also agreed he would not even begin to overtake another commercial vehicle until there was enough room between the vehicle he was overtaking and the next commercial vehicle ahead to safely fit between them. Even accepting the lower number of trucks ahead of him, he was unlikely to have been in a position to pass the Super B in much less than 2 minutes.

**153**  I find his evidence regarding the length of time he was in the passing lane (which he described as the middle lane of the highway as the lanes would have appeared had they been visible) to be entirely unreliable and self-serving. His sense of time is clearly not reliable in any respect.

**154**  He also answered questions with respect to how long he was in the passing lane with the response that Mr. Uy's car was right behind him before it hit him, suggesting that the evidence he gave with respect to his time in the passing lane may have been reasoned backwards from that premise.

**155**  Other relevant inconsistencies include changes in his evidence as to how long he was driving from the brake check to the accident location (6-7 minutes), and whether he saw any vehicles behind him on the road between the brake check and the accident. In examination for discovery he said that he saw headlights of a car or truck behind him before the accident, but later in that discovery he said he never saw Mr. Uy's car. At trial the evidence he gave in direct was that he did not see anything behind him before deciding to overtake the Super B, but when confronted with his admission at discovery he suggested that the lights he saw behind him "could have been anything."

**156**  He also repeated a number of times that he was certain that he had a clear view of the painted lane dividers on the highway before the collision and did not admit that he could not have had such a view until presented with photographic evidence that this was not possible. This also undermines his certainty that he was established in the middle lane at the time of the collision. Given that Mr. Dhillon was unable to see the line demarcations on the highway, there was no way for him to confirm with any degree of confidence that his Freightliner was traveling within the marked middle lane.

**157**  Mr. Dhillon was also unaware that the right lane was encroached upon by snow and insisted instead that there was a very wide paved shoulder at this point on the highway. In the absence of lane markings, he could not have known if the Super B he was attempting to overtake was in fact on the shoulder, in the right lane, or moving or encroaching into the middle lane at the point of impact where the concrete barriers had significantly narrowed the shoulder.

**158**  I have not reviewed all of Mr. Dhillon's inconsistencies and inaccuracies in his evidence. I think it is sufficient to say that where the evidence of Ms. De Leon and Mr. Dhillon conflict, I prefer the evidence of Ms. De Leon.

**159**  I therefore find on all the evidence, including the oral evidence at trial and the photographic, physical and expert evidence, that Mr. Dhillon was not established in the middle lane for any measurable length of time before the collision.

**160**  Rather I find that he had been travelling in the right lane for the one to two minutes that it would have taken him to arrive at the point where the concrete barrier on the right side of the road began to narrow, and that it was around this point that he began the process of changing lanes to overtake the Super B.

**161**  There were only two safe lanes of travel at that point, and up to that point Mr. Dhillon had been in the right lane, as Ms. De Leon described him to be.

**162**  Just prior to impact, I find that Ms. De Leon's evidence and the physical evidence as I have described above, establish that Mr. Dhillon was in the process of moving to the left into what would ordinarily be the middle lane, but in fact encroached upon the primary lane of travel that Ms. De Leon and Mr. Uy were traveling in, with the goal of passing the Super B ahead of him that was fully occupying the right lane and was likely encroaching into the middle lane as well, although that may not have been apparent to Mr. Dhillon.

**163**  At the time of impact, Mr. Dhillon's tractor had just moved fully into what was ordinarily the middle lane encroaching on the primary path of travel and was, I find, still moving gradually to the left and his rear trailer was still straddling the right and centre lane. I also accept Dr. Toor's evidence that because Mr. Dhillon's rear trailer was at the end of a long fulcrum, the movement of his rear trailer may have been exaggerated, moving more quickly into place behind its tractor as Mr. Dhillon moved to the left to overtake the Super B.

**164**  Ms. De Leon says that this movement occurred without warning. Mr. Dhillon said that he would have turned his left signal on before making this change, which would have changed his four way flashing hazard lights to indicate a left turn. I have to determine this issue on a balance of probabilities based on my assessment of the credibility of the parties.

**165**  I do not accept Mr. Dhillon's evidence for the following reasons:

1. First, I have found him to be an unreliable and self-serving witness.
2. Second, Mr. Dhillon admitted in examination for discovery that he did see headlights coming from behind him. However, he assumed, indeed believed very strongly, that he did not have to concern himself with that vehicle because it would be able to make use of the third passing lane and that his actions in passing the Super B in what he considered to be the middle lane would not affect that third lane or the ability of the oncoming car to pass his tractor trailer. I find Mr. Dhillon made this assumption in part because he considered this a routine drive in fairly routine winter conditions, and both at the scene and in court he was adamant that a third lane was open to Mr. Uy to pass him.

**166**  I find Mr. Dhillon was wrong in that belief and assumption and that he was careless in making that assumption given the lack of lines on the road. Had he been more attentive to the vehicle behind him and the path of the faster moving traffic as he emerged from the brake check, he would have realized that there was no active middle lane and moving into what was ordinarily the middle lane would encroach on the primary lane of traffic for faster-moving vehicles and the approaching vehicle's path.

**167**  Given Mr. Dhillon's carelessness to the traffic approaching from behind and the many self-serving discrepancies in his evidence, I cannot accept his evidence over that of Ms. De Leon as to whether he was signalling.

**Mr. Uy's Evasive Action**

**168**  I have found that Mr. Dhillon's tractor-trailer combination encroached on Mr. Uy's lane of travel suddenly and without warning. I find that in reaction and in order to evade this sudden and unexpected hazard, Mr. Uy steered aggressively to the right in the opposite direction he saw that the tractor trailer was moving. Mr. Uy lost control of the car, and it rotated clockwise hitting the rear left corner of the tractor trailer in the driver area and causing his injuries.

**169**  In this moment, it was not incumbent on Mr. Uy to pick the best type of evasive action. Mr. Dhillon says that Mr. Uy could have and should have moved to his left, where Mr. Dhillon says the left lane was not obstructed. Indeed Mr. Dinn's final opinions about the likely cause of the accident, which I have rejected, are premised on this presumption.

**170**  However, it is not clear to me, and it would not have been clear to Mr. Uy, that moving to the left, the same direction as the tractor-trailer was moving, would have been a safer option. I have found that Mr. Dhillon was moving to the left to overtake a large Super B combination that itself was shifted to the left by a snow bank in the right lane that Mr. Dhillon was not aware of. In order to overtake this Super B, Mr. Dhillon was required to continue to move further to the left and I find he was in the process of doing at the time of impact.

**171**  As has often been quoted from *Brook v. Tod Estate*, citing *Carswell's Manual of Motor Vehicle Law*, , Volume III, 3rd edition, at page 22:

Where an emergency arises, it is not necessary for a driver to possess extraordinary skill, presence of mind, poise or self-control, and his failure to act as an ordinary person in an emergency is not held to be ***negligence***. He is not necessarily required to adopt the most prudent course and is entitled to a reasonable time, depending on the circumstances, to exercise his judgment as to what steps should be taken to avoid a collision [citations omitted].

**172**  I find nothing careless or negligent in Mr. Uy's spontaneous evasive manoeuvre in the "agony of the collision" to steer aggressively to the right in an attempt to avoid the tractor trailer.

**CONCLUSION ON LIABILITY OF MR. DHILLON**

**173**  In conclusion, Mr. Dhillon had a duty to be aware of the traffic around him and to be patient and watch for emerging traffic from his blind spots before commencing or continuing with his lane change. In conditions where the highway lane markings were not visible, I find Mr. Dhillon had a duty to be aware of the actual paths of travel of vehicles in the faster lane to his left, and not to move to overtake another commercial vehicle unless he was sure it was safe to do so.

**174**  At the time of the collision Mr. Uy's vehicle was there to be seen. He was established in the primary path of travel and his headlights were on, and Mr. Dhillon had a 300 metre rearward view in his mirrors. Mr. Dhillon's failure to see Mr. Uy and in moving to overtake the Super B without ensuring that he would not encroach on Mr. Uy's path of travel was negligent.

**175**  I find that the cause of this collision was the sudden encroachment of Mr. Dhillon's tractor-trailer combination into Mr. Uy's established path of travel.

**176**  I therefore find that Mr. Uy has made out all of the elements of ***negligence*** in his case against the defendants Dhillon and Day & Ross. Ms. De Leon has also made out those elements.

**177**  I turn, then, to whether the defendants have established that Mr. Uy was contributorily negligent in his own case or contributed to the injuries of Ms. De Leon.

**CONCLUSION ON CONTRIBUTION OF MR. UY**

**178**  As I discussed above, there is a presumption or onus in rear-end collisions that the following driver is at fault for failing to keep a safe distance for the conditions. In the ordinary case these are conditions that involve one vehicle following another and failing to stop in time when the lead car stops unexpectedly.

**179**  This is not that typical case. Both vehicles were moving at speed, and I have found that the accident was caused by Mr. Dhillon moving into Mr. Uy's lane of travel suddenly and unexpectedly, rather than unexpectedly stopping in front of him. Mr. Uy was anticipating passing Mr. Dhillon to his left in the moments prior to the collision, and there is no reasonable basis to suggest that he should have been keeping a safe distance from the rear of Mr. Dhillon's trailer while he was in a different path of travel.

**180**  Given these circumstances, I find that the defendants are not able to rely on the presumption of liability in rear-end collisions, or putting it another way I find that the presumption in those cases has been rebutted on the proven facts.

**181**  The defendants have led no other evidence of inattentiveness or carelessness on Mr. Uy's part. Rather they say I should find that Mr. Uy's speed of 70 to 80 kilometres an hour is objectively unreasonable in these circumstances and that had he been driving more slowly, he could have avoided the collision.

**182**  It is not enough for a defendant to point at the plaintiff and allege wrongdoing. It is critical that the defendant also prove that a plaintiff's failure to take reasonable care contributed to the injuries suffered: See *Wormald v. Chiarot*, [*2016 BCCA 415*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M37-6RB1-FJDY-X090-00000-00&context=), at paragraphs 14 to 15, which read as follows:

[14] The analysis for contributory ***negligence*** involves two considerations: (1) whether the plaintiff failed to take reasonable care in her own interests; and (2) if so, whether that failure was causally connected to the loss she sustained: *Enviro West Inc. v. Copper Mountain Mining Corporation*, [*2012 BCCA 23*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1HK-00000-00&context=) at para. 37.

[15] To satisfy the requirement of a causal connection between the plaintiff's breach of the standard of care and the loss sustained, the defendant must establish more than that but for her ***negligence***, the damage would have been avoided. The plaintiff's conduct must be a "proximate cause" of the loss in that the loss results from the type of risk to which the appellant exposed herself: *Bevilacqua v. Altenkirk*, [*2004 BCSC 945*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X06X-00000-00&context=) at paras. 39-43 (per Groberman J., as he then was). In other words, the plaintiff's carelessness must relate to the risk that made the actual harm which occurred foreseeable: *Cempel v. Harrison Hot Springs Hotel Ltd*. [*(1997), 43 B.C.L.R. (3d) 219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=), [*[1998] 6 W.W.R. 233*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=) (C.A.) at para. 13.

**183**  The defendants rely upon *Mawani v. Pitcairn*, [*2012 BCSC 1288*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2JB-00000-00&context=), to support their argument for contributory ***negligence*** on grounds that Mr. Uy was going too fast for the conditions. However, I note in that case evidence was led about causation in the form of perception response time to support the finding (at para. 72).

**184**  In this case I have no such evidence. While I do accept that I do not need evidence on standard of care to determine what the appropriate standard is, I cannot find on the evidence before me that Mr. Uy's speed of 70 to 80 kilometres was careless or negligent. Mr. Jackson said that he considered 80 kilometres an hour to be an appropriate speed for the conditions for a passenger vehicle equipped with snow tires, and Mr. Uy's vehicle was so equipped. I do not agree with the defendants that while that speed may have been appropriate for Mr. Jackson, who knew this portion of the highway intimately, it was negligent in Mr. Uy's case.

**185**  Nor do I have any evidentiary foundation upon which to find that Mr. Uy would have avoided the accident at any speed lower than the one he was driving at short of not exceeding the speed of Mr. Dhillon's tractor-trailer. The evidence before me, however, does establish that tractor-trailer combinations are required to go significantly slower than passenger vehicles down the steep grade involved here and that indeed Mr. Dhillon fully expected to be passed by such vehicles.

**186**  I conclude that there was nothing that Mr. Uy could have reasonably done to avoid the collision. He was driving well below the speed limit. His Honda had snow tires and his headlights were activated. There is no evidence to suggest that Mr. Uy's Honda had any mechanical problems that could have contributed to the collision. There is no reliable evidence to suggest that Mr. Uy was distracted.

**187**  I find the defendants have not established that Mr. Uy was contributorily negligent or that he contributed to Ms. De Leon's injuries.

**CONCLUSION**

**188**  I want to thank counsel very much for their excellent, organized and focused submissions before me that allowed me to give these reasons today.

**189**  I will now hear brief submissions on costs.

**(SUBMISSIONS ON COSTS)**

**190**  THE COURT: All right. Well, let me say that obviously the missing evidence was not critical because I still found in the plaintiff's favour. So it was not critical to the plaintiff's case, and it was not intentional and I do not find any reprehensible conduct to be made out in this case. What did concern me is the possibility that the lack of that production may have caused additional costs in the course of the ordinary discovery, and what I would be willing to consider and I will go on to hear your submissions on this, is whether or not some kind of double costs of discovery or some element of discovery would be warranted.

**191**  Special costs are almost more expensive to collect than they are worth in some cases. Also I do not think that special costs are warranted on the law or on the facts of this case, but what I am prepared to consider, as I said, is some sort of additional tariff, doubling of some tariff items having to do with discovery. If there is some submission or evidence before me that discoveries were lengthened or prolonged because of the need to obtain those documents or the attempts to obtain those documents.

**(SUBMISSIONS ON COSTS)**

**192**  THE COURT: I am not prepared to do that, and I am not going to make Mr. Rogers stand up. I am going to say this. So ordinary costs are awardable to both plaintiffs, or each of the plaintiffs in each of their actions, from what I would refer to as the main defendants, that would be Mr. Dhillon and Day & Ross, and also pursuant to Rule 14-1(18). The defendant Uy is entitled to have his costs or have any costs that would be against him be paid by those main defendants, Mr. Dhillon and Day & Ross.

**193**  With respect to the additional costs, with respect to the failure to provide discovery that is, we do not know with certainty whether or not that evidence would have made a difference, and as I said, I am not prepared to give special costs on the basis of reprehensible conduct. I do not think that is made out here, and I am not prepared to give double costs of the trial.

**194**  What I am prepared to do, and it is the only thing that was brought to my attention, was an attempted application that did not go ahead. I am prepared to give double costs of that application, and that is the extent of the remedy that I would give for the inability to find and disclose those documents. All right.

F.V. MARZARI J.

**End of Document**

[***Lutter v. Smithson, [2013] B.C.J. No. 133***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M366-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

M.D. Macaulay J. (In Chambers)

Heard: January 10, 2013.

Judgment: January 28, 2013.

Docket: 08-5320

Registry: Victoria

**[2013] B.C.J. No. 133** | 2013 BCSC 119 | 225 A.C.W.S. (3d) 874 | 18 C.C.L.I. (5th) 294 | 2013 CarswellBC 185

Between Jeremy Lutter, Plaintiff, and Dallas Parker Smithson, Vonnie Zimmerman, Glen Mazu, Tralee Mazu, Leslie Duane Collins, in his capacity as the Executor of the Estate of Howard Allan Collins, Deceased and Vernon Taxi Inc., Defendants, and Insurance Corporation of British Columbia, Glen Mazu, Tralee Mazu, Leslie Duane Collins, in his capacity as the Executor of the Estate of Howard Allan Collins, Deceased and Vernon Tax Inc. and Dallas Parker Smithson, Third Parties

(31 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Judgments and orders — Summary judgments — To dismiss action — Application by Mazu defendants for summary judgment dismissing claims dismissed — Mazus allowed daughter to host BYOB party on their property — Defendant Smithson, who was under legal drinking age, collided with taxi in which plaintiff was travelling after he drove away from party drunk — Novel question of liability arising out of consumption of alcohol by minor at party hosted on Mazus' property was better addressed after full trial.**

**Tort law — Practice and procedure — Application by Mazu defendants for summary judgment dismissing claims dismissed — Mazus allowed daughter to host BYOB party on their property — Defendant Smithson, who was under legal drinking age, collided with taxi in which plaintiff was travelling after he drove away from party drunk — Novel question of liability arising out of consumption of alcohol by minor at party hosted on Mazus' property was better addressed after full trial.**

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| Application by the Mazu defendants for summary judgment dismissing all claims against them. The Mazus permitted their daughter to host a BYOB party on their property to celebrate her 19th birthday. The defendant Smithson, who was 18 and one-half years of age, attended the party and became very drunk. He later drove away from the party and was involved in a collision with a taxi in which the plaintiff was a passenger. The plaintiff commenced an action against Smithson and others for his alleged injuries and losses. He claimed against the Mazus for breach of alleged duties owed, as social hosts, including permitting Smithson, a minor, to consume alcohol on their property. The other parties opposed the Mazus' application on the basis that the matter was not suitable for summary judgment and, alternatively, that the evidence demonstrated that the Mazus, as social hosts, owed a duty of care to users of the road, which they breached.  HELD: Application dismissed.  The novel question of liability arising out of the consumption of alcohol by a minor at a party hosted on the Mazus' property was better addressed after a full trial. That approach ensured the most complete record possible. There was a significant risk of injustice in attempting to determine the answers to the essential questions raised by the Mazus on a summary trial. |

**Statutes, Regulations and Rules Cited:**

Liquor Control and Licensing Act, RSBC 1996, CHAPTER 267, s. 33(1)(c)

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

Supreme Court Civil Rule, Rule 9-7(2), Rule 9-7(3)

**Counsel**

Counsel for the Plaintiff: A. Wrona.

Counsel for the Defendant Vonnie Zimmerman: S.M. Katalinic.

Counsel for the Third Party Insurance, Corporation of British Columbia: S.M. Katalinic.

Counsel for the Third Parties Glen Mazu and Tralee Mazu: L.P.S. Folick.

**Reasons for Judgment**

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| **M.D. MACAULAY J.** |

**1**   In April 2008, Glen Mazu and Tralee Mazu permitted their daughter, Brianne, to host a Bring Your Own Bottle ("BYOB") party on their property to celebrate her 19th birthday. Unfortunately, one of the invited guests, then 18 1/2 year old Dallas Parker Smithson, became very drunk; eventually left the property; drove away in a vehicle; and shortly afterwards, was involved in a collision with a taxi, in which the plaintiff, Jeremy Lutter, was a passenger.

**2**  Lutter claims damages against Smithson and others for his alleged injuries and losses. The defendant, Vonnie Zimmerman, was the owner of the vehicle that Smithson was driving at the time of the accident. The claims against the Mazus are for breaches of alleged duties owed, as "social hosts", including permitting Smithson, a minor, to consume alcohol on their property contrary to the *Liquor Control and Licensing Act,* [*R.S.B.C. 1996, c. 267*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5MS4-PW61-DYV0-G06J-00000-00&context=) (the "*LCLA*"). The matter is currently scheduled for a 20 day trial commencing in late February 2013.

**3**  In a related proceeding (the "Collins action"), arising out of the death of the taxi driver, Howard Allan Collins, Zimmerman and the Insurance Corporation of British Columbia ("ICBC") also joined the Mazus as third parties. Neither the Collins estate nor any plaintiff in the Collins action took a position on the Mazu applications described below. Counsel did not provide me with any of the pleadings or orders in the Collins action. I assume that there is an order in place that both matters be heard at the same time and further, that counsel in the Collins action can agree as to the terms of any order that should flow from these reasons in that action. They will have liberty to speak to the matter if they cannot agree.

**4**  The Mazus seek summary judgment dismissing all claims against them. Lutter, Zimmerman and ICBC say that the matters are not suitable for disposition under *Supreme Court Civil Rule* 9-7(2) (the "summary judgment rule") and, in the alternative, that the evidence demonstrates that the Mazus, as social hosts, owed a duty of care to users of the road which they breached.

**5**  The Mazus are understandably motivated to bring their application in the expectation that a successful outcome will obviate the need for them to participate in the upcoming potentially lengthy trial. They say that putting them to a full trial would amount to a travesty of justice in the circumstances. Although they filed their application on October 31, 2012, it was not heard until January 10, 2013, barely within the 42 day before trial requirement set by Rule 9-7(3). Given the nature of the application, it should not have been left to such a late stage before proceeding with the hearing.

**6**  The application respondents say that the issues raised are interconnected with other issues that must proceed to regular trial and, in any event, the matter is inappropriate for a just determination on affidavit evidence under the summary judgment rule. For the reasons that follow, I accept the application respondents' submissions and dismiss the Mazus' summary judgment application.

**7**  The allegation against the Mazus is that, as social hosts, they owed a duty of care to users of the road that they breached. The alleged breaches, as set out in the amended pleadings of Zimmerman and ICBC, are:

1. in permitting the Defendant Dallas Smithson ("Smithson") to consume alcoholic beverages on their property located at 7015 Highway 6, in Vernon, British Columbia (the "Premises") when he was not legally of age to do so;
2. in failing to maintain proper or any control over the amount of alcohol consumed on the Premises, particularly given that many of the individuals on the Premises, including Smithson, were minors;
3. in failing to use reasonable, proper or any care to control the consumption of alcohol on the Premises particularly given that many of the individuals on the Premises, including Smithson, were minors;
4. in serving alcoholic beverages in a reckless, careless and improper manner or without regard to the safety of Smithson, the Plaintiff or others, particularly given that many of the individuals on the Premises, including Smithson, were minors;
5. in failing to take away the keys of the vehicles which were located on the Premises so as to ensure the individuals on the Premises, including Smithson, could not enter into and drive a motor vehicle when their judgment was impaired by the consumption of alcohol, particularly given that many of the individuals on the Premises, including Smithson, were minors;
6. in allowing and/or permitting Smithson to enter into and drive a motor vehicle when they knew or ought to have known that his judgment was impaired by the consumption of alcohol;
7. in failing to take reasonable steps to arrange a safe ride home for Smithson when they knew or ought to have known that his judgment was impaired by the consumption of alcohol

**8**  Lutter, in an amended statement of claim, adds the following allegations respecting the Mazus:

1. they continued to serve alcoholic beverages to the Defendant, "Smithson" even though he was clearly visibly intoxicated;
2. even though the Defendant, "Smithson" was clearly intoxicated they took no or inadequate steps to get his car keys or offer him an alternate way home;
3. they had the last clear chance to prevent the Defendant, "Smithson" from operating his motor vehicle when he was visibly intoxicated and where it would reasonably be assumed that he would constitute a danger to other users of the highway in his intoxicated state.

**9**  The available evidence includes the affidavits of Tralee Mazu, Glen Mazu, Brianne Jespersen (their daughter), Brett Jespersen (Brianne's husband and boyfriend at the material time), Sara Wallis (guest), Caitlee Lewis (guest), Dallas Smithson (guest and defendant driver). All of this evidence is properly admissible on the merits of the summary trial application.

**10**  As well, extracts from the examination for discovery of Smithson are in evidence, along with various documents attached as exhibits to the affidavit of a lawyer acting for Zimmerman and ICBC. Most of the latter is inadmissible on the merits, although I have relied on it to determine whether the case is appropriate for disposition under the summary judgment rule. In that regard, I have reviewed the following:

1. Certificate of Qualified Technician showing Smithson had blood alcohol readings of 150 and 140 milligrams of alcohol in one hundred millilitres of blood taken at 4:15 a.m. and 4:38 a.m., after the accident;
2. Hospital emergency record for Smithson after the accident;
3. Brianne's statement to the police dated April 20, 2008;
4. Police Occurrence Report dated April 20, 2008;
5. Police Occurrence Report dated April 24, 2008;
6. RCMP Toxicology Report dated June 23, 2008, re Smithson showing blood alcohol concentration at the time of driving in the range of 165-189 mg%;
7. Extracts from the examination for discovery of Tralee Mazu; and
8. Expert report regarding Smithson's alcohol consumption regarding, among other things, probable minimum alcohol consumption, given the known blood alcohol concentration levels.

Admissions obtained on examination for discovery are admissible on a trial of the merits but it is very doubtful that the remainder of the documents listed immediately above would be. In my view, their content opens a door to potential cross-examination at trial on issues relevant to determining the existence of the alleged social host duty and breach.

**11**  The application respondents complain, in part, that not all the guests at the party provided affidavits but I do not accept that contention. The evidence does not reveal the exact number who attended the party, although it certainly extends well beyond those who provided affidavits. Brianne had permission to invite 30 to 40 guests and several are identified in the evidence who have not provided evidence. All parties had ample opportunity to obtain affidavits from whomever they wished. If the evidence was otherwise sufficient, the absence of further evidence from guests at the party would not be an adequate reason to find it unjust to decide the issues.

**12**  The application respondents also say that the court should be cautious in deciding a discrete issue in the litigation as I am asked to do here. This is particularly so because there are allegations of ***negligence*** against multiple parties, including against Lutter.

**13**  If Lutter is partially at fault, any defendant(s) against whom he ultimately succeeds will only be liable in proportion to the degree to which each person is at fault (***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=)). Depending on the circumstances at the end of trial, the court may even have to consider the degree to which the fault of a non-party caused damage.

**14**  This raises the spectre that a finding now that the Mazus are not liable may embarrass the trial judge if she or he is required to assess individual fault. Of course, the problem is exacerbated if I were to conclude on this application that the Mazus owe a duty of care which they breached. The additional evidence before the trial judge might well support a different conclusion.

**15**  As a more general proposition, I am satisfied that the novel question of liability arising out of the consumption of alcohol by a minor at a party hosted on a defendant's property as raised in this case is best addressed after a full trial. That approach ensures the most complete record possible. In reaching that conclusion, I take into account the additional costs to the Mazus associated with the trial process but there is otherwise no prejudice. In *Sidhu v. Hiebert,* [*2011 BCSC 1364*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62DC-00000-00&context=), the summary judgment application judge reached a similar conclusion.

**16**  In *Sidhu,* the plaintiffs were passengers in a vehicle involved in a collision with a vehicle that Hiebert was driving. The plaintiff alleged that Hiebert got drunk at a party that the co-defendant, Rattan, hosted. The plaintiffs alleged fault against Rattan under a theory of social liability.

**17**  Rattan applied for summary judgment to have all claims against him dismissed. He relied, as the Mazus do here, on the Supreme Court of Canada decision in *Childs v. Desormeaux,* [*2006 SCC 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B16R-00000-00&context=), to demonstrate that a social host owed no duty to monitor a guest's alcohol intake while at his house or to take any steps to protect other users of the highways when the guest decided to drive away from his house.

**18**  Justice Johnston concluded in *Sidhu* that the findings of fact necessary to determine whether Rattan owed a duty of care should not be made on affidavits (para. 41). In particular, he observed that evidence relevant to foreseeability was identified in a statement made by a witness to the police, although no affidavit was available from the witness. Similarly, as I noted above, there is evidence before me not admissible at trial that demonstrates potential avenues for cross-examination.

**19**  The Mazus contend that *Sidhu* is distinguishable because the conflict in the evidence concerned whether Rattan should have known that Hiebert was intoxicated. Counsel submits there is no such conflict in the present case partially because, on the uncontradicted evidence, the Mazus did not supply liquor to any of the guests at the party and because Mrs. Mazu admits that Smithson was intoxicated. Mrs. Mazu deposes, however, that she had no reason to expect him to drive. Counsel contends, as a result, that there are no material disputes on the evidence.

**20**  The application respondents say that Mrs. Mazu's assertion that she had no reason to expect Smithson to drive must be assessed in the context of all the trial evidence, including cross-examination of individuals who were present during the party. Having reviewed *Childs,* I agree.

**21**  *Childs* is a very important decision relating to social host liability. In determining the sufficiency of the affidavit material here and whether it is just to decide the issues on summary judgment, a review of the principles that emerge from the case assists.

**22**  In *Childs,* the defendant homeowners hosted a party, during the course of which they served a small quantity of alcohol to adult guests. For the most part, the event was "BYOB". The defendants knew that one of the guests, Desormeaux, was known to be a heavy drinker. As Desormeaux walked to his car to leave, one of the hosts inquired if he was okay to drive. Desormeaux responded affirmatively and drove away. The accident ensued.

**23**  *Childs* was the first time the Supreme Court considered whether social, as opposed to commercial, hosts who invite guests to an event where alcohol is served owe a duty of care to third parties who may be injured by intoxicated guests (para. 8).

**24**  The court did not accept that the existence of a duty on the part of commercial hosts could be extended, by analogy, to the hosts of a private party (para. 23). Accordingly, the court went on to apply the first stage of the *Anns* test (*Anns v. Merton London Borough Council*, [1978] A.C. 728), and concluded, for two reasons, that the necessary proximity had not been established (para. 26):

First, the injury to Ms. Childs was not reasonably foreseeable on the facts found by the trial judge. Second, even if foreseeability were established, no duty would arise because the wrong alleged is a failure to act or nonfeasance in circumstances where there was no positive duty to act. [Emphasis added.]

**25**  Of potential significance here, the trial judge in *Childs* never found that the hosts knew, or ought to have known, that the guest who was about to drive was too drunk to do so. For that reason, foreseeability, and accordingly proximity, were not established. Although there was evidence that Desormeaux had a high blood alcohol rating, evidence that the hosts knew of his intoxication was absent (para. 28).

**26**  At first blush, Mrs. Mazu's admission that she knew Smithson was drunk before he left the party appears to fill the foreseeability gap that the Supreme Court first identified in *Childs.* That appears to strengthen the application respondents' contention that foreseeability may be established here.

**27**  As to the second point made in *Childs* respecting the lack of a positive duty to act, the hosts and guests were all adults. The court identified the lack of paternal relationship between host and guest, coupled with the autonomy of the guest, as factors that militated against imposing a positive duty to act on the hosts (see paras. 42-45).

**28**  In the present case, the application respondents point out that s. 33(1)(c) of the *LCLA* forbids a host permitting a minor to consume liquor "in or at a place under his or her control." At the material time, the uncontradicted evidence is that Smithson was 18 years old and, accordingly, a minor. I agree with the respondents that this may militate in favour of imposing a positive duty. The evidence also reveals that other minors were present at the party, although it may be that most were also close to the age of majority.

**29**  To adopt some of the language in *Childs,* found at para. 45, these distinctions raise the question whether an adult host is actively implicated in the creation or enhancement of the risk if she permits an underage person on her property to consume alcohol to the point of intoxication, perhaps extreme intoxication. As in *Sidhu,* that important question is, in my view, better left to be determined upon the fullest record available after a regular trial. Accordingly, it would be unjust to decide the issue on a summary judgment application.

**30**  There is, in my view, a significant risk of injustice in attempting to determine the answers to the essential questions that the Mazus raise in this case on a summary trial. I dismiss the application. It is accordingly not necessary for me to review the detailed evidence filed on behalf of the Mazus, including the basis for Mrs. Mazu's belief that Smithson would not drive and her reasons for not taking additional steps to reduce the risk that he might do so.

**31**  The application respondents should have approached this application differently and sought a separate determination whether it was appropriate for determination under the summary judgment rule. I decline to order any costs in their favour.

M.D. MACAULAY J.

**End of Document**

[***0932053 B.C. Ltd. v. TBM Holdco Ltd., [2018] B.C.J. No. 421***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RWF-9X71-K0BB-S33R-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.D. Burnyeat J.

Heard: September 19-23, 26-30, October

3-6, 14-18 and December 14, 2016.

Written submissions received October 20, 2017.

Judgment: March 9, 2018.

Docket: S142528

Registry: Vancouver

**[2018] B.C.J. No. 421** | 2018 BCSC 368 | 30 C.P.C. (8th) 378 | 2018 CarswellBC 545

Between 0932053 B.C. Ltd. and 0939687 B.C. Ltd., Plaintiffs, and TBM Holdco Ltd. Chalifour Canada Ltd., TBM Property Ltd., Tim-Br Marts Ltd., Purple Cow Retail Services Ltd., Timber Mart Retail Services Ltd., Carrying on Business as Tim-Br Mart Group and Tim-Br Mart, Tim-Br Mart Group and Tim-Br Mart., Defendants, and Timothy Urquhart, Third Party

(197 paras.)

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Civil Rules, Rule 1-3(1), Rule 3-1(1), Rule 3-4(7), Rule 3-5(a), Rule 3-5(1), Rule 3-5(1)(a) C Rule 9-8(5)

British Columbia Supreme Court Civil Rules, Rule 22, Rule 22(1), Rule 22(1)(c)

Canada Business Corporations Act, [*R.S.C. 1985, c. C-44, s. 122*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5XBT-KM61-JG02-S3GT-00000-00&context=)(1)(a)

Court Order Interest Act, *R.S.B.C. 1996, c. 79*,

Law and Equity Act, [*R.S.B.C. 1996, c. 253, s. 10*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-F4NT-X094-00000-00&context=)

***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 the Plaintiffs: J. Hunter, Q.C., C. DiPuma.

Counsel for the Respondents: H.R. Anderson, U. Radoja, A. Way.

Counsel for the Third Party: E. Miller, S. Hern.

**Reasons for Judgment**

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

**1**   The Plaintiffs, 0932053 B.C. Ltd ("053") and 0939687 B.C. Ltd. ("687") are companies incorporated within British Columbia. Norman Liefke is the sole shareholder, director, and officer of 053 and 053 is the sole shareholder of 687. Mr. Liefke is the sole director and officer of 687.

**2**  687 was the owner of a ten acre parcel of land located in Delta ("Lands").

**3**  TBM Holdco Ltd. ("TBM") is a company incorporated pursuant to the laws of Canada with a registered office in Winnipeg. The Defendants, Chalifour Canada Ltd. ("Chalifour"), TBM Property Ltd. ("Property"), Tim-Br Marts Ltd. ("Marts") and Timber Mart Retail Services Ltd. ("Retail") are companies incorporated pursuant to the laws of Canada with registered offices in Calgary and registered in British Columbia as extra-provincial companies.

**4**  TBM, Chalifour, Property, Marts, and Retail carried on business individually and collectively as the "Tim-Br Mart Group" and "Tim-Br Mart" (collectively the "Tim-Br Mart Group").

**5**  At all material times, Timothy Urquhart was a Director of Chalifour, Property, Marts, and Retail and, prior to July 24, 2013, was the President and Chief Executive Officer of the Tim-Br Mart Group. After July 24, 2013, Michael Westrum was the acting Chief Executive Officer of the Tim-Br Mart Group.

**6**  Chalifour had to vacate its existing distribution facility in Surrey by the end of December of 2013 and, although it might have been able to obtain an extension of its lease to the end of June of 2014, it was apparent that Chalifour needed to move by March 1, 2014 in order to have enough time to set up at a new facility.

**THE LANDS**

**7**  On March 23, 2012, the Municipality of Delta agreed to sell the Lands to Conwest Real Estate Corp. ("Conwest"). On May 3, 2012, Conwest assigned its interest in the purchase agreement to 687. Conwest agreed to sell the Lands to Mr. Liefke in exchange for the commitment of Mr. Liefke to retain Conwest to do the site preparation, design and construction work for a new building on the Lands.

**POSSIBLE LEASE OF THE LANDS**

**8**  Andrew Allen, the General Manager and Vice-President of Chalifour, and Grant Harris, the Operations Manager for Chalifour were tasked with finding a new distribution facility for Chalifour.

**9**  Mr. Liefke had been a supplier to the Tim-Br Mart Group for many years. He developed an interest in building on the Lands to house his own business and to generate income from other tenants ("Facility").

**10**  Mr. Liefke advised Mr. Urquhart that he was planned to build on the Lands and that the Facility might be suitable for the distribution centre needs of the Tim-Br Mart Group ("Centre").

**11**  In the Spring of 2012, Messrs. Liefke and Urquhart had discussions regarding the design and construction of a Centre. The size of the Lands permitted a building of approximately 230,000 square feet more or less. Mr. Urquhart advised that the Tim-Br Mart Group required approximately 140,000 square feet for a centre.

**12**  The Tim-Br Mart Group retained Kom Lynn Associates Ltd. ("Kom Lynn") and SSDG Interiors Inc. ("SSDG") to determine the specifications of and design of tenant improvements in the Facility if it was to be occupied by the Tim-Br Mart Group as its Centre.

**13**  In July of 2012, Conwest commenced the design of a site plan and a shell building centre incorporating the requirements of the Tim-Br Mart Group.

**14**  In August of 2012, Mr. Liefke requested that Conwest provide fee proposals from consultants for the design and build of the Facility.

**15**  In November of 2012, Kom Lynn commenced the design of the Improvements.

**16**  In November of 2012, Mr. Liefke presented a proposal to Mr. Urquhart featuring a ten year lease with a five year renewal, $1,400,000 per year rent, a design which would suit the needs of the Tim-Br Mart Group, and flexible rental rates to make sure that the Centre would be economically feasible for the Tim-Br Mart Group.

**17**  In December of 2012, Kom-Lynn recommended that the footprint be increased approximately 3,000 square feet to 135,080 square feet. It was later decided that only 600 additional square feet would be required. On December 21, 2012, Mr. Urquhart advised Bret Walters, the new General Manager of Chalifour that "this is about our new Vancouver DC. Norm [Liefke] is the owner of the land and building. Grant [Harris] is your resident Vancouver manager".

**18**  Mr. Urquhart advised Mr. Liefke that any proposal would require the approval of the Board of Directors of the Tim-Br Mart Group.

**19**  Peter Woerler, the Project Manager of Conwest described the work undertaken to prepare the Lands for construction included a preload process whereby sand was placed on the area of the Facility footprint for several months in order to replicate the approximate weight of the Facility. In order for the preload process to commence, the basic footprint of the Facility had to be defined. It was the evidence of Mr. Woerler that he understand that the Tim-Br Mart Group would be occupying Unit 100 situated at the west end of the Facility and that it would be occupying approximately 125,000 square feet.

**20**  Two changes were made to the design of the Facility to accommodate the requirements of the Tim-Br Mart Group: the footprint of the Facility was expanded to allow for an in-site drive-though loading area and additional preload material was applied to 15,000 square feet of space to accommodate the storage by the Tim-Br Mart Group of heavy inventory items such as drywall. The preload process was complete by the end of December of 2012 and the cost of the additional preload of approximately $220,000 was paid by Mr. Liefke.

**DECEMBER 19, 2012 MEETING OF THE BOARD OF TIM-BR MART GROUP**

**21**  Various options were presented to the meeting of the Board on December 19, 2012. The Lands presented the best option available. At that time, no request was made for Board approval. In addition to the attendance by the Directors, Mr. Urquhart and Barbara Hopper, the C.O.O. of the Tim-Br Mart Group attended the meeting.

**22**  The December 19, 2012 Minutes of the Board reflect the following:

Ms. Hopper presented options regarding the Vancouver B.C. facility. She advised that Chalifour currently leases the facility in Vancouver and the lease expires at the end of 2013. Management believes it could get an extension on the lease for an additional 6 months, if required. The B.C. Operations currently have a contribution margin of about 14% in this facility. Chalifour must continue to have a facility in the region because of the commitments it made when negotiating the asset purchase from IRLY Distributors Ltd. Discussion surrounding possible locations and solutions ensued, included information regarding possible options. One option involves high rent costs, while the other would be a shared location with a vendor partner and would involve a new build. In the build location there is some potential that rent will be a percentage tied to revenue. Current land has already been zoned environmental etc.

**Action Item:** The Board requested that management prepare a business plan regarding the options for the BC rental property.

**23**  The decision taken by the Board on the recommendation of Mr. Urquhart was to pursue the possibility that was presented by the Lands.

**24**  Kom-Lynn developed a detailed racking layout plan for the inventory of Chalifour and Conwest adjusted the planned spacing of the support columns to best accommodate the racking plan presented.

**25**  On December 21, 2012, Mr. Urquhart approved an expansion of the footprint of Unit 100 from 132,080 square feet to 135,080 square feet. By the end of 2012, the Centre included a drive-through loading area which was added at the request of Chalifour.

**26**  On January 3, 2013, Mr. Harris advised Messrs. Liefke and Woerler that the office space should be adjusted from two floors of 7,500 square feet to two floors of 5,000 square feet each.

**27**  On January 15, 2013, Mr. Harris provided Mr. Liefke with a layout of Unit 100 prepared by Kom-Lynn noting: "This is the final review of our facility plan to give Con-West the ability to get the building permits."

**JANUARY 28, 2013 MINUTES OF THE MEETING OF THE TIM-BR MART GROUP**

**28**  There were discussions about the Centre at the January 2013 meeting of the Board of Directors but no decision was made.

**29**  The January 28, 2013 Minutes include the following regarding the Centre:

Chalifour Vancouver - new facility

1. **Action Item:** Business plan to be finalized and presented to national board shortly
2. Tim Urquhart presented the drawings at the meeting
3. Proposed Chalifour Vancouver - partner with a vendor
4. Distribution facility will be 125k square street; less outside storage (currently 8.5 acres).
5. Proposed facility is smaller than current facility - will need to rethink how we use this facility - will have to improve our operational methods (Bret Walter's responsibility) [the General Manager of Chalifour].
6. Annual cost: $1.25m triple net, taxes extra - less than $10/sq ft
7. Will use 3rd party (i.e. Canwel) facility seasonally to support the Chalifour Vancouver building material business.

**30**  Although none of the Directors could say with certainty at Trial that the drawings dated January 7, 2013 were the drawings that were presented to the Board Meeting, I find that it is probably the case that the January 7, 2013 Drawings were presented at that Meeting. These drawings included a detailed plan of that portion of the Facility which would be occupied by the Tim-Br Mart Group. The corporate logos of both Chalifour and Tim-Br Mart appear on the drawings. The Drawings indicated a total of 125,904 square feet as "Unit 100".

**31**  Mr. Urquhart was asked at Trial how long the meeting on January 28th had taken and he estimated that, of the three hour meeting, approximately one hour of the meeting was taken up relating to the possible Centre. In chief, Mr. Urquhart was asked about the fact that the proposed Facility was smaller than the current facility and he stated:

I do, and it was an elaboration of the strategic change in direction and how this facility was going to work, which was different than what the old IRLY distribution model was. And this really goes to talking about all the different points of operating it as a fast-moving, high-turn, better-margin facility than what IRLY currently had.

**32**  In February of 2013, Conwest hosted regular meetings to ensure that the building design satisfied the requirements of the Tim-Br Mart Group. The Plaintiffs submitted that they, the Tim-Br Mart Group and Conwest agreed to the design of the Centre, that the Tim-Br Mart Group approved the building permit plans, and that Conwest then applied to the Municipality of Delta for a building permit.

**MATERIALS FOR THE MARCH 28, 2013 MEETING OF THE BOARD OF DIRECTORS OF THE TIM-BR MART GROUP**

**33**  On March 14, 2013, a first draft of a memorandum was sent out to the Board setting out that the proposed Centre was to be 145,000 square feet. On March 25, 2013, a revised version was sent to the Board setting out that the proposed Facility was to be a turnkey Facility of 140,000 square feet ("Memorandum"). Mr. Urquhart and Ms. Hopper set out the "Background", "Goals", "Assumptions", "Lease Term Recommendation", "Capital Cost", "Recommendation", and "Motions" in the Memorandum as follows:

**TIM-BR MART Group Goals**

1. Continue to operate a facility in lower mainland B.C
2. Chalifour Vancouver location must be self-sustaining; must generate a profit
3. Chalifour Vancouver delivers hardware and LBM products to TBM members and wholesale customers weekly

**Assumptions:**

1. Lease a TURN-KEY 140,000 square foot distribution facility in Delta, B.C, net lease cost per square foot is $6.35 plus operating costs (including taxes) of $3.65 ($10 per square foot all in)
2. NOTE: Includes office build-out plus extra-wide doors, superior lighting, ceiling fans (for better circulation), sprinklers installed per our rack plan, thicker concrete pad to handle additional weight of drywall & lumber.
3. NOTE: Market rate, in Vancouver, for comparable size facility without the "add-ons" noted in the above note is $11.00. A comparable "all-in" space is $13.50 per square foot with a lease term of 10-15 years.
4. Pallet racking with no hardware mezzanine (single pick)
5. Operate a cross-dock facility; warehouse would stock full case pack "A" and "B" skus only
6. Single picks would be shipped from closest eastern distribution centre
7. Act as an import reload centre in conjunction with ACE global sourcing initiative
8. Reduce overhead labour (non-warehouse) costs at Chalifour Vancouver
9. Assumed a slight change in mix of product sold through the facility
10. Conservative growth projections (3%) for 2015 to 2017
11. Assumed full freight recovery as per current Vancouver model
12. Assumed warehouse labour costs drop to 4% from 4.5% due to change in product mix
13. Opportunity to move 50% of Calgary office positions to either Vancouver or London - cost savings $150k per year (not factored into financial projections)
14. Business is profitable after interest carrying costs (inventory & cap ex) - see attached projected financial projections (FY2013 to 2017)
15. Capital cost amortization:
16. Anything considered a leasehold improvement will be amortized over the term of the initial lease (in our case, I'm suggesting 10 years)
17. Work related to systems integration will be amortized over 3 years.

**Lease Term Recommendation**

1. 10 year plus an optional 5 year term
2. Greater Vancouver area is growing; real estate prices will continue to increase. Facility lease rates will continue to rise.
3. This is an opportunity to lock-in our costs in a well-located facility. This location won't be available in the future.
4. This facility is not "built to suit" our purposes alone. It will be reasonably straight forward to sublease should we need to leave the facility.
5. Our gross rent is $10/sq. ft. compared with $13.50/sq. ft. Vacancy rates in Vancouver are low. Again, this opportunity to sublease is reasonable.
6. A shorter lease, with greater options for us to vacate, will be substantially more expensive. Landlord will need to build potential vacancy into their rent numbers.

**Capital Cost:**

1. $2.5m - details included on projected P&L
2. Will be financed 100%
3. Amortization policy included in the assumption

**Recommendation:**

1. Approval to finalize terms of the lease agreement
2. Approval to request funding from a financial institution

**Motions:**

1. That the Board grants management the authorization to finalize lease terms with a division of Regal Ideas [Mr. Liefke] for a lease term of 10 year plus optional 5 years and management ensures that there are favourable terms built into the lease that allow for exiting the facility before the end of the lease term (e.g. subletting).
2. That the Board authorizes management to spend up to $2.5m in capital expenditures related to set-up of this new Vancouver facility.
3. That the Board authorizes management to seek financing for capital expenditures related to this project.

**34**  Attached to the Memorandum was a "Capital Expenditure Capital Investment totalling $2,500,000 made up as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| Racking | $ | 1,200,000 |  |
| IT Infrastructure - full integration | $ | 500,000 |  |
| Facility furnishings (office & common area) | $ | 400,000 |  |
| Professional Fees (design, engineering) | $ | 75,000 |  |
| Signage | $ | 25,000 |  |
| Contingency - approx. 15% | $ | 300,000 |  |
| Total | $ | 2,500,000 |  |

**35**  Also attached to the Memorandum was a detailed Budget prepared by Mr. Urquhart and Ms. Hopper. This Budget outlined projected 2013 through 2017 sales, anticipated profits, overhead costs, total occupancy costs, inventory investment and capital expenditure investment.

**36**  In a March 27, 2013 email from Ms. Hopper to Messrs. Urquhart, Westrum, and five of the Directors of Tim-Br Mart Group, Ms. Hopper attached a copy of a floor plan as well as an outline of the "leased space" "for the Board's review". There was also some detail about the: "...proposed change in the business model" and the fact that the proposed site was smaller than what had been in use to date.

**MARCH 28, 2013 MEETING OF THE BOARD OF DIRECTORS**

**37**  The Board of Directors met on March 28, 2013 in a meeting conducted by "video conference call". Mr. Westrum chaired the meeting and Messrs. Coutre, Dyck, Maglio, Sentia, Toth, and Bowers were in attendance as were Mr. Urquhart, Ms. Hopper, and Mr. Walters "By Invitation". The Minutes reflect that the meeting opened with Mr. Urquhart setting out "3 motions" that he needed from the Board, being the three motions set out in the Memorandum.

**38**  It was noted in the Minutes that Mr. Urquhart stated "we have had basic preliminary talks with H.S.B.C to make sure they would be onside and they are". In response to a question from Mr. Dyck regarding the interest projections that were set out in the budget protection to the Memorandum "what the bank is asking for", Ms. Hopper responded: "Prime is anticipated to stay flat and may increase by 1/2% so we want to lock it in for 5 years."

**39**  There were a number of questions asked about the Centre and how it would be used and what it would feature. At the request Mr. Westrum, the order of the motions set out in the Memorandum was changed and the following motions were then made, seconded and carried unanimously:

1. That the Board authorizes management to seek financing for capital expenditures related to this project.
2. That the Board authorizes management to spend up to $2.5m in capital expenditures related to set-up of this new Vancouver facility.
3. That the Board grants management the authorization to finalize lease terms with a division of Regal Ideas for a lease term of 10 year plus optional 5 year and management ensures that there are favourable terms built into the lease that allow for exiting the facility before the end of the lease term (e.g. subletting).

**40**  The Minutes reflect the following statement made by Mr. Westrum:

We will have another conference call at a later date to discuss the financials and do our due diligence.

**41**  It was the position of the Plaintiffs and Mr. Urquhart at Trial that a binding agreement was reached on March 28, 2013 when the Board approved the use of the Facility for the Centre. It was the position of the Defendants at Trial that approval of the Board was not given at this meeting and that no final agreement was in place.

**42**  Mr. Liefke was advised by Mr. Urquhart of the approval by the Board.

**EVENTS OF APRIL THROUGH OCTOBER, 2013**

**43**  On April 8, 2013, Tim-Br Mart issued a press release ("Press Release"). It is unclear who prepared the Press Release and on whose instructions the Press Release was issued. It is clear that the Press Release was not approved by the Board. However, it is not clear that press releases would be approved by the Board prior to them being released.

**44**  The Press Release was under the heading "Chalifour BC Distribution Centre will move to state-of-the-art facility in mid-2014". The Press Release set out the following:

In order to continue to meet the needs of our growing customer base, Chalifour Canada will be relocating its Vancouver Distribution Centre to a modern industrial park in nearby Delta, BC. Construction is expected to be completed by mid-2014.

The new, state-of-the-art facility will be located in the Tilbury Industrial Park, approximately 20 minutes from the current site in Surrey. The new location will provide greater visibility for Chalifour, and improved access for commercial trucking.

The facility will be customized to meet the needs of our business, and we are working with a group of professionals to ensure that infrastructure will be in place to support our operations," says Bret Walters, General Manager of Chalifour Canada.

We made a commitment to our Dealers to maintain a strong presence on the West Coast, and our move to a new Distribution Centre reflects our ongoing efforts to improve workflow, and streamline our business to be more responsive to the needs of our customers, adds Tim Urquhart, President and CEO of TIM-BR MART Group.

**45**  A number of industry trade publications covered the announcement in the Spring and Summer of 2013. None of the members of the Board of the Tim-Br Mart Group who provided evidence during the Trial admitted to seeing the Press Release or any of the trade press publications announcing the relocation to the Tim-Br Mart Group Premises.

**46**  In mid April of 2013, Mr. Harris was provided with the "board approved budget" and the floorplan that was presented to the March 28, 2013 Meeting.

**47**  Previously, Mr. Harris had been told that he was not to engage SSDG until Board approval was obtained. SSDG was retained in mid April, 2013 and Mr. Harris began working with SSDG, Kom Lynn and Messrs. Woerler and Liefke relating to tenant improvements for the Centre and space planning and preparation of the design drawings and documents for the offices began as well.

**48**  In June of 2013, the Tim-Br Mart Group delivered the design drawings for the Centre that had been prepared by Kom Lynn and the design drawings for the first and second floor office space of the Tim-Br Mart Improvements which had been prepared by SSDG.

**APRIL 24, 2013 MEETING OF THE BOARD OR DIRECTORS**

**49**  The Board of the Tim-Br Mart Group met in Calgary on April 24, 2013 with Messrs. Urquhart and Walters and Ms. Hopper in attendance. Mr. Westrum as Chair started the meeting with a review of the Minutes from the December 19, 2012, January 28, 2013, and March 28, 2013 Meetings. A motion was made and approved that the Minutes for those Meetings be approved.

**50**  The following "Discussion" of the Minutes was recorded:

Mr. Couture inquired what the lease price was for the new Vancouver facility. It was confirmed that the lease price of $1.4 million was in the March 28, 2013 Board minutes and that this price would include some leasehold improvements.

Mr. Skrepnek asked what Chalifour is doing with the storage racking in the current Vancouver facility. Mr. Urquhart responded that Chalifour is still using the racking but that it will not be transferred to the new facility, and that management would look into selling it. Mr. Urquhart confirmed that Chalifour will keep the coverall from the facility.

**51**  The following was reflected in the Minutes of the April 24, 2017 Meeting:

Vancouver: in addition to moving the facility, looking at changing the business model and achieving IT integration. Regarding the new facility - next week the engineers will determine if the build can start. Regarding the business model - have begun addressing this now and the first phase has included monitoring orders to evaluate shipments.

**POST-APRIL 24, 2013 ACTIVITIES**

**52**  In June and July of 2013, Messrs. Urquhart and Liefke solicited suppliers and subcontractors for discounted prices for materials and services for the Centre. This was done pursuant to an agreement that, if Mr. Urquhart could obtain better pricing for materials that would be used by Conwest to construct the Facility, the cost savings would be split between the parties by providing a credit to the Tim-Br Mart Group for its tenant Improvements.

**53**  On July 16, 2013, the Corporation of Delta issued a permit for the "footings and foundation" thus allowing construction to commence on the footings and foundation of Unit 100 before continuing with the rest of the Facility. Conwest then commenced on-site construction.

**54**  By August of 2013, the tenant Improvements for Unit 100 had been designed to a significant degree of detail to suit the Centre, including: (a) the location and capacity of all offices and board rooms; (b) floor and window finishings, paint colours, wall treatments, and millwork; (c) the type of ceiling treatment in offices (drywall or T-bar); (d) the location of, and hardware installed, for all doors; (e) the location and capacity of washrooms including a discussion of whether the urinals installed would be waterless; (f) the layout of a shipper's office adjacent to the drive-through where truck drivers would attend when arriving with inventory; (g) the inclusion of an exterior propane refuelling station on a remote pad located at the rear of the Facility for the refueling of propane forklifts; (h) the inclusion of a forklift battery charging stations to coincide with the number and type of forklifts to be used; (i) the light fixtures to be installed and their approximate locations; and (j) the quantity of all coffee makers, dishwashers, fridges, photocopiers, printers, projectors and wall mounted televisions to be installed in Unit 100. These modifications were made to incorporate design features requested by Mr. Harris.

**55**  Conwest hosted meetings with Mr. Liefke and various members of the Tim-Br Mart Group to coordinate the design and building of improvements. Many of the minutes of the meetings with consultants referred to Chalifour as the "tenant" and Mr. Liefke as the "landlord".

**JULY 24, 2013 MEETING OF THE BOARD OF DIRECTORS**

**56**  The Board held an "In Camera" meeting on July 24, 2013 to which Mr. Urquhart was invited. The Minutes reflect the following questions posed by some of the Directors and the answers provided by Mr. Urquhart:

M.C. [Marcel Couture] What about Vancouver, have we signed an agreement? T.U. [Mr. Urquhart] No we haven't signed but we are working with them our date to be out of the IRLY site is May 2014

M.C. [Marcel Couture] Will norm [Liefke] put this on paper? T.U. [Mr. Urquhart] no he won't put it on paper so if he passes away. We have issues but he does want to sign. He knows what our former agreement was so he wants to make sure this works for us. He won' [sic] let us lose money

M.W. [Mr. Westrum] Are we still comfortable with the budget for Vancouver? T.U. [Mr. Urquhart] I don't know (comfortable with the 2.5 million in racking, we will get a better deal than that) Sept. is the time when the warehouse racking quotes go out, T.U. [Mr. Urquhart]. We need specific racking because of earthquakes and bog land according to the experts.

**57**  As a result of a situation unrelated to this litigation and the potential occupancy by the Tim-Br Mart Group in the Facility, the Board placed Mr. Urquhart and Ms. Hopper on leaves of absence. Mr. Westrum assumed the position of acting President and acting Chief Executive Officer of the Tim-Br Mart Group.

**AUGUST THROUGH OCTOBER 2013 ACTIVITIES AND ACTIONS TAKEN**

**58**  Mr. Westrum arranged for an August 1, 2013 meeting with Mr. Liefke. Mr. Westrum stated that the purpose of the meeting was to "find out exactly what was going on with that project, if it was different than what the Board had been led to believe". At the meeting, Mr. Liefke provided Mr. Westrum with a document outlining the lease terms in bullet form, the details about the build-out and changes that had been made and "ideas to offset higher costs" which outlined the arrangement that had been made with respect to the sourcing of construction materials.

**59**  Messrs. Harris and Westrum visited the Lands on August 13, 2013 and Mr. Westrum observed a sign that had been placed at the site announcing it as the "Future Home of the new Tim-Br Mart Distribution Centre". Mr. Harris gave evidence that he and Mr. Westrum visited other rental properties during their visit to the Lower Mainland but did not advise Mr. Liefke that they were looking at alternative locations. After the visit, Mr. Westrum emailed Mr. Liefke stating that the site was "impressive" and "work is progressing nicely" and also stating:

I don't know if you have a rough draft of a contract yet but it would be nice to see if we have covered what we think would be our responsibilities in our budget preparation. This "wish list" has certainly added a new dimension to our cash flow and financial forecasts as the Board's motion only approved a total capital budget of 2.5 million as was shown us at the budget presentation. We are working on that aspect now.

**60**  On August 16, 2013, Conwest applied to Delta for a building permit after Mr. Woerler obtained approval of the final building permit application drawings from Mr. Harris.

**61**  In mid-August of 2013, Messrs. Westrum and Harris inspected the building site in the presence of Mr. Liefke and confirmed that they were satisfied with the progress that had been made.

**62**  On August 18, 2013, Conwest and 687 executed a Construction Agreement for the construction of the Facility. On August 19, 2013, Conwest and 687 executed a Design-Build Contract for the design and building of the Centre.

**63**  On August 19, 2013, Mr. Westrum wrote to Mr. Liefke and advised him as follows:

The budget has been reviewed and more realistic sales figures, margins, cash flows and capital requirements were used for our 4 year projections. Although the rent seems very reasonable for current market projections, Chalifour Surrey is operating at a near Breakeven at a substantially lower rent and the management team could not see any increased margins or sales happening under the present economic conditions to cover the added cost. ... We need to talk ...

**64**  The employment of Mr. Urquhart was terminated on August 20, 2013. The termination did not come as a result of anything to do with this litigation or the potential occupation of the Facility by the Tim-Br Mart Group.

**65**  On August 20, 2013, Mr. Westrum informed Mr. Liefke that the cost of the Improvements would financially "stress" the Tim-Br Mart Group. Mr. Westrum advised that the Tim-Br Mart Group would not be relocating its head office from Calgary to Vancouver. As a result, Mr. Westrum requested that the tenant improvements should be redesigned to remove the second floor office space.

**66**  During September of 2013, Mr. Harris and the consultants, SSDG and Kom-Lynn continued to be involved in the planning of the Centre and assessing the capital expenditure items to attempt to reduce costs. After discussing proposed changes with Mr. Walters, Mr. Harris approved certain changes to the design of the Centre.

**67**  In September of 2013, the Tim-Br Mart Group ceased communication with, providing directions to, and participating in coordination meetings with Conwest and the Plaintiffs.

**68**  On October 7, 2013, Mr. Liefke was advised verbally that the Tim-Br Mart Group did not intend to occupy Unit 100. That intention was confirmed in writing on October 24, 2013 when Mr. Liefke was advised that the position of the Tim-Br Mart Group was as follows: "Better be very clear that there is no, and was never, an agreement with respect to a purported lease of your Delta property by any of the companies of the Tim-Br Mart Group".

**THIS LITIGATION**

**69**  The Plaintiffs sought damages for breach of an agreement to lease, damages for negligent misrepresentation, interest pursuant to the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*, and costs. The Plaintiffs stated that they entered into an agreement with the Tim-Br Mart Group with respect to the design, building and occupation of the Centre within the Facility ("Agreement").

**70**  The action of the Plaintiffs was defended on the basis that the alleged Agreement or any agreement was not made between the Plaintiffs and the Defendants so that the action of the Plaintiffs should be dismissed.

**71**  In a Third Party Notice filed July 20, 2015, Mr. Urquhart was named as a Third Party. The following relief was sought by the Defendants against Mr. Urquhart:

If it is found that the Agreement was entered into between the plaintiffs, or any one of them, and the defendants, or any one or more of them, or any such oral or written agreement was entered into between the parties respecting the Distribution Centre, which is not admitted but is specifically denied, or that Urquhart misrepresented to the Board of Directors of TBM Holdco on or about March 28, 2013 that he had not entered into the Agreement with the plaintiffs, or any one or more of them, on behalf of the defendants, or any one or more of them, or that any such oral or written agreement had not been entered into with the plaintiffs, and the defendants are found liable to the plaintiffs for any breaches of such agreement, the defendants seek the following relief:

1. A declaration that the plaintiffs' loss and damages were caused in whole or in part by the breach of contract, breach of fiduciary duties, negligent misrepresentation, and/or fraudulent misrepresentation committed by Urquhart.
2. A declaration that the Tim-Br Mart Group is entitled to contribution and indemnity from Urquhart pursuant to section 4 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, as amended, or pursuant to the common law, to the degree to which Urquhart is found by the court to have been at fault in respect of the plaintiffs' claims for any amount that may be found due from the Tim-Br Mart Group to the plaintiffs, including court order interest plus any costs the Tim-Br Mart Group may be ordered to pay to the plaintiffs, as well as the amount of its own costs in defending this action and the proceedings against Urquhart.
3. Judgment against Urquhart for any amount that may be found due from the Tim- Br Mart Group to the plaintiffs, including interest pursuant to the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*, and amendments thereto.
4. Judgment against Urquhart for the amount of any costs the Tim-Br Mart Group may be judged liable to pay to the plaintiffs, and for the amount of the Tim-Br Mart Group's own costs in defending the plaintiffs' action and proceedings against Urquhart.

Further, the defendants seek damages against Urquhart for breach of contract, breach of fiduciary duties, negligent misrepresentation, and fraudulent misrepresentation.

Interest pursuant to the *Court Order Interest Act*.

Costs.

**72**  After a 20-day Trial, judgment in the action between the Plaintiffs and the Defendants and in the Third Party Claim was reserved.

**73**  In August of 2017, the Plaintiffs and Defendants advised that they had settled their claims so it was no longer necessary to issue Reasons for Judgment relating to the claims of the Plaintiffs.

**74**  On September 13, 2017, the Plaintiffs filed a Notice of Discontinuance against all of the Defendants.

**75**  As no settlement was reached between the Defendants and Mr. Urquhart, these Reasons relate only to the Third Party Notice and the damages claimed by the Defendants relating to the amounts paid by them in their settlement with the Plaintiffs.

**CASE AUTHORITIES AND DISCUSSION - CAN THE THIRD PARTY CLAIM CONTINUE?**

**76**  The issue which arises is whether the Defendants are in a position to continue their claim against Mr. Urquhart now that the claims of the Plaintiffs against the Defendants have been settled and a discontinuance of the action against the Defendants has been filed. It is the position of Mr. Urquhart that the Defendants are not in a position to pursue their Third Party Claim against him.

**77**  The Defendants filed their Third Party Claim pursuant to Rule 3-5(1) of the Supreme Court Civil Rules. Originally, the Defendants sought to hold Mr. Urquhart liable for contribution and/or indemnity if the Defendants were found liable to the Plaintiffs and independent damages regardless of whether the Defendants were found liable. Before the Trial, the Defendants confirmed that they would only be pursuing their claims for contribution and/or indemnity.

**78**  The claim of the Defendants was based on the following allegations: (a) Mr. Urquhart breached his contractual, common law, and fiduciary duties owed to the Defendants; or (b) alternatively, Mr. Urquhart made negligent misrepresentations to the Defendants.

**79**  Rule 3-5(1) of the of the Rules which became effective July 1, 2010 states:

**Making a third party claim**

A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that

1. the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,
2. the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or
3. a question or issue between the party and the person
4. is substantially the same as a question or issue that relates to or is connected with
5. relief claimed in the action, or
6. the subject matter of the action, and
7. should properly be determined in the action.

**80**  Prior to 1961, third party proceedings were only available to claim contribution or indemnity and not for independent claims. The pre-1961 Rule*s* permitted a claim for "relief over" only when the measure of damages between the defendant and third party was the same as the measure of damages between the plaintiff and the defendant. In this way, the relief sought by the Defendants against Mr. Urquhart for breach of contract, fiduciary and tort duties owed to them, if resulting in a different level of damages than in the main action, would historically have been considered an independent cause of action.

**81**  Rule 22(1) the predecessor to Rule 3-5(1) stated:

**Filing a third party notice**

1. A party of record who is not a plaintiff may file a third party notice in Form 17 if the party of record alleges against any person (in this rule called "the third party"), whether or not the third party is a party to the action, that
2. the party is entitled to contribution or indemnity from the third party in respect of a claim made against the party in the action,
3. the party is entitled to any relief against the third party relating to or connected with the original subject matter of the action, or
4. a question or issue relating to or connected with any relief claimed in the action or with the original subject matter of the action is substantially the same as a question or issue between the party and the third party and should properly be determined in the action.

**82**  A number of decisions dealt with the predecessor Rule *22*.

1. **Decisions Under Rule 22(1)**

**83**  In *Bank of Montreal v. Bank of British Columbia*, [*[1987] B.C.J. No. 1032*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JXNB-632C-00000-00&context=) (S.C.), the Court held that, if a claim by a plaintiff against a defendant is dismissed as settled, the defendant's claim for indemnity against a third party is not necessarily compromised, even if it includes a claim for recovery of money paid by the defendant on the settlement. This very short decision does not explicitly discuss Rule 22(1).

**84**  *C. Vincent Ltd. v. Bank of Montreal*, [*[1993] B.C.J. No. 930*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-23JF-00000-00&context=) (S.C.) established the principle that the fact that the plaintiff had discontinued against the defendant was not a valid reason for requiring the defendant to discontinue the third party proceeding and bring a new action against the third party and that, to require this, would result in an unnecessary multiplicity of proceedings contrary to the policy of s. 10 of the *Law and Equity Act*, R.S.B.C., c. 253 and Rule 22(1)(c). In this regard, Hall, J (as he then was) stated:

Does the fact that the plaintiff is now out of the action mean that the defendant cannot continue its claim against the third party under the third party notice but must now abandon that course, and issue a writ and statement of claim in order to proceed validly against the third party? I think that would be a gross waste of time and a serious injustice to the defendant Bank of Montreal. Such a course would result in an unnecessary multiplicity of proceedings. In my view, the cases of *Allied Land Services Ltd. v. Bobey* [*(1980), 22 B.C.L.R. 143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-F8KH-X0YX-00000-00&context=) and *Stott v. West Yorkshire Road Co. Ltd.* [1971] 2 Q.B. 651 (CA) are persuasive authority in favour of the course of action proposed to be followed here by the defendant Bank of Montreal. [at para. 12]

**85**  *Rekis Estate v. Greater Vancouver (Regional District*), [*[1997] B.C.J. No. 1015*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B15M-00000-00&context=) (S.C.) dealt with whether Judgment debtor could commence third party proceedings against a co-defendant where the plaintiff had dismissed the claims against the co-defendant. Cited with approval and adopted was the decision in *Golden Gate Seafood (Vancouver) Co. v. Osborn & Lange Inc*. [*(1986), 1 B.C.L.R. (2d) 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-K0BB-S05F-00000-00&context=) (C.A.), where Lambert J.A. stated:

If third party proceedings are begun by a defendant before judgment is given against him, then my understanding is that they may be continued after judgment. But it is not my understanding that the defendant may begin third party proceedings after judgment has been given against him.

[at p. 183]

**86**  *Canada Mortgage and Housing Corp. v. Barclay Construction Corp*. [*[2007] B.C.J. No. 1411*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21S3-00000-00&context=) (S.C.) was a "leaky condominium" action. The third party manufacturers and distributors of building material applied to strike a third party notice issued against them by the defendant's architects. After the third party claim was filed, the plaintiffs and the defendant architects reached a settlement. The architects consented to judgment in favour of the plaintiff and assigned their third party claim to the plaintiffs. The third party claimed that the third party notice should be struck as there would be no trial in the main action because of the settlement so that the ability to defend the third party notice was thereby impaired. Pitfield J. determined this was not a barrier to the continuation of the third party proceedings and noted that the settlement did not prevent the third party from defending the extent of the liability arising out of the fault the third party. The Court did not reference the wording of Rule 22(1) in stating:

In some circumstances, the fact a Defendant settles will condemn a Third Party proceeding to failure, but that need not be the case, and will not be the case when a settlement is concluded after the commencement of Third Party proceedings: see *Pybus v. Palm Springs & European Health Spa Ltd*. [*(1986), 20 C.P.C. (2d) 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JNY7-X2TV-00000-00&context=) (B.C.S.C.).

[at para. 36]

**87**  On appeal, the third party argued that, because the defendants had assigned their rights to the plaintiff, the third party could not indemnify the defendants and, because the defendants were no longer required to defend themselves, the third party could not contest the extent of the liability of the defendant. Leave to appeal was granted ([*2007 BCCA 571*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21P2-00000-00&context=)). However, the appeal was not pursued.

**88**  I am satisfied that the decisions in *Bank of Montreal, C. Vincent Ltd.*, and *Barclay Construction*, all *supra*, established the principle under Rule 22(1) that a third party claim could be pursued even if there has been a settlement of the issues between the plaintiff and the defendant providing the third party notice was issued prior to the settlement.

1. **The Decision Under Rule 3-5(1)**

**89**  Only one decision deals with whether the principles established under Rule 22(1) continue to apply. In *Patterson v. Williams*, [*2010 BCSC 1455*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2YM-00000-00&context=), Sigurdson J., considered Rule 9-8(5) where the plaintiff had commenced two actions. In one action against Ms. Williams, Ms. Williams added Ms. Parker as a third party. In the second action, Ms. Parker added Ms. Williams as a third party. The plaintiff reached a settlement with Ms. Williams and filed a notice of discontinuance in the first action. As the third party in that action, Ms. Parker filed an application under Rule 9-8(5) that Ms. Williams pay her costs. Rule 9-8(5) provides that, if a plaintiff discontinues the whole part or any part of an action and if the "discontinuance ... disposes of the claim against the third party", the third party is entitled to costs and can apply to the Court for directions as to who should pay those costs.

**90**  The application of Ms. Parker was dismissed with Sigurdson J. making the following statements:

I think that this application for costs must fail. While the Release may limit the liability of the defendants and prevent successful third party proceedings against them, the notice of discontinuance itself does not prevent the defendants from continuing third party proceedings against Ms. Parker.

I do not think it can be said that the filing of the notice of discontinuance by the plaintiff disposes of the claim against the third party by the defendants.

The claim for contribution is a substantive right that continues to exist notwithstanding a settlement: see A.R. (Al) Smith Ltd. v. Turner, [*[1984] B.C.J. No. 3107*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2S9-00000-00&context=), [*[1985] 2 W.W.R. 424*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2S9-00000-00&context=) (B.C. Co. Ct.), and Canada v. Foundation Co. of Canada, [*[1980] 1 S.C.R. 695*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1TD-00000-00&context=).

[at paras 12-14]

**91**  It should be noted that there is nothing in the decision referring to the new language set out in Rule *3-5(1)*. However, in *obiter dicta* Sigurdson, J. does confirm that the third party claim continues to exist notwithstanding a settlement.

1. **Submissions of Mr. Urquhart**

**92**  Mr. Urquhart submits that, based on a plain reading of Rule 3-5(1), a defendant can only "pursue" (he submits "continue") a third party claim if the action of a plaintiff against a defendant is ongoing as Rule 3-5(1) dictates not only when a claim can be commenced but also when a claim can and cannot be maintained at various stages of the litigation of the main action.

**93**  Mr. Urquhart submits that there is a legally relevant distinction between the right to "file" as set out under Rule 22(1) and the right to "pursue" as set out under Rule 3-5(1) and that, with respect to cases decided under Rule 22(1), the defendant had a right to commence a third party claim and there was nothing that prevented the defendant continuing to pursue a third party claim following a subsequent settlement.

**94**  Mr. Urquhart also makes a distinction between Rule 22(1)(a), which allows contribution and indemnity "in respect of a claim made against the party in the action" and Rule 3-5(a), which allows contribution and indemnity "in relation to any relief that is being sought against the party in the action." Mr. Urquhart submits that the use of the present tense in Rule 3-5(1)(a) dictates that a claim for contribution and indemnity can only proceed as long as the main action is ongoing against the defendant.

**95**  Mr. Urquhart supports his interpretation by referencing the scheme under Rule 3-4(7) which provides that a counterclaim may proceed even if the claim of a plaintiff has been stayed, discontinued or dismissed. He submits that there is no equivalent provision for third party claims and this absence evidences an intention that a third party claim may not proceed if the claim of a plaintiff has been settled and the action against a defendant has been dismissed.

**96**  Mr. Urquhart also relies on the approach taken in Rule 9-8(5) which provides:

If a plaintiff discontinues the whole or any part of an action in which a person has been joined as a third party, the third party, if the discontinuance disposes of the claim against the third party, is entitled to costs and may apply to the court for a direction as to who should pay them.

**97**  Having distinguished the decisions based on the prior Rule 22(1) Mr. Urquhart submits that I should not follow the only decision that has dealt with the new Rule 3-5(1) as Sigurdson J. did not consider the language in Rule 3-5(1)(a) in coming to the conclusion that a discontinuance by the plaintiff did not dispose of the claim against the third party by the defendants and that the claim for contribution was a substantive right that continues to exist notwithstanding a settlement.

**(d) Should the Third Party Claim be Dismissed?**

**98**  I am of the view that the change in the language of Rule 3-5(1) from Rule 22(1) does not lead to a substantive change in the law. In this regard, the learned author of Sullivan on the *Construction of Statutes*, 6th ed (Markham Ontario: Lexis Nexis Canada, 2014) states that there can be three aspects to every statutory amendment made: (a) enactment of a new part of the law; (b) repeal of the part of the law that has been discarded; and (c) re-enactment of a part of the law that is not changed. In this regard, the learned author states that the Court should look to substance rather than form to determine whether a sub-section is an enactment or a re-enactment (at pp. 745-746). Here, I am satisfied that Rule 3-5(1) merely re-enacts part of the Rules, the effect of which has not changed.

**99**  Mr. Urquhart has not provided any compelling reason to suggest that the new Rule was intended to derogate from these principles. The interpretation of Mr. Urquhart could lead to an illogical result if the discontinuance of the claim would dispose of all third party claims, including claims for independent or separate causes of action.

**100**  I am of the view that the interpretation of the Defendants aligns better with the purpose of third party proceedings: to provide a single procedure for related questions, issues, relief, or remedies in order to avoid multiple actions and inconsistent findings.

**101**  Rule 3-5(1) allows a defendant to bring an independent cause of action against the third party in which no claim for contribution and indemnity is made. It does not make sense that the Rules, which were amended in 1961 to include independent claims in third party proceedings, would now create a situation where an independent claim (which may not rely on the liability of the defendant to the plaintiff), would be disposed of because the plaintiff and defendant settled.

**102**  Requiring the main action to continue in order to allow a third party proceeding to continue goes against the objectives of the Rules as a whole, including the principle of proportionality. In this regard, Rule 1-3(1) states: "The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits." It would be inefficient for a party to start a third party proceeding and then be required to start a new and separate civil claim if the main action settled.

**103**  The interpretation given by Mr. Urquhart might compel prudent litigants to advance a claim for contribution and indemnity based on independent causes of action in separate lawsuits rather than by a third party claim in order to avoid having to forgo either a settlement with a plaintiff or, on a settlement, their claim against the third party. What is recommended by Mr. Urquhart would encourage a proliferation of proceedings.

**104**  I am satisfied that nothing turns on the difference between the reference to "a claim made" as set out in Rule 22(1)(a) and the phrase "any relief that is being sought" as set out in Rule 3-5(1)(a). Both Rules merely deal with the prerequisites for the ability to make a third party claim within existing proceedings without having to commence a separate action and then apply to have both actions heard at the same time.

**105**  Also, I cannot adopt the distinction made by Mr. Urquhart relating to the decision in *Patterson, supra*. I am satisfied that I am bound by the decision despite the fact that Sigurdson, J. did not consider Rule 3-5(1) when arriving at the conclusion that a claim for contribution is a substantive right that continues to exist notwithstanding a settlement between plaintiff and defendant. It was not necessary to consider the provisions of Rule 3-5(1) as that Rule had no application in the matter before him as the ruling only dealt with the question of whether the third party was entitled to costs under Rule 9-8(5) as a result of the discontinuance. As well, it is clear that the right to costs provided under Rule 9-8(5) as a result of a discontinuance only arises if the discontinuance "disposes of the claim against the third party". In this case, it does not. The wording of Rule 9-8(5) does not imply that the discontinuance of an action necessarily or mandatorily disposes of the claim against the third party.

**106**  Nothing about Rule 3-5(1) mandates either explicitly or implicitly that a claim commenced by third party notice must later be dismissed if the plaintiff settles and discontinues their claim against the defendants. Rule 3-5(1) only grants a procedural right to an action against a third party within an existing lawsuit. The only requirement to "pursue" a third party claim without leave is that such a claim must be filed in Form 5. This provision is similar to the provisions of Rule 3-1(1) which deals with starting a proceeding by filing a notice of civil claim in Form 1 or, if a defendant wishes to pursue a claim within the action, a defendant must file a counterclaim in Form 3. Nothing in these particular Rule*s* established anything other than the procedures to be followed and the Forms to be used.

**107**  I am satisfied that in the change in the language in Rule 3-5(1) from Rule 22(1) does not lead to a substantive change in the law. Accordingly, I hold that the fact that there has been a settlement between the Plaintiffs and the Defendants and there has been a discontinuance of the action against the Defendants does not affect the ability of the Defendants to pursue their Third Party Claim against Mr. Urquhart.

**CASE AUTHORITIES AND DISCUSSION - DISPOSITION OF THE THIRD PARTY CLAIM**

**108**  It is the position of the Defendants that the Third Party Claim against Mr. Urquhart should result in his liability for the amount of the settlement reached between the Plaintiffs and the Defendants. The Defendants submit that Mr. Urquhart entered into any agreement with the Plaintiffs without authority and in breach of duties he owed to the Tim-Br Mart Group.

**109**  In the alternative, the Defendants submit that, if Mr. Urquhart did obtain authority on March 28, 2013 to enter into a lease agreement with the Plaintiffs on the terms alleged on behalf of the Defendants, he did so based on misrepresentations to the Board.

1. **Breach of Contract**

**110**  The Defendants allege that Mr. Urquhart owed "duties to the board (contractual, common law and fiduciary)" and that he breached those duties. However, they have not stated which contractual obligations are at issue or how Mr. Urquhart breached them. If they rely on the Employment Agreement of Mr. Urquhart and the generic duties set out therein they have failed to make out any claim of breach of contract against Mr. Urquhart. In any event, I am satisfied that the duties that are owed to the Board and to the Tim-Br Mart Group are paralleled by the common law fiduciary duties owed so that I do not have to deal with any alleged breaches of contract.

1. **Breach of Fiduciary Duties**

**111**  On a balance of probabilities, the Defendants have the burden of establishing Mr. Urquhart was in breach of his duties.

**112**  Fiduciary duty is codified in section 122(1)(a) of the *Canada Business Corporations Act*, [*R.S.C. 1985, c. C-44*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9W1-DY33-B2SS-00000-00&context=) ("*CBCA*"), which require officers to "act honestly and in good faith with a view to the best interests of the corporation" in exercising their powers and discharging their duties.

**113**  In *Peoples Department Store Inc. (Trustee of) v. Wise*, [*[2004] 3 S.C.R. 461*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B12J-00000-00&context=), Major and Deschamps J.J., on behalf of the Court stated in this regard:

First duty has been referred to in this case as the "fiduciary duty". It is better described as the "duty of loyalty". ... This duty requires directions and officers to act honestly and in good faith with a view to the best interest of the corporation. The second duty is commonly referred to as the "duty of care". Generally speaking, it imposes a legal obligation upon directors and officers to be diligent in supervising and managing the corporation's affairs.

[at para. 32]

**114**  Like the duty of care, the business judgment rule applies to the fiduciary duty to accord deference to a business decision "so long as it lies within a range of reasonable alternatives": at para. 64 in *Peoples, supra*. In this regard, the Court cited with approval the decision in *Maple Leaf Foods Inc. v. Schneider Corp*. [*(1998), 42 O.R. (3d) 177*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1RF-00000-00&context=) (C.A.) where Weiler J.A. had stated:

The court looks to see that the directors [also officers] made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination... As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision.

[at p. 192]

**115**  The decision in *Peoples, supra*, confirms that the "business judgment" rule applies in assessing actions taken by officers or directors:

Directors and officers will not be held to in breach of the duty of care under s. 122(1)(b) of the *CBCA* if the Act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in any manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant second-guess the application of business expertise the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

[at para. 67]

**116**  In assessing this standard of care, there was no legal obligation on Mr. Urquhart to be perfect; Instead, the standard is one of prudence on a reasonably informed basis.

**117**  The law on breach of duties was considered in *Bougainville Investment Corp. v. Semple*, [*[2013] B.C.J. No. 2308*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23PY-00000-00&context=) (S.C.). Mr. Semple was a former Director, President and CEO of Bougainville. During his tenure, Mr. Semple was involved in arranging several business opportunities in Papua New Guinea with the ultimate goal of securing a mining interest on the island. One of the business opportunities was a cattle ranch. Mr. Semple caused the company to advance approximately $175,000 in capital expenditures related to this project. It was alleged that the Board had not authorized this purchase and that Mr. Semple had breached his duty of care and fiduciary duty by advancing the funds. Mr. Semple did not dispute that he required approval of his Board to proceed with the project. He took the position that he had received this approval through his communications with Board members or, at very worst, there was a misunderstanding about whether Board approval had been given.

**118**  In the result, the Court accepted the evidence of Mr. Semple that "he considered that he had Board approval to proceed, based on the loose Board approval procedures in play at the time" and that this "belief was reasonable in light of how projects had been previously approved by the Board members..."

I accept that Mr. Semple firmly, honestly and reasonably believed that the cattle project was in accordance with the business plan of Invincible, in the best interests of Invincible and towards the goal of obtaining the mineral rights. He did not divert any of the funds for his own purposes, in that all of the money was spent on Bougainville in aid of this business objective. Nor did Mr. Semple improperly arrange for any third party to profit from these expenditures. There is no allegation that Mr. Semple was acting in a conflict of interest.

[at para. 118]

**119**  The conclusion was that the company had failed to show that Mr. Semple had acted in breach of his statutory or common law duties and that "... he acted at all times honestly and in good faith and with a view to furthering the interests of Invincible based on his reasonable belief that he had the approval of [the other directors] to proceed" (at para. 120).

**120**  It is clear that Mr. Urquhart owed a duty of care and a duty of loyalty to the Tim-Br Mart Group. As the President and CEO of the TIM-BR Mart Group, Mr. Urquhart was an officer who owed a duty of care and a duty of loyalty. With respect to the duty of care, this required Mr. Urquhart to exercise the care, diligence and skill that a reasonably prudent person would exercise in similar circumstances. With respect to the duty of loyalty, Mr. Urquhart was required to act honestly and in good faith with a view to the best interests of the corporation.

**121**  It is the submission of the Defendants that, at the March 28, 2013 Meeting, the Board provided specific directions to Mr. Urquhart and, by failing to fulfill these directions, Mr. Urquhart was in breach of the duties that he owed. The Defendants submit that the failure of Mr. Urquhart to follow the "clear directions" of the Board and committing the Defendants to the lease on the terms that were alleged by the Plaintiffs, was in breach of his duties.

**122**  The Defendants allege that the specific directions made by the Board at the March 28, 2013 Meeting were: (a) to secure $2.5 million financing for capital expenditures for the Centre; (b) to ensure that favourable terms to exit any lease were built into any agreement; (c) to finalize and secure in writing A "safety net"; (d) to conduct further due diligence regarding the financials for the project and; (e) to arrange a further meeting of the Board to discuss these issues.

**123**  The position of Mr. Urquhart is that he reasonably fulfilled all directions that may have been made by the Board and that he would have taken further steps, as appropriate, had he remained as the President and CEO of the Tim-Br Mart Group. Mr. Urquhart submits that the Defendants have failed to establish that he breached any of his duties or that his alleged breaches were the cause of any damages suffered by the Defendants.

**DID MR. URQUHART NOT FOLLOW SPECIFIC DIRECTIONS GIVEN TO HIM?**

1. **Failure to Secure Financing**

**124**  The Defendants submit that, after the March 28, 2013 Meeting, Mr. Urquhart took no steps to secure financing for the capital expenditures of $2,500,000, notwithstanding the "specific direction" provided by the Board. The fact that the Centre could not have proceeded if financing was not secured was something Mr. Urquhart readily acknowledged.

**125**  On this issue, Mr. Urquhart relies on a "preliminary discussion" that he had with Robin Penfold, then the Senior Vice-President and Head of Commercial Banking for Manitoba, Saskatchewan and Alberta for HSBC prior to the Board meeting. Mr. Urquhart's evidence was that he was told in "no uncertain terms that they [HSBC] would be there for us and finance whatever we needed".

**126**  The Defendants submit that the direction of financing being assured arises from the comment of Mr. Westrum at the March 28, 2013 Meeting that the "Motions should probably be reversed". The Defendants submit that the following evidence is critical on the issue of financing:

1. Mr. Urquhart originally testified (as part of the Plaintiffs' case) that he had a single conversation with Mr. Penfold prior to the Board meeting and that this discussion did not involve any mention of securing capital expenditures of up to $2.5 million. However, when testifying as part of the case for the third party and after listening to the testimony of Mr. Penfold, his testimony materially changed in that he suddenly recalled specifically discussing financing of $2.5 to $3 million for the capital expenditures. The explanation of Mr. Urquhart for this change in evidence was that "hearing his [Mr. Penfold's] voice actually brought back the conversation." It is the Defendants' position that this explanation is simply untenable and Mr. Urquhart's evidence should not be believed on this point;
2. Mr. Penfold, who was a witness with no material involvement in this action, testified that it would have been "impossible" for him to make any type of commitment over the telephone to provide financing on behalf of HSBC as there is a formal process that had to be followed prior to obtaining approval for financing of this nature which was not done. He denied, in all respects, making a verbal commitment to Mr. Urquhart respecting financing, prior to the March 28, 2013 Meeting or ever;
3. The evidence of John Steen, the Chief Financial Officer was that the credit facilities (including the bulge), were drawn to a maximum and this is something Mr. Urquhart confirmed;
4. At no time after the March 28, 2013 Meeting to the date of Mr. Urquhart's suspension on July 24, 2013, did he or anyone under his direction make a formal application for financing of up to $2.5 million.

**127**  While Mr. Westrum may have envisioned this step being completed prior to the lease terms being finalized, there is nothing in the Minutes or the evidence to suggest that this was ever communicated to management or made a pre-condition. It is also directly contrary to the understanding of Mr. Urquhart that the Board "had endorsed Mr. Liefke's property fully" and the evidence of Ms. Hopper that she did not consider financing to be a condition precedent to the other motions. Had the Board intended this, it would have been simple for them to amend the plain language of the Motions that suggest otherwise.

**128**  I find that Mr. Urquhart had sought financing at a preliminary level by virtue of his telephone call with Mr. Penfold of HSBC in January or February of 2013. Mr. Urquhart was confident that HSBC would provide the funds when needed. I am satisfied that this view was reasonable based on the assurances he stated that he received from Mr. Penfold and their history of dealings, including prior assurances regarding much larger sums. Mr. Urquhart communicated his discussion with Mr. Penfold to the Board during the March 28, 2013 Meeting and no further questions or concerns were raised by Board members at this Meeting or at subsequent meetings.

**129**  Even if the motion to "secure financing for capital expenditures for the Delta Warehouse" did require Mr. Urquhart to take steps to finalize financing, I find that there was nothing in the Motions which made this a prerequisite to Mr. Urquhart proceeding with the other resolutions, including to "finalize lease terms" with the Plaintiffs.

**130**  Mr. Urquhart was clear that he appreciated that a formal process existed for obtaining bank financing and that it would "absolutely" be required at the appropriate time. While he did not submit a formal application prior to his suspension in July of 2013, his evidence was this:

I knew that I had the bank financing in place from HSBC. There was no reason to doubt his word, there was no reason at all, and I didn't need the bank financing for some time. Many months.

**131**  While it may have been a "problem" if this financing had ultimately been denied, this denial is completely speculative as HSBC never denied the TIM-BR Mart Group the required financing. Further, it is speculative to suggest that alternative financing or another solution would not have been obtained. While the Defendants emphasize that "TIM-BR Mart's credit facilities (including the bulge), were drawn to a maximum", Mr. Urquhart clarified that this was a result of the restructuring of the business into different divisions.

**132**  I find that the actions of Mr. Urquhart regarding financing for the capital expenditures were reasonable in light of the authorization he was given by the Board and all of the surrounding circumstances. In this regard, it should be noted that the resolution authorized: "... management to seek finances for capital expenditures relating to this project." That motion carries with it no assumption that the seeking of financing must be immediate and that financing must be in place prior to any further actions regarding the Centre.

**133**  I also take into account that the exact amount required for capital expenditures would not have been known until the costing of those expenditures was ascertained. In this regard, whether the "Racking" would cost $1,200,000 would not be known until the costing for the Racking was complete in the early Fall of 2013. It would also not be known whether the whole of the $300,000 "Contingency" would be needed so that the Investment would actually total $2,500,000.

**134**  In the circumstances, it was not unreasonable or other than in accordance with the duties owed to the Tim-Br Mart Group for Mr. Urquhart not to make a formal application with HSBC as a first priority. Not to make a formal application with HSBC as a first priority and to not immediately make a formal application for the amount that would be required to cover the capital cost of the tenant improvements.

**135**  I find that Mr. Urquhart firmly, honestly and reasonably believed that he was acting in accordance with the resolution regarding financing passed by the Board at the March 28, 2013 Meeting, and in the best interests of the Tim-Br Mart Group generally.

**136**  Further, it cannot be said that Mr. Urquhart's actions caused the Defendants any losses. It was not a denial of financing by HSBC that prevented the Defendants from proceeding with the move to the Delta Warehouse but rather the decision not to proceed with the binding agreement.

1. **Failure to Obtain a "Safety Net" Term**

**137**  The Defendants submit that Mr. Urquhart acted contrary to the "specific direction" of the Board by failing to finalize and secure in writing a "safety net" term.

**138**  The only mention of this term is in the March 28, 2013 Meeting Minutes where Mr. Bowers is quoted as asking: "Norm has said he will do what he has to do to make this work for us ...he will make sure we don't lose money, can we get that on paper?". I find that was a question by Mr. Bowers and not a direction of the Board that Mr. Urquhart had to "finalize and secure in writing the safety net term". When Mr. Bowers was asked about his question at Trial, he testified that he found the assurance of Mr. Liefke "very vague" and that he would like "some detail on that". There is no evidence to suggest that Mr. Bowers or any other Board member directed management that this term "must be reduced to writing" immediately.

**139**  This issue came up again at the July 24, 2013 Meeting when Mr. Couture asked about it. Mr. Urquhart again confirmed "no he won't put it on paper" but also stated that Mr. Liefke "wants to make sure this works for us. He won't let us lose money". There is no suggestion in the evidence that this statement raised a concern for the Board or that Mr. Urquhart was directed that this term had to be in writing.

**140**  There is no question that Messrs. Urquhart and Liefke discussed the "rent deferral/safety net" term in the context of their discussion respecting the terms of a lease and that a safety net term was material to the Tim-Br Mart Group. That it was to be part of any lease is clear from the following evidence given by Mr. Urquhart during his Examination in Chief:

Q Having confirmed that, did you have any other discussions with Mr. Liefke in -- before in. say, the fall of 2012 about what he was proposing?

A In November of 2012 I did have a further discussion with him because I was still concerned about the rise in rent from where we were at. We were just -- or we were heading towards just being over $900,000 a year, and now we were going to be looking at $1.4 million a year. That's quite a jump. And I'm always very conscious of cost. And I shared that with Mr. Liefke that I was concerned about the jump, even though his price for the facility versus others was a good price. And at that time Mr. Liefke let me know that if, for whatever reason, especially with the start-up of the new distribution centre, if we were going to incur a loss, he would reduce the rent accordingly even if it meant bringing it back to zero rent for any time in the first three years to ensure that we didn't lose money because of the cost of being in a new distribution centre. That was music to my ears because that was -- that alleviated the concern that I had about making the move, wanting the business to generate enough revenue to pay for the increase in rent out of the gate. Because really there wouldn't have been any breathing room. We would have gone from 900-and-some-odd thousand dollars to 1.4 within a 30-day period, not giving us any time to ramp up. So I felt that was a good concession on his part to put that safety net into play.

Q And so where were matters left, then, after that concession was made? Did you have a further discussion with him about the project?

A Once he gave me that concession, I did let him know that he did have the best price, and with that safety net in place I felt that was something that I could take to the Board, which I did.

**141**  It is clear from this evidence that the offer of rent deferral was very important to Mr. Urquhart. In fact, it was the determining factor in his decision to bring the Liefke property to the attention of the Board at the December 19, 2012 meeting as a potential option. In cross-examination at Trial, Mr. Urquhart described the offer of rent deferral as the clincher.

**142**  Mr. Liefke agreed that he discussed the concern of Mr. Urquhart that the rent may cause the tenant to lose money and that, to alleviate that concern, he was prepared to defer rent. His evidence on this point was as follows:

Q Now, sir, when you spoke with Mr. Urquhart was there any discussion about deferring rent in any circumstance?

A We did have that discussion sometime, yes, and I expressed that that's fine, if you needed some help. Because he had expressed that they were paying -- and I'm not exactly sure what it was, or $800,000 a year at their current IRLY location in Surrey and another $300,000 for rent at their Calgary head office. And combining them, it's a bit more, but they were planning on -- this new location was larger, thousands of more SKUs. They planned on growing the business, shipping not just into BC now, but going over the mountains into Alberta and British Columbia - I mean Alberta and Saskatchewan because it's a lot cheaper to send this product from BC than it is from their London, Ontario, distribution centre.

Q All right. So -- and then in terms of -- It didn't seem like a concern to me that it would be that major, and I was fine with that.

Q And what did you understand that Mr. Urquhart wanted or felt he needed with respect to this deferral issue?

A If they needed some help initially for the first period of time, they had to defer some rent, that was okay with me.

Q Did you say anything to Mr. Urquhart about whether that particular matter could be in writing or not?

A I don't recall that, but it wouldn't have bothered me if it was.

Q If it was in writing?

A If it was in writing.

**143**  In addition, the following Discovery evidence was put to Mr. Liefke, which he confirmed to be true:

Q I know it's hypothetical, and you can object if you want.

Q Let's say the lease rate was 1.4 million per year. I think that's one thing that you've said consistently.

A Yes, that's correct.

Q And Chalifour's operating costs resulted in a net loss of $400,000. Did you ever give any assurances that you would take that $400,000 operating loss off the rent?

A Not that we would ever forgive the rent. We might postpone rent. Defer it.

Q On what terms?

A Whatever was reasonable. That wasn't discussed, but I was okay with deferring it if they needed something.

Q But there was no agreement that it would be forgiven, the rent?

A Not forgiven. Deferred.

Q Do you know when that agreement was reached?

**144**  Mr. Liefke further confirmed the following evidence he gave at his Discovery regarding this matter:

1. Yes, I guess ... What I'm -- I'm more interested in whether or not you provided any kind of a safety net to Mr. Urquhart that Chalifour would not lose any money by leasing your premises.

Ms. DiPuma: I just - I'm not quite sure that term is clear, "safety net." Sorry.

So the question is:

Q An assurance?

A That I would defer rent.

Q Just that you would defer rent?

A Mr. Henning also offered the same thing to Randy Martin, to defer rent.

Q Was there going to be interest charged on deferred rent?

A That - that was - I don't remember that was ever being discussed.

Q How long would it be deferred for?

A It really didn't matter to me. You know, I wasn't expecting it to be long term, but it really wasn't determined.

It was fine.

Q Was there any discussions as to the terms as to what would trigger the deferral?

A No.

**145**  Mr. Urquhart recalled raising a concern with respect to the rent cost of $1.4 million, explaining to Mr. Liefke that Chalifour was paying rent of approximately $900,000 at its current Irly location. Mr. Urquhart advised Mr. Liefke that, while the proposed rent was comparatively "good", it was an increase over current costs. Mr. Urquhart's evidence was that Mr. Liefke agreed that if Chalifour encountered difficulties paying rent in the first three years, Mr. Liefke would reduce the rent accordingly. The deferred rent would be "moved" to the end of the lease. This was similar to the arrangement TBM had with Irly. Mr. Urquhart described the rent deferral arrangement as a "safety net."

**146**  Mr. Liefke also recalled discussing rent deferral with Mr. Urquhart in November 2012, though his recollection was less detailed than Mr. Urquhart's recollection. Mr. Liefke recalled agreeing to defer rent as necessary for "up to three years" until "they got on their feet". Mr. Liefke was not overly concerned about the rent deferral because he knew that Chalifour was already paying "6 or $800,000 a year at their current Irly location in Surrey" and Chalifour was planning to increase its distribution volume.

**147**  I cannot find that there was a "specific direction" by the Board and that, by failing to finalize and secure in writing such a "safety term", Mr. Urquhart was in breach of the duties that he owed. While I am satisfied that such a term had to be included within any lease, the failure to obtain a finalized lease by the time the employment of Mr. Urquhart was terminated does not, in my opinion, amount to a breach of the duties owed by Mr. Urquhart.

**148**  It was clear that an accommodation would be reached. I am satisfied that the verbal assurances received from Mr. Liefke as confirmed at his Examination for Discovery and at Trial established an honestly held and reasonably believed assumption on the part of Mr. Urquhart that such a term would be available.

**149**  I find that it was not a breach of the duties that Mr. Urquhart owed that such a term was not, as yet, in writing. I find that it would have been available and that there was ample time for such a term to be included within the lease that would be in place.

**150**  I am satisfied that the Defendants have not proven on a balance of probabilities that Mr. Urquhart was in breach of his duties owed regarding the so called "safety net". I am satisfied that he exhibited an appropriate degree of prudence and diligence on this question.

**(c) Failure to Ensure a Favourable Term for an "exit" From the Facility**

**151**  The Defendants submit that Mr. Urquhart breached his duty by failing to ensure that favourable exit terms were built into the lease. The resolution passed by the Board specified that management was to ensure "that there are favourable terms built into the lease that allow for exiting the facility before the end of the lease term."

**152**  Mr. Urquhart testified that he "believed that Mr. Liefke would give me that term [subletting]". Consistent with the belief of Mr. Urquhart, Mr. Liefke testified that he considered a subleasing term to be one of the "normal standard clauses in the lease" and that "it's in every lease I've ever done". In all the circumstances, it was reasonable for Mr. Urquhart to have understood that Mr. Liefke would agree to this term.

**153**  Even if it could be argued that Mr. Urquhart should have expressly confirmed an agreement which included this term prior to the March 28, 2013 Meeting and that Mr. Urquhart owed a duty to have such a term in place, it cannot be said that his failure to do so caused losses to the Defendant. I find that the evidence demonstrates that Mr. Liefke would have agreed to this term and the lease with this term would have been finalized in any event. Any losses and any claim for indemnity by the Defendants do not flow from any failure to obtain confirmation that a subletting clause would be included in the lease. It is also clear from the Memorandum that was before the March 28, 2013 Meeting and the Minutes from that Meeting that the gross rental of $10 per square foot would make the opportunity to sublease reasonable. I find that the Defendants have not proven on a balance of probabilities that Mr. Urquhart was in breach of any duties owed in this regard.

**(d) Was There a Failure to conduct "further due diligence"?**

**154**  The Minutes of March 28, 2013 attribute Mr. Westrum as stating "We will have another conference call at a later date to discuss the financials and do our due diligence". It is the submission of the Defendants that Mr. Urquhart took no steps to conduct further due diligence regarding the financial implications or to arrange a further meeting of the Board to discuss these implications and that, by failing to do so, Mr. Urquhart was in breach of his duties.

**155**  It was the understanding of Mr. Urquhart at the Meeting that this was not a direction to management but that the Board itself would be doing further due diligence. I find that this is an entirely reasonable interpretation given that management had just given a presentation in the Memorandum without any questions or concerns being raised about its contents. Further, the Board had just authorized management to "finalize lease terms". The Minutes of the April 24, 2013 Meeting do not reflect either a discussion of "due diligence" by the Board or an indication from any of the Directors including Mr. Westrum that any report from senior management regarding "due diligence" had not been forthcoming.

**156**  At Trial, Mr. Westrum never testified that management was actually tasked with this due diligence. Rather, he spoke of how he prepared a "break-even" budget spreadsheet between the March and the April Meetings. Mr. Westrum was reluctant to describe this spreadsheet as being part of his "due diligence", preferring to describe it as his "duty" or "fiduciary duty". Mr. Westrum ultimately agreed at Trial that the spreadsheet he prepared was part of his own due diligence when confronted with his Discovery evidence when he had characterized it as such. The following questions and answers from his Examination for Discovery indicated the following:

Q I take it that that occurred? The conference call at a later date occurred?

A We did not, the board of directors. We didn't get any feedback back.

Q Well, it doesn't look like, according to this note, that it's linked to feedback. It looks like it's something that is driven by the board to do due diligence, isn't it?

A I did due diligence on my own.

Q And when did that occur?

A After this meeting [of March 28, 2012].

Q Okay. And what did you do?

A I ran the numbers through that I thought would be realistic and I worked up from a break - to a break-even budget.

**157**  Under cross-examination, Mr. Westrum stated that he started a spreadsheet which he titled "Break-Even Budget" after the March 28, 2013 Meeting, that his spreadsheet was not finished, and that he did not keep it: "No. I was running out of time, and so I decided to do it a different way without the spreadsheet." He stated that he did not bring it to the attention of other Board members: "...because I was waiting for the due diligence to come". "I was waiting because I wanted to hear back from the senior leadership team regarding some concerns I had with the spreadsheet, and I wanted to make sure that they would bring that back to me."

**158**  While Mr. Westrum testified that he had "some concern" or questions with the numbers after having prepared his spreadsheet, he did not keep the spreadsheet he had prepared and agreed that he did not bring any questions he had to the attention of other Board members or senior management at the April 24, 2013 Meeting or otherwise. As well, there is no evidence before the Court that Mr. Westrum complained that senior management had failed to produce the due diligence which was set out in the Minutes of the March 28, 2013 Meeting of the Board.

**159**  The Memorandum set out in detail the financial implications of the move to the Facility and the change in the operation of the Chalifour warehouse. A final decision had been made previously and the Facility was already being referred to as "the new facility". I find that the purpose of the April 24, 2013 Meeting was to deal with any questions that Directors had regarding the Facility and the only matter raised was confirmation that the lease price was $1,400,000.

**160**  The Tim-Br Mart Group had to locate a new facility and Mr. Urquhart presented some options to the Board in that regard in December of 2012. When it became clear that only one of these options was financially viable, Mr. Urquhart provided the Board with the necessary information to make an informed decision about moving forward, including a modified business strategy of cutting costs and increasing sales to make any new facility profitable. The Board received the Memorandum to which was attached projections regarding the implication of the decision that they would take.

**161**  I find that there was no failure on the part of Mr. Urquhart to provide the Board with further "due diligence". I find that Mr. Urquhart did not breach any duties owed. The Defendants have failed to prove on a balance of probabilities that he did.

**162**  On the general question of whether Mr. Urquhart failed to fulfill the specific directions made by the Board at the March 28, 2013 Meeting, I have concluded that no such specific directions were given and that, if given, were fulfilled in accordance with what was within the range of reasonableness. I am satisfied that Mr. Urquhart proceeded with prudence, that he acted honestly and in good faith with a view to the best interests of the Tim-Br Mart Group and that performed his duty of care in a diligent and reasonable manner. In the circumstances, it is inappropriate to "second-guess" the business expertise that he brought to the situation.

**163**  Having reached that conclusion, it is then necessary to review the alternative position raised by the Defendants regarding what they allege were misrepresentations made to the Board.

**DID MR. URQUHART MAKE MISREPRESENTATIONS TO THE BOARD OF DIRECTORS?**

**164**  Mr. Urquhart was obliged to disclose all material information to the Board that would likely impact their decision-making process respecting the relevant subject matter. The issue is what a reasonable man in the position of Mr. Urquhart would have viewed as information likely to influence the conduct of the Board in the circumstances. The obligation of full disclosure was described by Taggart J.A. on behalf of the Court in *Ocean City Realty Ltd*. v. *A&M Holdings Ltd.*, [*36 D.L.R. (4th) 94*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JXNB-62MK-00000-00&context=) (B.C.C.A.):

... The duty of disclosure is not confined to those instances where the agent has gained an advantage in the transaction or where the information might affect the value of the property, or where a conflict of interest exists. The agent certainly has a duty of full disclosure in such circumstances; they are commonly occurring circumstances which require full disclosure by the agent. However, they are not exhaustive.

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

If the decision of Lieff J. in Chugal Properties Ltd. v. Levine et al. (1970), [*1970 CanLII 394*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJT1-F956-S3T5-00000-00&context=) (ON SC), [*17 D.L.R. (3d) 667*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJT1-F956-S3T5-00000-00&context=), [*[1971] 2 O.R. 331*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJT1-F956-S3T5-00000-00&context=), expresses a more restricted view of the obligation of an agent to his principal in the circumstances of the case that was before that learned judge, then I respectfully disagree with his conclusion.

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

[at pp. 98-99]

**165**  If Mr. Urquhart obtained full authority at the March 28, 2013 Meeting, the Defendants submit that he did so based on misrepresentations and a failure to disclose to the Board the true status of his dealings with Mr. Liefke and the true status of the implications of the move of the Centre to the Lands.

**166**  The Defendants are required to satisfy five elements to make out a claim of negligent misrepresentation: a) the existence of a duty of care, based on a "special relationship" between the representor and representee; b) an untrue, inaccurate, or misleading representation; c) the representor acted negligently in making the misrepresentation; d) the representee reasonably relied on the misrepresentation; and e) the reliance was detrimental to the representee, in that it caused damage. The Defendants have the onus of showing that the statements made by Mr. Urquhart were "an untrue, inaccurate, or misleading representation". Further, they must have been made negligently by Mr. Urquhart.

**167**  In assessing whether a representor acted negligently, the applicable standard of care is that of a reasonable person; the court will ask whether the representor took reasonable care in the context of all the facts to ensure that the representations were true and did not misinform the representee.

**168**  Even where a misrepresentation was made negligently, the representee still has the onus of proving that the misrepresentation was "material in the sense that it would be likely to influence the conduct of the plaintiff or would be likely to operate upon his judgment". Further, the representee must also show that he or she relied on the misrepresentation, and was reasonable in doing so. If the representee would have done the same thing, even if accurate information was provided, causation will not be shown and the claim must fail.

1. **Spreadsheet was Negligently Prepared**

**169**  The Defendants submit that Mr. Urquhart was negligent in preparing the financial information attached to the Memorandum, that the Memorandum failed to take into account the repayment of the principle of the $2,500,000 loan that would be necessary for the contemplated capital expenditures, that a proper business plan for the Centre had not been developed, that there were other misrepresentations in the Memorandum.

**170**  I have concluded that Mr. Urquhart was not negligent in preparing the spreadsheet. It was reasonable that he relied on Ms. Hopper to compile the financing information, particularly given her expertise in accounting. At most, the exclusion of this information was a mistake that Mr. Urquhart did not catch and that is not actionable as Mr. Urquhart took all reasonable care to ensure that the spreadsheet was accurate and not misleading for the Board members. That no one else caught the mistake until the third week of Trial shows that it was hardly an obvious error.

**171**  While Mr. Urquhart did not have an explanation for principal repayment not being included in the Memorandum, Ms. Hopper, who was primarily responsible for the cost portion of the spreadsheet, did. She explained that the spreadsheet was a Profit and Loss Statement (as opposed to a Cash Flow Statement), which typically takes into account interest payments, but not principal repayments. The mere fact that the Memorandum did not include this amount did not make it "untrue".

**172**  The Board had the Memorandum at March 25, 2013 and had an opportunity review it in advance of the March 28, 2013 Meeting and to discuss it at the Meeting. There is no evidence that *anyone* at the Meeting identified principal repayments as missing from the calculations or sought any clarifications in this respect. While Mr. Westrum undertook to review the numbers following the March 28, 2013 Meeting, he never identified any concerns with respect to capital repayment.

**173**  The Defendants have not met the burden of demonstrating that, had the Board had this additional information, they would not have authorized management to proceed. I cannot conclude that any damages accrued to the Defendants by virtue of the failure to take into account the repayment of the principle of the loan of $2,500,000 for the contemplated capital expenditures.

**174**  The Defendants have failed to demonstrate that Mr. Urquhart made an "untrue, inaccurate, or misleading representation", that Mr. Urquhart acted negligently, that the Defendants reasonably relied on the alleged misrepresentation, or that alleged misrepresentation caused the Defendants to suffer damages.

**(b) No Proper Business Plan Had Been Developed**

**175**  The Defendants submit that Mr. Urquhart represented to the Board that he had developed a proper business plan for the new Facility which demonstrated (based on reasonable and verifiable terms and assumptions) that the lease of the Centre made financial sense, would permit Chalifour to be self-sustaining, and would allow it to generate a profit, as was mandated by the Board and acknowledged by Mr. Urquhart as being important.

**176**  The Defendants submit that the Memorandum presented to the Board on March 28, 2013 was not a "business plan" and no proper business plan respecting the significant change in the business model was ever prepared by Mr. Urquhart.

**177**  Ms. Hopper testified that the change in strategic direction that Mr. Urquhart envisioned and that needed to be put into motion to be successful so that Chalifour would be able to meet its financial obligations was essentially "in his head". Although he talked about pieces of the plan to her, she and Mr. Walters were largely relying on Mr. Urquhart to articulate the vision for the new Facility. She further testified that a full plan for these changes in strategic direction was never set out in writing.

**178**  Mr. Toth who was a Director testified that what Mr. Urquhart presented to the Board on March 28, 2013, was not the business plan that the Board had requested that senior management put together back in December of 2012. In his words, "There still really wasn't one in place". Finally, Mr. Harris testified that, in his discussions about the cost of the new proposed Facility, Mr. Urquhart agreed that Chalifour could not afford the cost unless it significantly increased revenues.

**179**  I conclude that the facts on which this submission is based falls short of establishing that Mr. Urquhart made an "untrue, inaccurate, or misleading representation", that Mr. Urquhart acted negligently, that the Defendants reasonably relied on the alleged misrepresentation or that the alleged misrepresentation caused damages.

**180**  Mr. Urquhart and Ms. Hopper each testified that the Memorandum was prepared specifically in response to the request for management to prepare a business plan. Ms. Hopper testified that its form and detail was "appropriate for the situation at hand". I agree.

**181**  With respect to the anticipated changes to the business model for Chalifour, Mr. Urquhart provided detailed testimony at Trial on the changes to the business model that he contemplated, and how they were incorporated into the Memorandum. The Memorandum sets out in the "Assumptions" section the strategic changes that were incorporated into the spreadsheet. Additional clarification was provided to the Board in a March 27, 2013 e-mail from Ms. Hopper.

**182**  If the Defendants thought the Memorandum was lacking as it was not in the format of a "proper business plan", that it failed to include the anticipated changes to the business model, or that it was not what had been requested at the December 19, 2012 Meeting, then the members of the Board would have said that that was the case. At the time, the Board had the Memorandum by March 25, 2013. It was presented to them at the March 28, 2013 Meeting by Mr. Urquhart, Ms. Hopper and Mr. Walters. There was a discussion about it then. If they thought it was in the wrong format, inadequate or not sufficiently detailed, they had numerous opportunities to ask Mr. Urquhart for additional or different information. They did not do so.

**183**  The testimony at Trial simply highlighted the point. Mr. Toth testified in chief that he was expecting "a complete business plan" following the December 19, 2012 Meeting. However, in cross-examination he acknowledged that he did not specify to Mr. Urquhart what type of information he wanted, or make any inquiries into the status of this "complete business plan". He also acknowledged that the Memorandum included information on changes to the business model. Despite his supposed concerns with the Memorandum, he made no comments about it and voted along with the other Board members to pass the Motions at the March 28, 2013 Meeting.

**184**  I conclude that the Defendants have not proven on a balance of probabilities relating to this submission that Mr. Urquhart made an "untrue, inaccurate, or misleading misrepresentation", that he acted negligently, that the Defendants reasonably relied on the alleged misrepresentation or that reliance on the alleged misrepresentation caused damages.

1. **Items Not Included in the Lease**

**185**  It was represented that the price for the Centre included several key design features, outside of any specific TIM-BR MART tenant improvements as the Memorandum stated that the lease price included:

... office build-out plus extra wide doors, superior lighting, ceiling fans (for better circulation), sprinklers installed per our rack plan, thicker concrete pad to handle additional weight of drywall and lumber.

**186**  This note was included in the Memorandum by Mr. Urquhart but Mr. Harris testified that he had no discussions with Mr. Liefke or Mr. Woerler at any time before March 28, 2013 about these items being included or not included in the lease rate that Mr. Liefke was offering.

**187**  The Defendants submit that it is clear that Mr. Urquhart and Mr. Liefke never discussed issues of spacing or design features during their negotiations. The extent of Mr. Urquhart's evidence is that he knew it was "the size of a distribution centre that we would - that would suit our purposes". Therefore, the Defendants submit that Mr. Urquhart had not basis for representing to the Board that the lease price included any of the terms specifically mentioned. Since this was never discussed or determined to be the case, the Defendants submit this was a false statement to the Board.

**188**  With respect to whether the statement was untrue, Mr. Urquhart testified that he learned after the March 28, 2013 Meeting, that the "asks" that he understood to be included in the lease price were actually above and beyond what was actually to be included. However, he explained that the solution to this problem involved using the buying power of the TIM-BR Mart Group to buy materials with the cost savings being split between the TIM-BR Mart Group and Mr. Liefke and that this arrangement was mutually beneficial and ensured that the TIM-BR Mart Group would not go beyond its $2.5 million budgeted for capital expenditures and the $1.4 million all-inclusive lease costs. Mr. Liefke confirmed this agreement.

**189**  I find that Mr. Urquhart was not negligent in making the statement in the Memorandum. He testified that he received this information from Mr. Harris. While the Defendants suggest that the contrary evidence of Mr. Harris should be preferred, there is no basis to suggest that Mr. Urquhart would have purposefully or accidently "made up" this information. He had no need or reason to "sell" the Board by exaggerating the feature of the Liefke Proposal.

**190**  It is clear to me that the "extra wide doors" and the "thicker concrete pad to handle additional weight of the drywall and lumber" was included within the lease price quoted by Mr. Liefke. Those features were already included within the planning for the Facility. While it may be that other "asks" were not included within the lease price, there is no evidence before me which would allow me to conclude that these "asks" could not have been brought within the $2.5 million budget for capital expenditures. Accordingly, while the Defendants allege that the Memorandum represented to the Board that certain design features would be included in the lease price, I find that the Defendants have failed to demonstrate that Mr. Urquhart made an "untrue, inaccurate, or misleading representation", that Mr. Urquhart acted negligently, or that the Defendants reasonably relied on the alleged misrepresentations.

1. **Not "Build to Suit"**

**191**  The Memorandum stated under "Lease Term Recommendations" that "This facility is not 'built to suit' our purpose alone. It will be reasonably straight forward to sublease should we need to leave the facility." The Defendants allege that Mr. Urquhart misrepresented that the Facility was not "built to suit" only for the TIM-BR Mart Group and that it would be reasonably straight forward to sublease.

**192**  I have concluded that the Defendants have failed to prove on a balance of probabilities that Mr. Urquhart made an "untrue, inaccurate, or misleading misrepresentation" in this regard or that he acted negligently in making the statement that he did.

**193**  Even if the statement over-estimated the attractiveness of Unit 100 as a sublet, Mr. Urquhart did not act negligently in making it. He testified that he understood the statement (which obviously entails a degree of opinion and uncertainty) to be correct, based on everything that he had learned from Messrs. Allen and Walters. These were the individuals that Mr. Urquhart tasked with finding an alternate distribution facility. They had been directly involved in reviewing alternative options and dealing with the agent that had been retained. It was reasonable for Mr. Urquhart to form his understanding of the relative likelihood of subletting based on the information that he received. Similarly, when Ms. Hopper sought information regarding the comparative rental rates, she spoke to Mr. Harris. Mr. Urquhart took reasonable care in the context of all the facts to ensure that the representation was true and did not misinform the Board.

**194**  Regarding the alleged misrepresentation that the Facility was not "build to suit", I am satisfied that the Defendants have failed to demonstrate that Mr. Urquhart made an "untrue, inaccurate, misleading representation" or that Mr. Urquhart acted negligently in stating that in the Memorandum.

**(e) Failure to Include the Repayment of the Principal of $2.5 Million Alone**

**195**  As noted above, the financial projections appended to the Memorandum did not take into account the repayment of the principal of the loan of $2.5 million required for the capital expenditures for the distribution centre. For the factors noted above, I have concluded that the Defendants have failed to demonstrate that Mr. Urquhart made an "untrue, inaccurate, or misleading representation" or that Mr. Urquhart acted negligently in the financial projections appended to Memorandum not taking into account the repayment of the principal of the loan.

**(f) Conclusion Regarding Alleged Misrepresentations**

**196**  Taking into account the information that Mr. Urquhart had before him, the source of that information, and his general understanding of the advantages and disadvantages of using the Facility for the Centre, I cannot conclude that what he advised the Board in the Memorandum amounted to misrepresentations. I have concluded that the Defendants have failed to prove on a balance of probabilities that Mr. Urquhart acted negligently in the information that was set out in the Memorandum including the financial projections which were attached to the Memorandum. Accordingly, I dismiss the alternate submissions put forward on behalf of the Defendants.

**SUMMARY**

**197**  The Third Party Claim against Mr. Urquhart is dismissed. The parties will be in a position to speak to the question of costs.

G.D. BURNYEAT J.

**End of Document**

[***Atkinson v. Niles, [2009] B.C.J. No. 645***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S45K-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

I.B. Josephson J.

Heard: March 11-13, 2009.

Judgment: April 1, 2009.

Docket: M111110

Registry: New Westminster

**[2009] B.C.J. No. 645** | [*2009 BCSC 442*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2SK-00000-00&context=) | [*177 A.C.W.S. (3d) 396*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2SK-00000-00&context=)

Between Kevin Atkinson, Plaintiff, and Edson Lloyd Niles, Michael Norman Atkinson and Roy Atkinson, Defendants

(30 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Leg injuries — Knee — Considerations impacting on award — Contributory *negligence* — Young, elite baseball player who injured knee in motor vehicle accident awarded $55,000 for non-pecuniary damages and $100,000 for lost earning capacity — Knee injury precluded player from playing position for which he was best suited and would limit him in alternate employment pursuits — Damages reduced to $120,125 because player not wearing seatbelt at time of accident.**

**Damages — Types of damages — For personal injuries — Loss of earning capacity — Non-pecuniary loss — Young, elite baseball player who injured knee in motor vehicle accident awarded $55,000 for non-pecuniary damages and $100,000 for lost earning capacity — Knee injury precluded player from playing position for which he was best suited and would limit him in alternate employment pursuits — Damages reduced to $120,125 because player not wearing seatbelt at time of accident.**

**Damages — Assessment of damages — Limiting factors — Contributory *negligence* — Young, elite baseball player who injured knee in motor vehicle accident awarded $55,000 for non-pecuniary damages and $100,000 for lost earning capacity — Knee injury precluded player from playing position for which he was best suited and would limit him in alternate employment pursuits — Damages reduced to $120,125 because player not wearing seatbelt at time of accident.**

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| Assessment of damages in an action arising from a motor vehicle accident in which Atkinson sustained injuries to his face and knee. At the time of the accident, Atkinson was 16 years old and an elite baseball player with aspirations of playing in a professional league as a catcher. He was not wearing his seatbelt and was a front-seat passenger in a car driven by his brother collided with a vehicle that suddenly turned into its path. The other driver, Niles, admitted liability for the accident. Atkinson was unable to return to his position playing catcher after the accident because he suffered from knee pain that prevented him from squatting. He was placed at first base, but lacked the size most professional leagues required of a player at that position. Hi foot speed was also likely to have been affected by his knee injury. He was expected to require surgery for his knee problems in the future. He testified that if his goal of playing baseball professionally did not pan out, he wanted to become a firefighter or enter a trade, like his father and brother. At the time of trial, he was 22 years old an on a baseball scholarship to university.  HELD: Atkinson was awarded non-pecuniary damages of $55,000 and $100,000 for lost earning capacity.  The award was reduced by 23 percent to $120,125 because Atkinson was not wearing his seatbelt at the time of the accident. The evidence established Atkinson had a real chance of playing professional baseball and that his injuries in the accident rendered him less capable overall and less marketable as a player as well as an employee in one of his other career choices. |

**Counsel**

Counsel for Plaintiff: J.C. Moulton.

Counsel for Defendants: A.R. Ayliffe and J.R. Filek.

[Editor's note: A corrigendum was released by the Court April 6, 2009, the correction has been made to the text and the corrigendum is appended to this document.]

**Reasons for Judgment**

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| **I.B. JOSEPHSON J.** |

**1**   The 22 year old plaintiff is a gifted athlete in his senior year of a baseball scholarship with the University of New Mexico. He has aspirations to play in a professional league.

**2**  In 2003, he suffered facial cuts and an injury to his left knee. The knee injury and its implications for the plaintiff in the past and future has been the focus of this trial. For a sedentary person, that injury would have had much less impact, but the implications were much greater for this elite athlete.

**The Motor Vehicle Accident**

**3**  On May 12, 2003, the then 16 year old plaintiff was a passenger in the front seat of a vehicle driven by his brother. A third person was seated behind the plaintiff. The defendant suddenly turned into their path. There was a significant impact. Liability is admitted.

**4**  The plaintiff was not wearing a seat belt. The parties agree that there will be a 22.5% reduction because of this from any award granted.

**5**  The plaintiff's head struck the windshield, causing lacerations and bleeding to his face and head. The left knee of the plaintiff struck the dash board, causing immediate and ongoing pain. He was transported to hospital, where treatment focused on the lacerations. Surgical strips were employed rather than stitches. There was no visible injury to the knee, though the plaintiff complained of pain.

**Post Accident**

**6**  The significant cuts and lacerations healed normally, but some permanent scarring on the forehead remains. The scarring is now slight, but a source of embarrassment for the plaintiff. He combs his hair down over his forehead and often wears hats to conceal the scars.

**7**  The plaintiff also received an injury to the head when he struck the windshield, but that was relatively minor and pain resolved within a couple of weeks.

**8**  While there is evidence that the plaintiff was treated for a bone chip in his right arm one year after the accident, there is no evidence linking that condition causally to the motor vehicle accident.

**9**  The plaintiff was back in school after a couple of days and back to baseball within a week or two.

**10**  The plaintiff was a catcher for a White Rock team in an "elite" league. He was particularly suited to that position and was regarded as one of the team's strongest players. The knee injury did not affect his high batting proficiency, but he found knee pain prevented him from squatting and thus prevented him from resuming his position as catcher. That situation continues to the present. He first returned to game play as a designated hitter and was then was placed at the first base position, a position he occupies with his university team today.

**The Left Knee**

**11**  This injury and its impact on the plaintiff was the primary focus of the trial. The diagnostic cause of the ongoing knee disability was a contested issue, with the plaintiff maintaining it is the rare and difficult to diagnose posterior cruciate ligament tear, while the defendant maintains it is damage to the trochlea groove of the femur. Orthopaedic surgeon Dr. Smit examined the plaintiff and obtained an MRI report in coming to the former conclusion. Orthopaedic surgeon Dr. Hill conducted a file review for an independent medical examination on behalf of the Defendant in coming to the latter conclusion.

**12**  The issue is of more academic interest than one of relevance to the issues in this trial. Both doctors agree that the plaintiff injured his knee in a manner consistent with the knee having forcefully struck the dashboard in a motor vehicle accident. There is no evidence of another blow to the knee and I accept the evidence of the plaintiff that there was none. Both doctors agree that the injury is permanent and that the plaintiff is at a much increased risk of developing progressive osteoarthritis, eventually requiring knee replacement surgery.

**13**  Having said that, I prefer the opinion of Dr. Smit over that of Dr. Hill. Dr. Smit had the benefit of a careful examination of the plaintiff. Dr. Hill did not. He had the results of the 2007 MRI, the "gold standard" for diagnosing injuries of this type, and based his diagnosis on objective symptoms. A very thorough cross examination exposed no weaknesses. I reject completely the submission by the defendant that Dr. Smit had become an "advocate" for the plaintiff. He was extremely thorough and careful in forming his opinion. This type of injury is extreme both its rarity and the degree of difficulty in its diagnosis, perhaps explaining why the diagnosis was missed by previous caregivers.

**Non-Pecuniary Damages**

**14**  The plaintiff suffered lacerations to the face and head, leaving slight but permanent scarring to his forehead that is the source of some embarrassment.

**15**  More significantly, he suffered a permanent injury to his left knee that has caused and will continue to cause intermittent pain, particularly with certain body positions. He will suffer the early onset of osteo-arthritis and require knee replacement surgery, likely in his 40's. If he lived a sedentary life, as Dr. Hill recommends, the time for that surgery could be extended to the 60's. However, the plaintiff is a gifted and active athlete. Extending the time for surgery by remaining inactive would constitute a drastic negative impact on his lifestyle. There is evidence that, because of the limited life span of a knee replacement, other surgeries may be required. While the defendant points to ongoing medical research which may provide other alternatives in future, that remains speculative at present.

**16**  A significant impact for this plaintiff has been the impact on his baseball career. The evidence is that he was particularly suited to playing the position of catcher, a position he has not been able to occupy since the accident, nor will he ever. There is evidence, which I accept, is that he would have been most attractive to professional baseball had he been able to play that position. There is also evidence that, playing at first base, he does not have the size that professional baseball seeks for that position. There is also evidence that the knee injury had some impact on his foot speed, which would also diminish his chances of playing professionally.

**17**  I was referred to a number of cases from counsel in which the range for non-pecuniary damages was between $27,000 and $102,000 in 2009 dollars. The plaintiffs in the cases at the higher end of this spectrum suffered more disabling effects from their injuries as compared to the plaintiff in this case: ***Lawson v. Vu***, [*2000 BCSC 206*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X23S-00000-00&context=) ***Farrell v. White Rock Players' Club***, [*[1997] B.C.J. No. 507*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21K7-00000-00&context=), New Westminster Registry No. S023720. These plaintiffs were restricted completely in their recreational activities and significantly in day to day movements and activities.

**18**  This case is also distinct from the cases at the lower end of the spectrum: ***Milsom v. Verron***, [*2005 BCSC 1452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B266-00000-00&context=), ***Barbour v. Khamis***, [*73 A.C.W.S. (3d) 245*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M130-00000-00&context=), [*[1997] B.C.J. No. 1857*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M130-00000-00&context=). The plaintiff in this case is younger, and has a higher chance of requiring invasive surgery at least once in his life. The plaintiff is also a highly gifted athlete who has been substantially effected in his primary recreation, which distinguishes from the plaintiff in ***Barbour***. I also consider to a degree the probability that this injury has affected his chance of fulfilling a dream that he has worked very hard for and continues to do so - playing professional baseball. Under this heading of damages, however, I am careful to only consider this possibility in relation to loss of enjoyment. Any potential loss of earning capacity which will be addressed subsequently in this judgment.

**19**  Having considered the circumstances of this case and the authority provided by counsel, I assess non-pecuniary damages at $55,000.

**Loss of Earning Capacity**

**20**  The plaintiff will be graduating from university with a general degree. Thus he has no earnings history. As earlier stated, his goal has long been to play professional baseball. That has not been a unrealistic goal given his exceptional talent.

**21**  However, he is less attractive to professional baseball because of the knee injury, both because of that fact and the fact that the injury required him to move permanently to a position where he is less valuable. The evidence of professional baseball scout Mr. Archer in that regard is consistent with common sense. Measuring that lessened opportunity is a particularly difficult exercise at his youthful age, except to say that it is real and not insignificant.

**22**  If that dream is not realized, the plaintiff intends to seek a career as a firefighter or in a trade, as his brother and father have done. While there is no expert evidence on the issue, It is plain and obvious that the plaintiff, with his permanent knee injury, will be less attractive to future employers, particular those occupations requiring physical exertion.

**23**  Finally, I must consider the very real possibility that the plaintiff will be forced to undergo at least one major knee surgery and the effect this will have on his employability and ability to earn income in the physically demanding careers most likely open to him.

**24**  In ***Andrews et al. v. Grand & Toy Alberta Ltd. et al.***, [*[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=) Dickson J., as he then was, characterized the problem of assessing a claim for lost ability to earn income in this way (p. 469 D.L.R.):

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 of which compensation must be made: The Queen v. Jennings, supra, [*[1966] S.C.R. 532*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22JX-00000-00&context=). A capital asset has been lost: what was its value?

**25**  The court 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=) (SC) cited this passage with approval and answered the questions posed on application to the facts in that case. The Court explained, that the plaintiff loss of ability to earn income must be assessed taking into account: the fact that some lines of work are now closed to him; the effect of future symptoms on employability; and the possibility of future surgeries and recovery time.

**26**  I conclude that the plaintiff has met the four tests set out ***Kwel v. Bolsclair*** [*(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.):

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.

**27**  Having assessed all the circumstances of this case and the above noted legal principles, I award the plaintiff $100,000.

**Future Care Costs**

**28**  Pointing to evidence that the plaintiff will require knee replacement surgery sometime in his forties, the plaintiff seeks $5,000 for rehabilitation costs following surgery. There is simply no evidence beyond speculation as to what those costs might be, if anything.

**29**  I will decline to award these costs.

**Summary**

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| 1. |  | Non-Pecuniary Damages | $55,000 |  |

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| --- | --- | --- | --- | --- |
| 2. |  | Loss of Earning Capacity | 100,000 |  |

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| --- | --- | --- | --- |
|  | TOTAL | $155,000 |  |

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|  | Less 22.5% seatbelt reduction | $120,125 |  |

**30**  The plaintiff will have his costs, with leave to apply.

I.B. JOSEPHSON J.

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Corrigendum

Released: April 6, 2009

***Revised Judgment***

Please be advised that the attached Reasons for Judgment of Mr. Justice I.B. Josephson dated April 1, 2009 have been edited.

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|  | \* |  | *On the front page, J.R. Filek has been added as Co-Counsel for the Defendants.* |  |

**End of Document**

[***Canada Trustco Mortgage Co. v. Renard, [2006] B.C.J. No. 2840***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2MW-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Burnyeat J.

Heard: March 7 - 11, 14 - 18 and 21-24; April 5 -

8; April 18 - 22 and 25-26; May 2 - 4 and 30 - 31;

and June 1 - 3 and 6 - 8, 2005.

Judgment: October 31, 2006.

Vancouver Registry No. C984908

**[2006] B.C.J. No. 2840** | 2006 BCSC 1609 | 51 R.P.R. (4th) 204 | 153 A.C.W.S. (3d) 450 | 2006 CarswellBC 2666

Between Canada Trustco Mortgage Company, Plaintiff, and Regis Eugene Renard and Velma Elaine Renard, Defendants, and Andre Glockl, Defendant by Counterclaim

(243 paras.)

**Case Summary**

**Commercial law — Banking — Financial institutions — Trust companies — Loans — Application by the plaintiff trust company for judgment against the defendants on a promissory note and mortgage allowed — Plaintiff and its employee who dealt with the defendants were not in a fiduciary relationship with the defendants — Defendants were not induced to borrow the funds because of the representations of the employee for which the plaintiff would have been vicariously liable — Note and mortgage were enforceable because they were not part of a contract to commit a criminal or civil wrong.**

**Contracts — Formation — Legality — Illegal contracts — Application by the plaintiff trust company for judgment against the defendants on a promissory note and mortgage allowed — Note and mortgage were enforceable because they were not part of a contract to commit a criminal or civil wrong.**

**Real property law — Mortgages — Mortgage agreement — Validity — Mortgagee's remedies — Foreclosure order — Application by the plaintiff trust company for judgment against the defendants on a mortgage allowed — Plaintiff and its employee who dealt with the defendants were not in a fiduciary relationship with the defendants — Defendants were not induced to borrow the funds because of the representations of the employee for which the plaintiff would have been vicariously liable — Mortgage was enforceable because it was not part of a contract to commit a criminal or civil wrong — Plaintiff was granted a foreclosure order.**

**Tort law — Fraud and misrepresentation — Negligent misrepresentation — Fraudulent misrepresentation — Application by the plaintiff trust company for judgment against the defendants on a promissory note and mortgage allowed — Plaintiff and its employee who dealt with the defendants were not in a fiduciary relationship with the defendants — Defendants were not induced to borrow the funds because of the representations of the employee for which the plaintiff would have been vicariously liable.**

**Tort law — *Negligence* — Fiduciary duty — Duty of care — Application by the plaintiff trust company for judgment against the defendants on a promissory note and mortgage allowed — Plaintiff and its employee who dealt with the defendants were not in a fiduciary relationship with the defendants — No duty of care was owed to the defendants — Defendants were not induced to borrow the funds because of the representations of the employee for which the plaintiff would have been vicariously liable.**

**Tort law — Vicarious liability — Employer, for acts of employees — Application by the plaintiff trust company for judgment against the defendants on a promissory note and mortgage allowed — Plaintiff and its employee who dealt with the defendants were not in a fiduciary relationship with the defendants — Defendants were not induced to borrow the funds because of the representations of the employee for which the plaintiff would have been vicariously liable.**

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| Application by Canada Trustco Mortgage Company for judgment against the defendants Regis and Velma Renard based on a promissory note and a mortgage that were both obtained from them in June 1996 -- Defendants defended the claim on the basis that an individual named Glockl, who was the defendant by counterclaim, made certain representations about an investment and that the defendants, in reliance of those representations, borrowed funds from Trustco to make the investment when Glockl knew that the defendants relied upon his negligent and fraudulent representations -- They counterclaimed against Glockl for damages because of his conduct -- They also claimed that Trustco was vicariously liable for his conduct -- Glockl was employed by Trustco when he made the alleged representations -- Defendants also claimed that the note and mortgage were unenforceable because they were part of a contract to commit a criminal or civil wrong -- HELD: Action allowed -- Counterclaim dismissed -- Trustco was entitled to an order nisi of foreclosure of the amount found to be owing under the mortgage -- Relationship between the defendants and Trustco was between two independent contracting parties -- Defendants did not have the right to expect that Glockl and Trustco would act in their interests to the exclusion of the interests of Trustco -- This was a commercial relationship -- It was not a bargain between an experienced financial institution and unsophisticated borrowers -- There was no fiduciary relationship between Trustco and the defendants -- Elements necessary to satisfy the torts of negligent or fraudulent misrepresentation were not established -- No duty of care was owed to the defendants by Glockl and Trustco -- There was no special relationship between Glockl and Trustco and the defendants -- There was no existing banker-customer relationship -- Glockl was a banker and was not a financial advisor -- There was no evidence that the defendants told Glockl that they relied upon him or Trustco for investment advice -- There was no reason for Glockl or Trustco to believe that the defendants would rely on any statements made by Glockl about the investment -- Defendants did not go to Glockl for financial and investment advice -- They went to Trustco to obtain a loan -- They chose Trustco because it had no prior knowledge about their finances and could be convinced to lend them sufficient funds -- Defendants' misrepresentations induced Trustco to make the loans -- Payment of $5,000 that the defendants paid to arrange for an expedited appraisal was interest within the scope of the Criminal Code provision that prohibited criminal rates of interest -- However, it did not make the interest under the mortgage into a criminal rate of interest -- Mortgage did not violate the provisions of the Trust and Loans Companies Act and the Bank Act -- S. 418(1) of the Trust Act and s. 418 of the Bank Act did not allow a mortgage loan to exceed 75 per cent of the value of residential property -- These provisions did not apply because the mortgage was not obtained on the security of residential property to purchase or improve the property -- Property was not residential as defined in the legislation -- Mortgage was obtained to pay off an existing loan and to make available sufficient funds for an investment -- Even if the provisions applied and the loan exceeded the permissible limit the mortgage would still be enforceable against the defendants because the legislation was intended to protect Trustco and not the defendants -- Mortgage was not a contract to commit a criminal or civil wrong -- It did not fall under any statutory illegality -- There was no common law illegality that made the mortgage unenforceable -- Defendants' claim, that Glockl took advantage of them and his breach of trust was a civil wrong that made the resulting transactions unenforceable, was rejected because Glockl did not take advantage of the defendants -- There was no breach of trust and no fraud by Glockl against the defendants -- Mortgage and the note were documents that evidenced a legitimate advance of funds from Trustco to the defendants -- Counterclaim was dismissed because the defendants did not suffer damages as a result of Glockl's actions -- Trustco could not be held vicariously liable for what Glockl said and did. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 37

Bank Act, [*S.C. 1991, c. 46, s. 16*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B721-FH4C-X0F5-00000-00&context=), s. 418, s. 988

Criminal Code, s. 347, s. 347(2)

Trust and Loans Companies Act, *S.C. 1991, c. 45, s. 2*, s. 15, s. 418, s. 418(1), s. 436, s. 533, s. 535

**Counsel**

Counsel for the Plaintiff: K.W. Wellburn

Counsel for the Defendants: P.E. Jaffe

Counsel for Mr. Glockl: A.G. Sandilands

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| **BURNYEAT J.** |

**1**   The Plaintiff applies for judgment pursuant to a June 24, 1996 promissory note in the original principal amount of $50,000.00 with interest on the principal balances owing from time to time at the rate of 12.20% per annum ("Note"), as well as pursuant to a June 28, 1996 mortgage having an original principal amount of $250,000.00 with interest of the principal sums owing from time to time at the rate of 6.20% per annum, calculated half-yearly, not in advance, ("Mortgage"), being a Mortgage registered against property having a civic address at 540 Columbia Valley Road, Lindell Beach ("Property"), of which the Defendants are the registered owners as Joint Tenants.

**2**  The claims on the Note and the Mortgage are defended on the basis that the Defendant by Counterclaim, Andre Glockl, made certain representations regarding an investment contemplated by the Defendants and that the Defendants, relying on those representations, borrowed funds from the Plaintiff to invest in the investment ("Investment") at a time when Mr. Glockl knew that the Defendants intended to rely on the representations and that the representations were made negligently or, in the alternative, fraudulently. The Defendants also defend on the basis that Mr. Glockl, as the agent and representative of the Plaintiff, required the payment to him personally of the sum of $5,000.00 and the provision to him personally of a $110,000.00 (U.S.) promissory note ("Promissory Note") as a condition of the approval of the transaction whereby the Renards granted the Note and the Mortgage in favour of the Plaintiff so that the amounts claimed by the Plaintiff amount to an unenforceable transaction.

**3**  In their Counterclaim, the Defendants (Plaintiffs by Counterclaim) state that the Defendant by Counterclaim by reason of his ***negligence***, breach of fiduciary duty or fraud, have caused the Defendants (Plaintiffs by Counterclaim) damages, including aggravated and punitive damages and that the Plaintiff is vicariously liable to the Defendants (Plaintiffs by Counterclaim) as a result of the actions of Andre Glockl as the Defendant by Counterclaim.

**4**  At various places in these Reasons for Judgment, I show words used by witnesses at Trial in quotes. These passages represent my notes taken at Trial. Where quotations are taken from Examinations for Discovery, the quotations are from the transcripts that were made available.

**BACKGROUND**

**5**  Sir Winston Churchill was quoted as stating: "In war-time, truth is so precious that she should always be attended by a bodyguard of lies." The Renards and Mr. Glockl appear to have adopted the same attitude regarding this litigation. While the backgrounds of the Renards and Mr. Glockl are very different, each of them has shown that they can be very skilful in avoiding recounting the truth of what actually happened in the various transactions which are the subject matter of this litigation. It has been difficult to make findings of fact as I have come to the conclusion that Regis Renard, Velma Renard, and Andre Glockl have all been less than truthful in recounting what occurred almost 10 years ago.

**6**  Mr. Renard is almost 70. He completed grade 10 and part of grade 11 in Saskatoon, he was a CAT operator, worked on the railway, was a truck driver for four years, and then worked for eight years with the Regina City Police. In 1965, he worked as security officer. After 1969 when he came to British Columbia, Mr. Renard operated a small farm in addition to being a security officer. He ran a commercial hog operation for three years and then started to raise ostriches to maturity eventually selling six of them. His ostrich business on the Property was undertaken for about three years but not continued after the mid 1990s. He exhibited ostriches at the PNE for others for about six years. He developed an electroplating business on the Property but, in March 1996, he sold his electroplating equipment. His income at the time of his dealings with the Plaintiff was stated to be only $650 per month from a permanent disability pension. In fact, I find that the combined family income of the Renards was $24,769.00 (1995); $17,859.00 (1996); and $14,998.00 (1997). I found Mr. Renard to be a proud man with a selective memory who made attempts in vein to refashion the evidence to accord with his hoped-for outcome.

**7**  Ms. Renard has a Grade 11 education. Ms. Renard worked for nine years in the accounting department of a telephone company in Saskatchewan, and then as a secretary and bookkeeper in various ventures between 1965 and 1977. While Ms. Renard made a better attempt than Mr. Renard to recall the events which occurred, I find that she had a selective memory would often merely parrot what Mr. Renard had said as they both attempted to recount what they believed was most helpful for the positions outlined in the Defence and the Counterclaim. The Property was purchased by the Renards in 1982 and consists of 10 acres with a 60-foot mobile home and two shops on concrete slabs.

**8**  After graduating from high school, Mr. Glockl attended a two-year program at B.C.I.T. in "Administrative Management". He took his Real Estate Salesman-Mortgage Broker's licence examination and worked as a mortgage broker between 1986 and 1995 prior to joining the Tsawwassen branch of the Plaintiff which had opened the previous year and was looking to expand its mortgage business. Initially, his income was based partially on commission sales but he testified that, after February 1996, he was on salary only. His employment with the Plaintiff was terminated in July, 1997 when a number of irregularities came to the attention of the Plaintiff. Since that time, Mr. Glockl has worked as a mortgage broker in his own business. While Mr. Glockl was able to specifically deny a number of allegations made by the Renards, on all other matters he had no or only a vague recollection of what had occurred. I find that the specific denials lacked credibility in the context of his faulty memory relating to other matters which were in evidence.

**9**  After investigations made by the Plaintiff and after a lengthy interview of Mr. Glockl by a representative of the Plaintiff, the employment of Mr. Glockl was terminated. The Renards seek to have in evidence the notes of Mr. Daniel Weaver of the Plaintiff who not only investigated certain activities of Mr. Glockl but also made notes of their conversation on the day that Mr. Glockl's employment was terminated. Although I find those notes to be of limited value in the issues which are before me, I am satisfied that they should be admitted into evidence.

**10**  It was the submission of the Renards that Mr. Glockl was dismissed because he subjected them and several other customers of the Plaintiff to "unscrupulous and dishonourable practices". The Renards submit that the notes and the evidence given by Mr. Weaver at Trial should be admissible on the basis that they represented evidence of such "unscrupulous and dishonourable practices". My review of the evidence does not lead me to conclude that what is alleged by the Renards was repeated with other customers of the Plaintiff or that it showed that Mr. Glockl created "fictitious" loans, received any "secret commissions", or removed documents in order to hide wrongdoing. Rather, I find that Mr. Glockl was dismissed because of his failure to follow the procedures of the Plaintiff, his continued acceptance of mortgage work from mortgage brokers who were not approved by the Plaintiff, improprieties relating to his expense accounts, and failure to perform in accordance with the requirements of the position that he held.

**11**  Mr. and Mrs. Renard met Mr. Glockl when Mr. Glockl was making a social visit to a neighbour of the Renards. I find that there was a brief discussion between Mr. Glockl and Mr. Renard, that Mr. Glockl gave his business card to Mr. Renard, that Mr. Glockl gave the Renards a general description of his functions at the Plaintiff, that his position with the Plaintiff at the time was "Mortgage Development Manager", and that Mr. Glockl may have been able to make some observations about what he presumed was the Property.

**12**  Mr. Glockl had only a vague recollection of his discussions with the Renards but he did state that he recalls speaking to Mr. Renard about the ostrich business and recalls seeing a "Tennis court not maintained" and "out buildings long-fenced pens - runs for ostriches or emus", "a 10 - 12-year-old house". Mr. Renard recalls Mr. Glockl asked him about the Property and that he advised Mr. Glockl "The property was 10 acres but that the land was not particularly productive as there was no irrigation". I accept the statement of Mr. Renard that Mr. Glockl indicated that he could be contacted if the Renards wished to "expand into any pursuit".

**13**  The business card given to Mr. Renard was in evidence. While the handwriting on the card was the handwriting of Mr. Renard, Mr. Renard could not remember when he wrote the phone numbers which appear on the back of the business card. I find that the phone numbers written on the business card were written by Mr. Renard in June of 1996 and not at the time when he first met Mr. Glockl.

**14**  While counsel for the Renards and while Mr. Renard himself attempted to paint the picture of the Renards as being unsophisticated and unaware of the procedures and requirements of financial institutions, I cannot come to that conclusion. First, the Renards maintained bank accounts with both the Toronto Dominion Bank and the Hong Kong Bank of Canada ("H.S.B.C."). Second, Ms. Renard as a bookkeeper/accountant and Mr. Renard as a businessman had a number of dealings with financial institutions, had executed mortgages relating to various properties in British Columbia, and had received a number of loans with various financial institutions since arriving in British Columbia. Prior to 1996, I find that the Renards had arranged three or four mortgages and, in these regards, Mr. Renard confirmed that each time that he had to qualify by having sufficient value in the Property and sufficient income. Third, Mr. Renard confirmed that he had to prepare a business plan when applying for a business loan with H.S.B.C., including providing income tax returns to make sure that they had sufficient income to support the requested loan. Fourth, I also find that Mr. Renard had attempted to involve himself in a sophisticated banking arrangement with H.S.B.C. in 1995.

**DEALINGS WITH H.S.B.C.**

**15**  In evidence were a number of materials from H.S.B.C. regarding loans relating to the various business operations of the Renards as well as the possibility of Mr. Renard entering into the importation of ostriches and the subsequent export of those ostriches to China.

**16**  While objection was taken to the introduction of the evidence in this regard, I am satisfied that these materials are relevant to the issue of the sophistication of the knowledge of Mr. Renard regarding financial transactions, the requirements of financial institutions, the documents necessary to arrange for borrowing from financial institutions, and the matters raised in the Defence and the Counterclaim regarding the misrepresentations stated to have been made by Mr. Glockl. I also find that the denials of Mr. Renard about his dealings with H.S.B.C. correspond closely with the denials that he made about his dealings with the Plaintiff.

**17**  I find that H.S.B.C. held a first mortgage against the Property to secure a business loan which had been made for the purchase of equipment for the business operations conducted by Mr. Renard on the Property. A November 30, 1995 "Application for Review of Banking Facilities" indicates that the security held by the bank was a $65,000.00 "Collateral 1st Mortgage" and that the "Tax Assessed Value" of the Property including the mobile home on the Property was $205,000.00. That document also sets out the following under the heading "Proposal of Ostrich Business":

Mr. Renard has approached the Bank and met with the writer and Mr. Follis to discuss a facility in the $800M range. We have very clearly indicated to Mr. Renard the Bank will not finance the ostrich business. Mr. Renard had initially indicated that he required financing against an irrevocable letter of credit from a U.S. Bank in order to cover operating costs and purchase costs of ostriches in order to resell same to a buyer for a profit. He indicated to the writer that he did not wish to divulge the source of his ostriches because he felt that the buyer may go directly to his source. Mr. Renard has also indicated to the Bank that the latest proposal will generate a profit in excess of $500M U.S. We provided Mr. Renard with the Code of Conduct brochure. We referred to the section which outlines the requirements for a Bank proposal. The amount of funds requested are considered to be substantial. In order to support such a transaction we would require the name of the Bank which would be issuing the irrevocable letter of credit to determine the acceptability of the irrevocable letter of credit. We would then require a copy of a contract between the parties involved, preferably drafted by solicitors, in view of the size of the transaction. Our concern is that the purchaser would be putting approximately $800,000 U.S. in the hands of Mr. Renard on a promise to deliver ostriches at a later date. This transaction is fraught with risk for the purchaser of the birds. The Bank does not wish to be viewed as lending credibility to the transaction in view of the risk for the purchaser. This is all the more reason we wish to see a formal agreement in place prepared by solicitors and signed by all parties involved. The Bank wishes only to be involved in order to facilitate a transfer of funds and is placing no reliance on the ostrich business.

**18**  In a memorandum to file, I.A. Follis, Manager, Commercial Banking of H.S.B.C. made the following on November 23, 1995 notes:

We would have a great deal of difficulty supporting an $800,000 new facility to Renard for several reasons:

1. Ostrich farming/financing is extremely high risk. Renard has previously been told that we will not finance it.
2. Unless the L/C payable to him was clean and unconditional, the risk would be too great. It would be a one off transaction with high risk. Even though he says he can make $800,000 profit in four months on this one set of transactions, remember: "if it looks too good to be true, then it probably is". If he has a clean L/C that allows partial drawings, why would he need any credit?
3. Salton had only $3,900 in sales during 1994 and lost $6,106.
4. Farm income was $28,700 ($25,200 from goats and $3,500 from selling a trailer). After expenses, but before drawings, the net income was only $609.
5. Employment income was only $1,200 (Mr. & Mrs. combined).
6. No 2nd way out (assets are limited and centred in the residence which is a farm in the ALR). Also, if he ever has a problem, farm debt review board may be one of his shelters. Note that property taxes are unpaid for 1995.
7. We barely get enough deposited each month to cover the existing loan payment and this is often late. Note maximum credit usage and no deposits.
8. Renard doesn't have a business plan and his financial statement information is not up to our usual standards.
9. We are not convinced Renard has the business acumen to justify our confidence in granting any more credit than the Bank has already extended.

**19**  In these regards, H.S.B.C. had on file the following undated letter from Salton Agri Enterprises (Regis Renard, President) addressed to The Bridges Import & Export Co. Ltd. of Richmond (Attention Jian Ye - President):

As President of my company, Salton Agri Enterprises, I personally and with the assistance of professional staff would be pleased to serve you in this exciting and most profitable business.

We have the ability to supply the Ostriches, the Government approved facilities to accommodate the quarantine requirements and the delivery system by charter air freight direct to your country.

Your Governments' protocol will dictate the expected requirements of health tests for quarantine, which you will have to obtain from your government. This is required for our Government to comply with your country's quarantine demands. I would ask that you specifically state in your protocol that all birds shipped have originated or hatched in "North America". This allows for any qualified birds to have been hatched in the U.S.A. or Canada. If your protocol requests birds hatched in Canada only, we can supply, but the price will be very much higher than quoted because our breeding stock is thinning. Every ostrich will be micro-chip implanted for identification and a genetic history for each ostrich supplied.

Conditions for our services are as follows:

Number of adult birds - 120 (60 male, 60 female)

DC8 chartered aircraft - direct flight.

Age upon arrival to destination - 18 to 24 months. (Younger birds cannot take the stress)

Price to you delivered to your country - 30,000.00 US per pair.

Time frame of delivery - 150 days after placement of order.

Payment schedule - $600,000. US deposit on order.

|  |  |  |  |
| --- | --- | --- | --- |
|  | 90 days | $600,000 US upon quarantine commencement. |  |
|  | 60 days | $600,000. US upon Vancouver airport departure. |  |

All payment made to Salton Agri Enterprises, c/o Hong Kong Bank of Canada, Bank of B.C. Division, 9345 Main St., Chilliwack, B.C. Canada V2P 4M3 Account #302853 001.

Ostriches start laying at two years of age. At three years of age they are in full production. You can expect twenty chicks per female per year. That amounts to 1,200 chicks per year. A female ostrich will produce for forty [sic] years. Ostriches can live for seventy years. Your investment return is swift and your profits high.

**20**  At Trial, Mr. Renard was adamant that he had only approached H.S.B.C. to obtain copies of their standard form letter of credit and that he had not raised the possibility of a credit facility of $800,000.00. The testimony of Mr. Renard of why he went to H.S.B.C. is simply not believable. First, there is such considerable details set out in the notes to file maintained by H.S.B.C. personnel that it is impossible to conclude that they could have fabricated such information. Second, the correspondence between Mr. Renard and The Bridges Import & Export Co. Ltd. sets out the type of proposal that appears to have been discussed with personnel from H.S.B.C. and also gives the address for Salton Agri Enterprises as being care of H.S.B.C. Third, I accept the evidence of Patrick Ramsden of H.S.B.C. in preference to the testimony of Mr. Renard regarding what was discussed and proposed by Mr. Renard in November of 1995. The notes to file made by Messrs. Ramsden and Follis of H.S.B.C. and the consistent recollections of Mr. Ramsden at Trial allow me to conclude that Mr. Renard had in mind a sophisticated scheme that would produce considerable profit for him and that he was approaching H.S.B.C. to obtain financing for the scheme.

**21**  I find that Mr. Renard did not go to H.S.B.C. on several occasions to obtain an understanding of how a letter of credit worked. Rather, he attended at H.S.B.C. to make inquires about whether H.S.B.C. would finance what had been proposed by Salton Agri Enterprises Ltd. to The Bridges Import & Export Co. Ltd. It is apparent from the attempted transaction with H.S.B.C. that Mr. Renard had a series of grandiose dreams of using his expertise in the ostrich business to produce substantial profits but that he did not have the capital to do so.

**22**  I find that a combination of lack of income, of approaching retirement age, and of the hope of having a scheme which would produce substantial profit combined to result in Mr. Renard continuing his search for a profitable enterprise and which led him eventually to the Plaintiff and Mr. Glockl.

**23**  I also find that much of the testimony of the Renards regarding why they did and did not approach the Plaintiff and their dealings with the Plaintiff parallel the denials made at Trial that they had approached H.S.B.C. for those purposes set out clearly in what is in evidence. I find that Mr. Renard had a fairly high level of sophistication as to what would be required by a financial institution as pre-requisites to making loans of the magnitude now sought to be enforced by the Plaintiff.

**DEALINGS WITH DONLEY LEHMAN AND THE SOLOMON FOUNDATION**

**24**  Mr. Renard first met Mr. Lehman when Mr. Renard had an exhibit at the Pacific National Exhibition relating to the ostrich business. Mr. Renard conceded that the purpose of the exhibition at the P.N.E. was to attract investment to an ostrich business he would run. While Mr. Renard stated that he was too busy to deal with Mr. Lehman at that time, they later made contact. Mr. Lehman then outlined a program that he envisioned which would see a farm operation available for the teaching and training of developmentally challenged individuals ("Lehman Project").

**25**  For a number of months during 1995 and 1996, Mr. Renard assisted Mr. Lehman in searching for a suitable location for such a project. It was the understanding of Mr. Renard that Mr. Lehman had potential financing available from U.S investors through a U.S. foundation for such a project. Mr. Renard understood that the out-of-pocket expenses that he was incurring would ultimately be reimbursed once the Lehman Project and the financing for it was in place. Mr. Renard testified: "He suggested any cost to assist him for my efforts would come from his finance sources from the U.S. as managed by a Canadian."

**26**  Mr. Renard testified that his discussions with Mr. Lehman eventually evolved into Mr. Renard involved in the acquisition of breeding stock and in the training of personnel for the management of the Lehman Project.

**27**  In evidence is a March 27, 1996 letter addressed to Salton Agri Enterprises Ltd. attention Mr. Renard "President". The "re" of the letter is "Letter of Intent for Ostrich and Emu Propagation Program". The letter is signed by Donley Lehman "Chief Executive Officer" and the letter states:

As part of a large integrated project - FUTURE 2000 - we wish to advise you of the following - - subsequent to our previous discussions and your letters. The SOLOMON BENEVOLENT FOUNDATION is presently arranging the TOTAL Project finances. This entire project and subsequent appointments are subject to financial arrangements being completed. In the event finances are completed, this program will proceed forthwith. In the event SOLOMON BENEVOLENT FOUNDATION does not receive adequate finances for the above program, there will not be commitments honoured at this time.

We envision, for this portion of the project, to acquire and purchase 200 Ostrich Trios, 12 months of age and older, classified as yearlings and 100 - 200 pair of Emu, 12 months of age or older in the same yearling classification.

Our intent at that time is to appoint you - Regis Renard - on our behalf to acquire and fulfil this number of Ostrich and Emu within a reasonable time frame of approximately 6 months duration from commencement. We will also require you to instruct management personnel in Ostrich and Emu husbandry.

While we have no problem with the fees and arrangements suggested by yourself - we feel it would be in both of our interests, to fine tune these items at such time as the funding has been released to us - - so that they can properly reflect current market conditions and procedures.

I trust this covers your points of concern and we look forward to working with you on this interesting project in the very near future.

**28**  At Trial, Mr. Renard stated, that by late Spring and early Summer of 1996, he was becoming increasingly frustrated with the lack of progress being made by Mr. Lehman regarding available financing and by the constantly changing nature of what Mr. Lehman envisioned. In the context of possible financing or the possibility that his expenses would be paid, Mr. Renard agreed with Mr. Lehman to meet with Edward Sailer and Richard Strom who he learned were representatives of Tri-Sal International Inc. ("Tri-Sal"). I find that Mr. Renard was led to believe that Tri-Sal was the U.S. source of funds referred to by Mr. Lehman.

**29**  At Trial, Mr. Renard stated that he was advised by Mr. Lehman on June 5 or 6, 1996 that he would be able to present the Lehman Project to those who would approve the financing. Mr. Renard stated that the purpose of the meeting was to put the project to them but was also "mostly to be introduced to Sailer and Strom" and to see if he could be reimbursed for his expenses. Based on the testimony of Mr. Sailer at Trial and the fact that the Renards had not itemized the expenses that had been incurred, I find that the purpose of the meeting was to meet the representatives of the sources in the United States who would be funding the Lehman Project, that Mr. Renard had not given up on the possibility of the Lehman Project coming to fruition through the availability of financing, that Mr. Renard had not given up on Mr. Lehman and the Lehman Project, and that the purpose of the meeting was not to find out how the expenses that had been incurred by Mr. Renard would be reimbursed. Messrs. Renard and Lehman then met with Messrs. Sailer and Strom.

**MEETING WITH MESSRS. STROM AND SAILER ON FRIDAY, JUNE 7, 1996**

**30**  At Trial, Mr. Renard stated that, when he arrived at the meeting, it became apparent to him that Messrs. Sailer and Strom were "directing their attention to me" and suggesting that the Renards invest $175,000.00 (U.S.) in a project that they were undertaking and that they would only have funds to finance the Lehman Project once this project came to fruition.

**31**  Mr. Renard stated that Messrs. Sailer and Strom discussed a Bank Bond Training Program ("B.B.T.P.") and provided him with a one page typed and a one page handwritten outline of how the B.B.T.P. program worked and the potential returns that would be available from it. Mr. Renard stated that he knew of the B.B.T.P. about two weeks prior to the meeting and that he knew the name of Tri-Sal about two days prior to the meeting.

**32**  At Trial, Mr. Sailer testified that he was under the impression that Mr. Renard had already made the decision to invest in the B.B.T.P. prior to when Mr. Renard met with him and Mr. Strom on June 7, 1996: "I think the decision had been made." "I recall assessed value of property so additional funds were required over the assessed value of the property ....". I am satisfied that the impression of Mr. Sailer was accurate and that the Renards had already decided to make the Investment in the B.B.T.P.

**33**  I find that the primary purpose of the meeting that Messrs. Renard and Lehman had with Messrs. Strom and Sailer was to attempt to obtain greater detail regarding the availability of funding regarding the B.B.T.P. for the Lehman Project. The fact that the Renards had not totalled up the expenses incurred relating to the Lehman Project and, therefore, Mr. Renard took no summary of the expenses incurred when he went to meet with Messrs. Sailer and Strom further reinforces the conclusion that I have drawn that Mr. Renard was not attending the meeting with Messrs. Sailer and Strom to obtain reimbursement for his expenses. The fact that Mr. Renard went with Mr. Lehman to Duncan on June 12, 1996 and paid for his own expenses for that day also further re-enforces the conclusion that I have drawn that Mr. Renard was not attending the meeting with Messrs. Sailer and Strom to obtain reimbursement for his expenses and had not abandoned the Lehman Project. It is clear that the purpose of the meeting was to discuss the B.B.T.P. and how Mr. Renard and the Lehman Project would benefit from that program as Mr. Renard admitted that he knew about the B.B.T.P. several weeks before the meeting.

**34**  As was described to Mr. Renard, the B.B.T.P. required the investment of $175,000.00 (U.S.) as part of a package of $1,000,000.00 and that, after 45 days, Mr. Renard would receive his $175,000.00 plus $375,000.00 profit, that Tri-Sal would pay all costs of obtaining a loan to finance the $175,000.00 and all costs of bringing the B.B.T.P. to fruition. Tri-Sal would also obtain considerable profit for itself which would then be available to finance the Lehman Project. At Trial, Mr. Renard stated that he was told: "Not enough money for ostriches until they entered into a B.B.T.P. and then they would then have enough money to finance the project.

**35**  As to the rate of return that was being promised, counsel at Trial put it to Mr. Renard that the rate of return was "ridiculous". Mr. Renard could only state: "Red flag went up." "Thought it was high." "Not know what to think." At his Examination for Discovery on April 15, 2003, Mr. Renard was asked whether or not he said to Mr. Strom that the impressive rate of return sounded ridiculous and Mr. Renard stated: "I said it to myself." At trial, he confirmed that he did not say to Sailer and Strom that it was "too good to be true" but stated that he later said it to Mr. Glockl. It is an adage that would have been known to Mr. Renard as a former police officer that "If it looks too good to be true, then it probably is." The investment in the B.B.T.P. through Tri-Sal has proved "too good to be true" as the Renards ultimately saw only some of their funds returned from Tri-Sal, saw the rest of their funds lost, and received no funds from the B.B.T.P.

**36**  Under cross-examination, Mr. Renard was asked whether he thought it odd that Messrs. Strom and Sailer could only produce the paper that they did and he answered: "All he gave - cordial as only met once - not committed myself." "Not [discuss] in detail." "Only a presentation - not a formal agreement laying it out in formal terms."

**37**  In an Affidavit sworn August 3, 2001 in these proceedings, Mr. Renard stated:

During the first meeting with Strom and Lehman, they proposed that I invest $175,000 (USD) in a "high yield investment program" in order that financing for the Project could be obtained. Strom promoted the high yield investment program as a secure investment that within 45 days would yield $350,000 (USD) in profit, plus the return of the original capital investment of $175,000 (USD) and any costs incurred (the "Investment").

In subsequent conversations Strom represented that the 45 day turnaround time could not be predicted with certainty but that, in any event, the returns would be realized within at least 60 days of the investment.

I advised Strom that the only family asset owned by my wife and I was the Farm, and I was therefore not in a position to participate in the Investment. Notwithstanding my advice, Strom continued to attempt to persuade me that the Investment ought to be made as it was "bank" guaranteed and all that was necessary was the accessing and delivery of funds which had to be done immediately.

In pursuit of the Investment, Strom encouraged me to seek out mortgage financing for the Farm in order to facilitate the financing.

**38**  Mr. Renard stated that the meeting with Messrs. Lehman, Strom and Sailer lasted 30 minutes at most and that he then went home and left a message at the Branch of the Plaintiff to have Mr. Glockl phone him. Mr. Renard confirmed that he phoned no one else and did not phone his own banks or anyone at his two banks.

**39**  Ms. Renard was asked why they did not approach H.S.B.C. and replied "Never even crossed our mind" and that Mr. Glockl was located closer to Messrs. Strom and Sailer than his "bank in Chilliwack would be". This rationale was given despite the fact that Mr. Sailer had a Chilliwack home address.

**40**  I find that there were other reasons why the Renards did not approach H.S.B.C.. First, they had been unsuccessful in their previous dealings with H.S.B.C. when they attempted to obtain financing for an ostrich operation and a significant loan to purchase ostriches in the United States to export them to China. Second, they had sold much of the equipment which was the subject matter of their business loan with H.S.B.C. but had used the funds or had earmarked the funds for personal purposes including a holiday trip to Cuba. When the funds from the sale of the equipment were available, the funds were deposited in their account with the Toronto Dominion Bank rather than with H.S.B.C. I find that this was a deliberate attempt to deal with the funds other than in accordance with the earlier requests received from and the arrangements relating to the business loan with H.S.B.C. The funds should have gone to H.S.B.C. They did not. This was a deliberate attempt by the Renards to hide from H.S.B.C. that the equipment had been sold but that the business loan had not been paid off. Third, H.S.B.C. had up-to-date information on the value of the Property, the finances and the income of the Renards. I find that the Renards knew that it would not be possible to borrow sufficient funds to finance the Lehman Project which would employ Mr. Renard at a handsome salary or the B.B.T.P. proposed by Messrs. Strom and Sailer. Fourth, there could be no logical explanation given by the Renards as to why the location of Mr. Strom in White Rock would have any bearing on the question of which financial institution they would deal with and why the Renards would go beyond White Rock to a bank in Tsawwassen rather than to continue to bank in Chilliwack.

**ARRANGING THE MEETING WITH MR. GLOCKL**

**41**  Mr. Renard stated at Trial that, when he spoke with Mr. Glockl on Friday, June 7, 1996, he had the names of Messrs. Sailer and Strom and he "explained in general terms - asked if I could come in and discuss the project - not alone - not at that stage yet." An appointment was made for the Renards to come in on Monday, June 10.

**42**  The telephone records of the Renards which were in evidence provide a different picture of the attempts of the Renards to contact Mr. Glockl. On the business card of Mr. Glockl which is in evidence, his business number is noted as being 943-2563 and his cell number is noted as being 313-0759. The telephone records of the Renards indicate the following:

1. Calls were made to 943-2563 on June 6 (13:54); June 6 (14:09); June 7 (09:13); June 10 (08:49); June 11 (14:36); June 11 (14:49); June 15 (15:07); June 17 (11:44); June 19 (15:02); June 26 (14:06); June 27 (15:04); June 27 (17:24); and July 15 (09:05). Other than the calls on June 7 (4 minutes); June 27 (6 minutes); June 27 (3 minutes), all of the calls to that number were of a duration of one minute.
2. The following calls were made by the Renards to the number 313-0759: June 6 (14:10); June 6 (19:25); June 10 (08:50); June 11 (14:51); June 14 (15:07); June 19 (15:02); June 24 (09:03); June 26 (10:08); June 27 (13:04); June 27 (20:10); June 28 (18:55); July 15 (09:05); July 16 (15:25). All calls were of one or two minute duration other than the following: June 27 (4 minutes); June 27 (3 minutes).

**43**  The testimony of Mr. Renard and the sequence of events that he presents create glaring inconsistencies in the story that he told at Trial. If the primary purpose of going to the meeting with Messrs. Sailer and Strom on June 7, was to obtain reimbursement of the expenses that he had incurred relating to the Lehman Project, there is no explanation why Mr. Renard would make calls to Mr. Glockl on June 6, 1996 at 13:54 and 14:09 to the business number, and at 14:10 and 19:25 to the cell phone number. Mr. Renard was asked about this under cross-examination at Trial. I find that he had no explanation as to why he would call Mr. Glockl other than to make arrangements to come to discuss a possible loan.

**44**  If Mr. Renard actually believed that he was attending the meeting with Messrs. Strom and Sailer to obtain details about how they would finance the Lehman Project or to obtain reimbursement for his own expenses, there would have been no reason for Mr. Renard to have made attempts prior to the meeting to contact Mr. Glockl. The only reason Mr. Renard would try to contact Mr. Glockl would be to arrange to borrow funds. Accordingly, I find that Mr. Renard knew prior to the meeting with Messrs. Strom and Sailer that he would have to borrow funds and invest in a project with Tri-Sal such as the B.B.T.P. before Tri-Sal was in a position to fund the Lehman Project.

**JUNE 10, 1996 MEETING WITH MR. GLOCKL**

**45**  Mr. Renard testified that he and Ms. Renard met with Mr. Glockl on June 10, 1996 and that the purpose of the meeting was to not arrange for a loan but rather to have Mr. Glockl check out the B.B.T.P. At Trial, Mr. Renard stated that they "presented the information received," (the typed page and the handwritten page received from Tri-Sal), that Mr. Glockl assured him that he was aware of such programs, and that he would investigate legitimacy of Tri-Sal and the B.B.T.P. Mr. Renard quotes Mr. Glockl as stating he would: "Check out Strom and Sailer by contacting them." "If he not verifying legitimacy, then there were people at the bank who could do it."

**46**  Despite the testimony of Mr. Renard, I find that the primary purposes of meeting was to provide Mr. Glockl with the type of financial information about themselves which would ordinarily be required by a financial institution before a loan was made so that the Renards could borrow sufficient funds to invest in the B.B.T.P., so the Renards could make a considerable profit which would be available to them for their retirement, and so that Tri-Sal would have sufficient funds to invest in the Lehman Project which would, in turn, produce significant income to Mr. Renard when the Lehman Project came to fruition.

**47**  I also find that the Renards were well aware that they were making an application for a loan, that they made representations to Mr. Glockl regarding their financial situation, they signed a credit application prepared by Mr. Renard, and that they indicated that the funds they wished to borrow were required quickly.

**48**  Mr. Renard stated at Trial: "We signed some papers - not sure" because Mr. Glockl said, "We should sign as that would give him a jump start as time was of the essence according to Strom and Sailer." At this time, Mr. Glockl had not spoken to Strom and Sailer and, accordingly, he must have been told that time was of the essence by Mr. Renard. I find that the Renards provided a great deal of information about themselves to Mr. Glockl at the June 10, 1996 meeting and that Mr. Glockl was advised that the $175,000.00 (U.S.) would be required by June 27 or 28, 1996.

**49**  Mr. Renard stated that Mr. Glockl "would get back to us after doing whatever he would be doing." At his Examination for Discovery, Mr. Renard stated that the meeting took about 15 minutes and that, after the meeting, the Renards met with Messrs. Strom and Sailer in White Rock to get more information "if we could understand these programs." At Trial, Ms. Renard also confirmed that the meeting with Mr. Glockl took only about 15 minutes. If the Renards did not understand the program, it is difficult to know what they could have told Mr. Glockl in 15 minutes so that Mr. Glockl would understand the program. The two pages provided by Tri-Sal to the Renards and provided by the Renards to Mr. Glockl would certainly not have explained the B.B.T.P. As well, at least some of the meeting time with Mr. Glockl would have been taken up by the Renards providing information about themselves to Mr. Glockl.

**50**  The Renards testified that they marked down appointments and various important events in a daytimer. Mr. Renard stated that it was for the purpose of: "Where I kept notes of events which were significant to me." The daytimer for the months January, 1996 through December, 1996 was in evidence. The following entries are of importance:

June 6 "11:30 a.m. ABC";

June 7 "10:00 a.m. ABC" "meet Don [Lehman] ...";

June 10 "meet with Andre and signed papers";

June 11 "meeting Ed and Richard $3,000 U.S.";

June 12 "Victoria with Don. Home at 11:30 p.m.";

June 13 "meeting Andre ($5,000)" "Ed and Richard Whiterock";

June 14 "Don Lehman phoned re Osoyoos";

June 15 "faxed info for Ed to Alta.";

June 17 "Notary public will not do employment contract. Says I have to have mortgage lien on Kildonian";

June 18 "ABC 10:00 a.m. Ed, Don big day";

June 19 "the letter of appointment by Kildonian done up and signed in Chilliwack by Don Lehman";

June 21 "Kamloops interested in Cache Creek Top Hat Ranch";

June 24 "Arthur Dyck $$$ Clearbrook";

September 19 "Andre Glockl called";

October 28 "1:00 p.m. ABC meeting Arthur and Ed".

**51**  It should be noted they recorded that they "signed papers" on June 10, 1996 and that they do not record any indication that Mr. Glockl would be making any inquiries on their behalf. It should also be noted that Mr. Renard continued to work with Mr. Lehman regarding the Lehman Project after June 7, 1996 even though it was the testimony of Mr. Renard that he had given up on Mr. Lehman and was only interested in obtaining reimbursement for the "considerable" expenses that had been incurred by him in his work with Mr. Lehman.

**WHAT DOCUMENTS WERE SIGNED BY THE RENARDS ON JUNE 10, 1996?**

**52**  While the records available from the Plaintiff leave much to be desired as not all of the records of the Plaintiff in evidence could be produced by the Plaintiff and as some of the records now relied upon by the Plaintiff are not in evidence, I find that significant financial information was provided by the Renards to Mr. Glockl when they met with him on June 10, 1996. I am able to conclude this as there is in evidence a request for an appraisal on the Property dated June 11, 1996 which sets out considerable information about the Renards.

**53**  This application form is generated by computer. I find that it is necessary for someone to input the information prior to the form being printed. The request for an appraisal is dated June 11, 1996, the "Req." date is shown as June 12, 1996 at 13:55:31 and the "Req. ID is shown as "B574320". The "Lot Size" shown as "Acreage". Under the heading "Additional Info." is the notation: "CURRENTLY LISTED FOR SALE 770K." "250K REQUIRED FOR IMPROVEMENT". It is shown as "Requested By" Andre Glockl whose phone number is given as 604 313-0759, which is his cell number.

**54**  I find that the information set out in the appraisal request form was provided by the Renards to Mr. Glockl. Despite the fact that Mr. Renard denied that the Property had ever been listed for sale for $770,000.00 or any other price, I find that the Renards advised Mr. Glockl that the Property was listed for sale for $770,000.00 and that they would require the $250,000.00 which would produce the $175,000.00 (U.S.). I am satisfied that there would have been no other way for Mr. Glockl to have this information other than if he had been told this information by the Renards. There would have been no motive at this time for Mr. Glockl to input false information.

**55**  Also in evidence is a handwritten Credit Application. It is dated June 11, 1996 and was signed by the Renards on June 13, 1996. At her Examination for Discovery, Ms. Lowden on behalf of the Plaintiff testified that an employee of the Plaintiff such as Mr. Glockl would ordinarily input information into the computer and that he would ordinarily input on the basis of what he was told by the customers. I find that the information on the handwritten Credit Application was provided by the Renards to Mr. Glockl prior to when the Renards went to the branch of the Plaintiff on June 13, 1996 to sign the handwritten Credit Application. I also find that the information set out in the Credit Application was provided by the Renards to Mr. Glockl. I find that it would not have been possible for Mr. Glockl to have requisitioned an appraisal on June 11, 1996 if the information on the Credit Application had only been provided on June 13, 1996.

**56**  On the Credit Application, the amount requested is "250K" and the "Purpose" is: "Refinance". The social insurance numbers, date of birth and address of the Renards are shown. The employer of Mr. Renard is listed as "Salton Agri Enterprises", the "occupation" is noted as "Manager" and there is also the notation 10("Years") and 100,000("Income"). H.S.B.C. and "T.D." are listed as the "Banking Institutions" with the name "Patrick Ramsen" noted as the contact person for H.S.B.C. Regarding the notation for "Real Estate & Mortgages", $350,000 is listed as the "Current Value" and $45,000 is listed as the "Current Balance" of the mortgage on the Property.

**57**  Mr. Renard confirmed that the social insurance numbers and the birth dates for each of them were accurate. Mr. Glockl testified under cross examination the he could not recall if Mr. or Mrs. Renard gave him the information which he took down but he was adamant "it had to be one of them." I agree and make that finding.

**58**  It was the testimony of Mr. Renard that they signed a number of the documents in blank. This does not accord with his testimony that he was always very careful in his dealing with H.S.B.C. and that he would not invest in Tri-Sal unless he could be assured that it was legitimate. It is inconceivable that the Renards would sign anything in blank. I find that the Credit Application was not signed in blank by the Renards on June 13, 1996, and that all of the information was set out in the Credit Application before they signed it. I also find that almost all of the financial information provided by the Renards to Mr. Glockl is false. The income of the Renards was not $100,000.00, the "Current Value" of the Property was not $350,000.00, the "Current Balance" on the mortgage on the Property was not $45,000.00, and the Property was not listed for sale for $770,000.00 or any other listing price. I find that the Renards provided false information to Mr. Glockl in order to obtain the money that they had decided to invest in the B.B.T.P.

**WHAT STATEMENTS WERE MADE BY MR. GLOCKL REGARDING TRI-SAL, MESSRS. STROM AND SAILER AND THE B.B.T.P.?**

**59**  It is what happened after the June 10, 1996 attendance at the Plaintiff that is at the centre of the claim, defence, and counterclaim of the parties. Mr. Renard was adamant that Mr. Glockl telephoned him on the evening of June 10, 1996 to state that he "had spoken to Strom and Sailer and was absolutely satisfied they and their B.B.T.P. were legitimate". Mr. Glockl denies that any such conversation took place. Mr. Renard stated that, as a result of that conversation, they withdrew $3,000.00 (U.S.) from their bank account at the Toronto Dominion Bank and provided that sum to Mr. Strom in order to "start" the B.B.T.P. process.

**60**  In his August 3, 2001 Affidavit in these proceedings, Mr. Renard gave this testimony regarding the June 10 meeting and telephone conversation with Mr. Glockl:

.... After meeting with Lehman and Strom, I was unsure as to whether we should proceed further with the Investment. I decided that I ought to seek out the advice of an institutional banker who could offer me some objective financial advice.

On or about June 7, 1998, I attended at the Tsawwassen Branch of Canada Trustco and spoke with Glockl about the Investment.

I explained to Glockl our financial situation, the immediate loan requirement of $175,000 (USD) to finance the Investment (the "Loan") and advised him of the anticipated profit that my wife and I were told we could expect as explained to me earlier by Lehman and Strom. I requested that Glockl advise me with respect to whether the Investment was sound and whether Canada Trustco could provide the necessary financing.

Glockl agreed that he would make enquiries regarding the Investment including speaking with Strom to determine if the Investment was secure and advisable.

Thereafter, Glockl contacted me to advise that he had spoken with Strom and he would recommend the Investment as secure, and for which Canada Trustco would lend necessary monies on various terms (the "Representations").

**61**  Through no fault of Mr. Glockl, his telephone records were not available to be in evidence. Therefore, it is impossible to know whether he made such a call to Mr. Renard on June 10, 1996. Assuming that these statements alleged to have been made by Mr. Glockl were, in fact, made, I have concluded that the conversation did not take place on the evening of June 10, 1996.

**62**  First, there is no notation in the diary maintained by the Renards indicating that such a call was received even though Mr. Renard had stated that he kept notes of events "which were significant to me". It is hard to think of anything more significant in the life of Renards at that time. Second, it should also be noted that the appraisal requisitioned by Mr. Glockl was requisitioned on the next day, June 11, 1996. There would have been no reason for Mr. Glockl to have requisitioned an appraisal if he already believed that the Property would not support borrowings of $250,000.00 and he had no assurances that the Promissory Note would be granted by the Renards or the $5,000.00 paid. It was clear that Mr. Renard had not agreed to provide the Note or the $5,000.00 on June 10, 1996 as he said that he did not and because he would have to check with Messrs. Strom and Sailer to see whether they would agree that they would cover the payment of the $110,000.00 (U.S.) and $5,000.00 to Mr. Glockl as part of the cost of what would be paid from the proceeds of the B.B.T.P. Third, the Renards made arrangements to obtain $3,000.00 (U.S.) from their Toronto Dominion Bank account prior to the meeting with Messrs. Strom and Sailer, thus prior to obtaining any assurances from Messrs. Strom and Sailer that they would cover the payment of the balance owing under the Promissory Note and the $5,000.00. I can conclude that, not only had the Renards decided to proceed with the B.B.T.P. but also that they were prepared to provide the $3,000.00 without receiving any assurances from Messrs. Strom and Sailer that the $110,000.00 and the $5,000.00 would be paid by Tri-Sal. Fourth, in a March 16, 1998 letter to the B.C. Securities Commission, Mr. Renard stated that he met with Mr. Glockl and then: "Within two days of that time Andre Glockl called by telephone to advise that he probably could put the deal through but certain criteria would have to be met and agreed to by myself and my wife to complete the transaction." This advice in 1998 is completely contrary to the testimony of Mr. and Ms. Renard at Trial but I am satisfied more accurately reflects what occurred as it was stated by Mr. Renard less than two years after the events of June 10, 1996. Fifth, I find that the testimony of the Renards at their Examinations for Discovery is to be believed rather than what they stated at Trial.

**63**  At her December 11, 2003 Examination for Discovery, Ms. Renard was asked when Mr. Glockl phoned her husband and the following questions were asked and answered by her in that regard:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I believe Mr. Glockl phoned Reg and made an appointment for us to come in on the 13th. |  |
|  | Q |  | And when was that phone call? If you want to look at your notes, I don't mind, if you've got a specific date. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | On Tuesday, June the 11th. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Tuesday, June the 11th, that's when Mr. Glockl phoned your husband? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Hm-hmm. |  |
|  | Q | Do you remember what time? |  |
|  | A | My note says eight o'clock in the evening. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. And that note, that was taken off the calendar? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | So that should be pretty accurate? |  |
|  | A | Should be. |  |

**64**  When questioned about the bank draft for $3,000.00 (U.S.) given to Tri-Sal, Ms. Renard was asked the following questions and gave the following answers:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You don't remember? So you don't remember giving a $3,000 U.S. bank draft to Mr. Strom payable to Tri-Sal on June 11th, 1996? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I remember giving him the bank draft, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Was that before you heard back from Mr. Glockl or afterwards? Before the telephone conversation or after the telephone conversation? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I think it was before. |  |

....

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. And you've actually -- you're the one who took out the bank draft, weren't you? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then you gave -- you or somebody gave it to Mr. Strom on the same date, on June 11th, 1996? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But had you already decided to become involved in the trading plan at that point? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I don't know. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But that's -- given your modest income, isn't that quite a bit of money for you, $3,000 U.S.? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. |  |
|  | Q | Did you think you would get the money back? |  |
|  | A | At the time I thought we would. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You thought you'd get it back. How would you get it back? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Of we went into the investment with him. |  |
|  | Q | It would come back out of the investment programme? |  |
|  | A | I thought it would, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So at that time had you already decided to go into the investment programme? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Well, it was dependent on Glockl. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Why did you give Mr. Strom $3,000 U.S. before you heard back from Mr. Glockl? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I don't know. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | What if Mr. Glockl had come back and said "oh, this is all a big scam, you better not invest any money in it"? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | We wouldn't have done it. |  |

**65**  At Trial, Ms. Renard stated: "I was confused at the time by the dates." She confirmed that she had made notes and that she had referred to the notes at the Examination for Discovery "to make sure the dates were correct". As to what had happened to the notes, she replied, "I don't know." As to the notes, Ms. Renard stated: "Probably got discarded". This is a too convenient explanation of why the notes taken by Ms. Renard were not available at Trial. Additionally, if Ms. Renard made notes after reviewing the calendar and those notes indicated that the telephone call with Mr. Glockl was June 11, 1996, it casts considerable doubts on the authenticity of the calendar that is in evidence which makes no mention of a telephone conversation with Mr. Glockl.

**66**  When asked whether she was certain that the telephone call between her husband and Mr. Glockl took place on the 10th, Ms. Renard under cross-examination at Trial could only state "I believe so." A draft counterclaim was in evidence which Ms. Renard admitted was based on information that they provided to their then solicitor. Paragraph 35 of the draft counterclaim stated: "Several days later, Glockl contacted Regis [Renard] and advised him that he had spoken with Strom and would recommend the investment as secure and for which Canada Trustco would lend monies (the "representation")." In this regard, Ms. Renard stated: "He called back but I don't think it was several days later. I think the 10th as we surprised he could check them out so quickly."

**67**  The testimony of Mr. Renard at his Examination for Discovery was consistent with the testimony of Ms. Renard at her Examination for Discovery. Regarding when Mr. Glockl phoned him back after their meeting with him, Mr. Renard was asked the following questions and gave the following answers at his April 15, 2003 Examination for Discovery:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | How did the next contact with Mr. Glockl come about? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Mr. Glockl phoned me I believe on the Monday morning when I was talking to him about this after the first meeting. And Tuesday night, the following day, at approximately 8 p.m. It was in the evening anyway. It was after the dinner hour. And said that he had checked them out and they were legitimate. In his opinion. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Now, was that his word or are you paraphrasing now? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | No, I'm just - words to that effect. That everything was okay. They'd been checked out and everything was okay. Words to that effect. |  |

**68**  Mr. Renard was also asked the following questions and gave the following answers:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. And then the next day, the 11th, there's no note about a call from Andre, is there? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No, but it doesn't mean to say I didn't have one. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But there is a note that you had a meeting with Ed and Richard? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That was earlier in the day, yes. |  |
|  | Q | So you had a meeting with them on 11th as well? |  |
|  | A | That's what I said. It was earlier in the day. |  |
|  | Q | Yes. What was that meeting about? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, they wanted $3,000 US, and they got it from us. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | What did they want $3,000 for? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I don't know. For legal fees or loan application, or some ---- |  |
|  | Q |  | So you gave them $3,000 US before you had any information or feedback from Andre about their -- |  |
|  | A |  | That's right, that's right. This $3,000 US was a start --- that had already spoken to Andre. Andre was satisfied with their qualifications status, he told them that. He told me that. I told them that. And they wanted to start doing some advance prep work which I said was part and parcel of the cost of doing this, and it was all returnable in the vent that this --- at any rate. |  |
|  | Q |  | That's fine, Mr. Renard. But your evidence is that you had the meeting with them earlier in the day before you got the phone call from Andre. That was before Andre told you that they checked out and everything was legitimate. You gave them the $3,000 before Andre called you, didn't' you? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah, it was. |  |

**69**  At his February 10, 2005 Examination for Discovery, Mr. Renard was asked the following question and gave the following answer:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. So that does refresh your memory. It was on the evening of the 11th that he called you back; is that right? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | To the best of my knowledge, it is. |  |

**70**  Regarding why he had stated at his April 15, 2003 Examination for Discovery that it was Tuesday night at approximately 8:00 p.m., Mr. Renard stated at Trial: "It is incorrect - we now know he phoned me on Monday night." "Because we would not pay $3,000.00 without hearing from Andre Glockl about legitimacy." As to why Ms. Renard had also said that it was on a Tuesday night, Mr. Renard again denied that it was on a Tuesday. "She was in error." "We both have discussed it as a certainty and a fact we gave $3,000.00 on the 11th." "We both in error - we would never give money before hearing from Andre Glockl."

**71**  The "logic" of this explanation is circular at best. First, it is inconsistent with answers given by both of the Renards at Examinations for Discovery which took place in 2003 and 2005 when it was likely that their memories would be better than at Trial. Second, it is clear that they withdrew $3,000.00 from their bank account and brought it to a meeting with Messrs. Strom and Sailer prior to obtaining any commitment from them and Tri-Sal that the amounts alleged to have been demanded by Mr. Glockl would be repaid out of the B.B.T.P. I find that it was only prior to Trial that the Renards decided that they would have to change their testimony to state incorrectly that any phone call that they had with Mr. Glockl regarding the legitimacy of the Investment was received prior to when they provided the $3,000.00 to Tri-Sal.

**72**  Despite the many inconsistencies and fabrications that I find in the testimony of Mr. Glockl, I am still prepared to find that, if any assurances from Mr. Glockl about the legitimacy of Tri-Sal, the B.B.T.P. and Messrs. Strom and Sailer were given, any conversation took place after the decision had been made by the Renards to invest in the B.B.T.P. and provide the $3,000.00 to Tri-Sal.

**73**  In response to the statement that the Renards said that he had checked out the Investment, Mr. Glockl stated: "I deny that completely." This outright denial is in contrast with virtually all of the rest of the testimony of Mr. Glockl that he could not recall any of the circumstances surrounding the transaction with the Renards. In response to the suggestion that he told Mr. Renard that he had been speaking with Messrs. Strom and Sailer, Mr. Glockl stated: "I deny I had any dealings. Don't know anything about an investment program." In direct examination, he denied ever phoning Messrs. Sailer or Strom or that he was asked to check out the individuals or their company. Regarding whether he had ever met Messrs. Strom or Sailer, when he was asked that question on direct examination he could only state: "I don't believe so". He stated that the first time he heard of Mr. Strom or Tri-Sal was in the course of litigation. He denied ever telling the Renards that Tri-Sal or the two individuals were "legitimate".

**74**  I do not accept the testimony of Mr. Glockl that he never contacted Messrs. Sailer or Strom prior to the commencement of the litigation. At best, Mr. Glockl's memory of events was selective. I find that Mr. Glockl spoke to either or both of Messrs. Sailer or Strom in the Fall of 1996 when the funds borrowed by the Renards were not paid as contemplated.

**75**  Despite this finding, I am satisfied that any conversation took place after the Renards had provided Tri-Sal with the bank draft for $3,000.00 (U.S.) and after the Renards had gone to the branch of the Plaintiff on June 10, 1996 to start the process of borrowing sufficient funds to enter into the B.B.T.P. In this regard, I also take into account the March 16, 1998 letter that Mr. Renard wrote to the B.C. Securities Commission wherein he indicated that he met with Mr. Glockl and that "Within two days of that time Andre Glockl called by telephone to advise that he probably could put the deal through ...."

**76**  At Trial, Mr. Sailer was not asked by counsel whether Mr. Glockl had been in touch with him to inquire about the B.B.T.P. either before the loans were made by the Plaintiff or at any time. This is an unfortunate omission. As well, Mr. Strom was not called as a witness despite my conclusion that he would have been readily available to any of the parties. This is also an unfortunate omission. However, I am not in a position to draw an adverse inference for the failure of any party to ask Mr. Sailer the question or call Mr. Strom as a witness. While Mr. Strom may well have had critical evidence regarding the question of whether Mr. Glockl had been in contact to check out the "legitimacy" of the Investment, I cannot conclude that it would be appropriate to draw an adverse inference against either the Renards or the Plaintiff as it is not clear which party has failed to call Mr. Strom as a witness on the basis that Mr. Strom might be expected to provide important supporting evidence. In this regard, see: ***Royal Trust Co. v. Toronto Transportation Commn.*** [*[1935] S.C.R. 671*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1C4-00000-00&context=); ***Murray v. Saskatoon (City)*** [*[1952] 2 D.L.R. 499*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K731-F361-M0WK-00000-00&context=) (Sask. C.A.); and ***Barker v. McQuahe et al*** (1984), 49 W.W.R. 685 (B.C.C.A.).

**ALLEGED NEGLIGENT OR FRAUDULENT MISREPRESENTATION OF MR. GLOCKL REGARDING THE LEGITIMACY OF TRI-SAL, MESSRS. STROM AND SAILER, AND THE B.B.T.P.**

**77**  The first question is whether it can be said that there was a fiduciary relationship existing between the Plaintiff and the Renards? 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=), Wilson J., then in dissent, stated the following regarding a fiduciary relationship in a passage that has since been frequently cited with approval:

A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses: see, for example, E. Vinter, A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts (3rd ed. 1955); Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1; Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968), 84 L.Q.R. 472; George W. Keeton and L.A. Sheridan, Equity (1969), at pp. 336-52; Shepherd, supra, at p. 94. Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

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.

(at paras. 59-60)

**78**  In ***Hodgkinson v. Simms***, [*[1994] 3 S.C.R. 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3FN-00000-00&context=), La Forest J., for the majority, found a fiduciary relationship to exist between the plaintiff and the defendant accountant even though there was also a contractual relationship:

Finally, I note that the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations; see Johnson v. Birkett [*(1910), 21 O.L.R. 319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBT1-F8KH-X2F1-00000-00&context=) (H.C.); McLeod v. Sweezey, [*[1944] S.C.R. 111*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B02W-00000-00&context=); P.D. Finn, "Contract and the Fiduciary Principle" (1989), 12 U.N.S.W.L.J. 76. In other contractual relationships, however, the facts surrounding the relationship will give rise to a fiduciary inference where the legal incidents surrounding the relationship might not lead to such a conclusion; see Standard Investments Ltd. v. Canadian Imperial Bank of Commerce [*(1985), 52 O.R. (2d) 473*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-FGY5-M2TK-00000-00&context=) (Ont. C.A.), leave to appeal refused, [*[1986] S.C.C.A. No. 29*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1S91-JGBH-B3Y0-00000-00&context=). However, as Prof. Finn puts it, the "end point" in each situation is to ascertain whether "the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests"; see supra, at p. 88.

... As I stated in M.(K.) v. M.(H.), [*[1992] 3 S.C.R. 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-608J-00000-00&context=), at p. 62, over the past ten years or so this Court has had occasion to consider and enforce fiduciary obligations in a wide variety of contexts, and this has led to the development of a "fiduciary principle" which can be defined and applied with some measure of precision. One may begin with the following words of Dickson J. (as he then was) in Guerin v. The Queen, [*[1984] 2 S.C.R. 335*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-233X-00000-00&context=), at p. 384:

. . . where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power,

the party thus empowered becomes a fiduciary . . . .

It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of ***negligence***, should not be considered closed. (at paras. 28-9)

**79**  However, there is considerable reluctance on the part of the Supreme Court of Canada to find a fiduciary relationship in the context of an arms-length commercial relationship. In ***Lac Minerals Ltd. v. International Corona Resources Ltd.***, [*[1989] 2 S.C.R. 574*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6519-00000-00&context=), Sopinka J. stated on behalf of the majority:

The consequences attendant on a finding of a fiduciary relationship and its breach have resulted in judicial reluctance to do so except where the application of this "blunt tool of equity" is really necessary. It is rare that it is required in the context of an arm's length commercial transaction. Kennedy J., in "Equity in a Commercial Context" in Equity and Commercial Relationships, ed., P.D. Finn, The Law Book Company, 1987, explains why:

It would seem that part of the reluctance to find a fiduciary duty within an arm's length commercial transaction is due to the fact that the parties in that situation have an adequate opportunity to prescribe their own mutual obligations, and that the contractual remedies available to them to obtain compensation for any breach of those obligations should be sufficient. Although the relief granted in the case of a breach of a fiduciary duty will be moulded by the equity of the particular transaction, an offending fiduciary will still be exposed to a variety of available remedies, many of which go beyond mere compensation for the loss suffered by the person to whom the duty was owed, equity, unlike the ordinary law of contract, having [sic] regard to the gain obtained by the wrongdoer, and not simply to the need to compensate the injured party. (at para. 27)

**80**  After endorsing the view that it would undermine the sound doctrine of equity to make unreasonable and inequitable applications of it, Sopinka J. stated: "... equity's blunt tool must be reserved for situations that are truly in need of the special protection that equity affords." (at para. 29) Additionally, in ***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=), Binnie J. stated:

Even prior to Lac Minerals the Court expressed the view that the policy objectives underlying fiduciary relationships did not generally apply to business entities dealing at arm's length. 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=), Wilson J. stated, at pp. 137-38:

Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, Jirna Ltd. v. Mister Donut of Canada Ltd. [*(1971), 22 D.L.R. (3d) 639*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M035-00000-00&context=) (Ont. C.A.), aff'd [*[1975] 1 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B08G-00000-00&context=). The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.

To the same effect, see Lac Minerals per Sopinka J. at p. 595, Hodgkinson v. Simms, [*[1994] 3 S.C.R. 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3FN-00000-00&context=), at p. 414, per La Forest J., and the comment of Professor Davies that "[s]trong evidence should be required before a breach of confidential information situation is metamorphosed into one of fiduciary relationship" (Davies, supra, at p. 7). Despite these warnings, a majority of this Court in Hodgkinson v. Simms, supra, held that where the ingredients giving rise to a fiduciary duty are otherwise present, its existence will not be denied simply because of the commercial context. The vulnerability of clients to their professional advisors invoked traditional fiduciary principles. In this case there is nothing in the relationship between a juice manufacturer and its licensee to suggest that the former surrendered its self-interest or rendered itself "vulnerable" to a discretion conferred on the latter. The overriding deterrence objective applicable to situations of particular vulnerability to the exercise of a discretionary power (M.(K.) v. M.(H.), supra, per McLachlin J. at p. 86) does not operate here. If different policy objectives apply, one would not expect the remedy necessarily to be the same. (at para. 30)

**81**  I find the situation much like the findings made by J.M. Spence J. in ***Baldwin v. Daubney***, [*[2005] O.J. No. 5330*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDS1-F956-S0MT-00000-00&context=) (Ont. S.C.J.), where he concluded that it was a well established proposition that the ordinary relationship of lender and borrower did not involve or give rise to a fiduciary duty on the part of the lender towards the borrower. In this regard, J.M. Spence J. stated:

It is well established in the case law that the ordinary relationship of lender and borrower does not involve or give rise to a fiduciary duty on the part of the lender towards the borrower. See Mastercraft, supra, at p. 284 in paras. 47 to 49; also Anand v. Medjuck, [*[1995] O.J. No. 2571*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCW1-FBV7-B21P-00000-00&context=) (Gen. Div.) at p. 43 at para. 40 and Bank of Montreal v. Witkin, [*[2005] O.J. No. 3221*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDR1-JSJC-X4VH-00000-00&context=), at paras. 54 and 55 and 59 to 61.

The reason that there is no fiduciary duty is simple. A fiduciary duty arises where a relationship between the parties, such as trustee and beneficiary, is established in order to give one party the responsibility to look out for the best interests of the other. The relationship between a lender and a borrower is not of that kind. Rather, it is a typical commercial relationship in which the interests of the parties are not the same and each party seeks to secure its own interest and can reasonably believe only that the other party is doing the same. (at paras. 65-6)

**82**  I am satisfied that the relationship here was between two independent contracting parties and that the Renards did not have the right to expect that Mr. Glockl and the Plaintiff would act in their interests or in their joint interests to the exclusion of the interests of the Plaintiff. This was a commercial relationship. This was not a bargain between an experienced financial institution and unsophisticated borrowers. I conclude that no fiduciary relationship existed between the Plaintiff and the Renards.

**83**  Accordingly, the question which arises is whether the elements necessary to establish the tort of negligent misrepresentation or fraudulent misrepresentation were present so that I can make the finding requested by the Renards. The essential ingredients of the tort of negligent misrepresentation were set out in ***The 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=): "(a) there must be a duty of care based on a special relationship between the parties; (b) the statement or advice given must have been untrue, inaccurate or misleading; (c) the person making the representation must have acted negligently in making the representation; (d) the person who received the representation must have reasonably relied on the misrepresentation; and (e) the reliance must have resulted in financial detriment.

**84**  I find that there was no duty of care owed to the Renards. I can find no "special relationship" between Mr. Glockl and the Plaintiff and the Renards. There was no existing banker/customer relationship. There were no previous dealings between the Renards and Mr. Glockl other than a short introduction in a social setting. Mr. Glockl was a banker and not a financial advisor. There is no evidence that the Renards told Mr. Glockl that they were relying on him or the Plaintiff for investment advice. There was no reason for Mr. Glockl or the Plaintiff to believe that the Renards would rely on any statements that Mr. Glockl might make about Tri-Sal, Messrs. Strom and Sailer, or the B.B.T.P. As Ms. Radford testified, Mr. Glockl was not authorized to give financial advice or to check out any investment. Ms. Radford testified that Mr. Glockl would have been instructed by the Plaintiff to tell customers that they should do their own inquiries and should go to a financial planner. I cannot conclude that Mr. Glockl did otherwise. I find that it would have been clear to the Renards that Mr. Glockl was not in a position to provide investment advice. In any event, I find that the Renards did not go to Mr. Glockl to obtain financial and investment advice. Rather, they went to the Plaintiff to obtain a loan. They chose the Plaintiff and Mr. Glockl because they were of the belief that only a financial institution that had no prior knowledge about their finances could be convinced to lend them sufficient funds to pay out their existing mortgage and to provide sufficient funds to make the Investment. If anything, it was the misrepresentations of the Renards that induced the Plaintiff to make the loans that it did.

**85**  In ***Baldwin***, *supra*, J.M. Spence J. sets out the duty of care of a lender as follows:

A clear statement of the applicable law in this jurisdiction as to whether a lender has a duty of care to advise a borrower is set out in the following passage from the decision of the Court of Appeal for Ontario given earlier this year in Pierce v. Canada Trustco Mortgage Company [*(2005), 254 D.L.R. (4th) 79*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDR1-F1H1-21T5-00000-00&context=) at 85 at para. 27:

[27] Generally speaking, the relationship between a financial institution lender and its customer borrower is a purely commercial relationship of creditor and debtor. Absent any special relationship or exceptional circumstances such as would give rise to a fiduciary duty (which is not pleaded by Mrs. Pierce), the Courts have consistently held that the lender owes no duty to the borrower in connection with the making of the loan. In particular, the bank owes no duty to its customer to advise the customer not to undertake the loan: see Bertolo v. Bank of Montreal [*(1986), 57 O.R. (2d) 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-JF75-M18H-00000-00&context=), [*33 D.L.R. (4th) 610*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-JF75-M18H-00000-00&context=) (C.A.), and Bank of Montreal v. Duguid [*(2000), 47 O.R. (3d) 737*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4S7-00000-00&context=), [*185 D.L.R. (4th) 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4S7-00000-00&context=) (C.A.).

While this statement is made in the course of an analysis relating to the issue of negligent misrepresentation, it is apparent from the text at paragraph 27 that it is a general statement as to the duty of care of a lender. Since (for the reasons given above) there is no fiduciary relationship in this case, on the basis of the law as set out in the Pierce decision, the financial institutions would not have any duty of care to advise the plaintiffs about the loan risk unless there was a "special relationship" between the financial institutions and the plaintiffs (i.e., other than, to use the words in Pierce, "a purely commercial relationship of creditor and debtor") or some kind of "exceptional circumstances" which would be adequately similar to those which would give rise to a fiduciary relationship.

(at paras. 78-9)

With these additional factors of agreement and disclosure, the situation between the parties as regards the proximity of the alleged tortfeasor to the prospective risk of harm is materially altered. It remains true that the harm could not occur without the making of the loan. But the making of the loan requires the consent of two parties, the lender and the borrower. And the lender cannot impose the loan on the borrower. So where, as here, the borrower has received disclosure of the terms of the loan and has been placed in a position to make an assessment of the risk (and is in a better position than the lender to do so, because the borrower has knowledge of the proposed investment program which the borrower received from his or her financial advisor) the analysis of proximity must take these relative positions into account. "Proximity" has to do with closeness (and its opposite, lack of closeness or "remoteness") with respect to the cause of the harm. The foreseeable harm here would seem to be the loss incurred by the occurrence of a margin call (or, perhaps, the unrealized but prospective loss where a loan goes out of margin). But the person who is closest to the causing of that harm is the person who decided to borrow funds to make the investments that could result in that loss. That person is the borrower. In the terminology of Anns, the borrower has proximity to the cause of the loss. Next in proximity would be the financial advisor. Compared to the borrower and the financial advisor, the lender does not have proximity. Its loan is necessary but not sufficient for the harm. The borrower's action is necessary and sufficient for the harm.

The fact that a loan transaction is made by way of an agreement between the parties strongly affects the two critical elements of duty of care that are identified in Anns: the nature of the relationship between the parties and the degree of proximity between them. Where the relationship between the parties is only contractual, the contract necessarily determines the reasonable expectations of the parties with regard to each other. Where the contract itself does not give the lender a duty to advise, there is no reason to consider that such a duty is part of the relationship unless there is a special relationship or circumstance which would reasonably give rise to such a duty. Similarly, where the relationship is only contractual, there is no reason to view the parties as having a proximity to the prospective harm that is different from the reasonable expectations created by the terms of their contract. (at paras. 83-4)

The plaintiffs submit that their cause of action in ***negligence*** falls into a recognized category of circumstances where a duty of ***negligence*** has been held to exist. How that category might be properly described requires consideration. The plaintiffs say in their factum that a duty of care in ***negligence*** arises when a person's conduct creates a foreseeable risk of harm to foreseeable persons. But for this formulation to be applicable in this case, it is necessary to conclude that the conduct of lending creates a foreseeable risk of harm to foreseeable persons. This position ignores the point that it is the borrower who decides to take the loan and so creates whatever foreseeable risk may thereby arise. The position also ignores the fact that it is contrary to what the case law has concluded in the case of lending. The case law recognizes that advisors have a duty of care in respect of advising, but it has not recognized that lenders are advisors. The plaintiffs say that the Court ought to discern or draw an analogy between advisors and lenders in this case on the basis of the similarity of their circumstances vis-à-vis the plaintiffs and the prospect of harm to them. But the differences between the circumstances of the advisors and the lenders are more instructive than any similarities. The plaintiffs dealt with the financial advisors to obtain their financial advice and they say they relied upon that advice. The plaintiffs went to the financial institutions, not for advice, but for loans. There is no evidence that the plaintiffs placed any reliance on the financial institutions with respect to their borrowing and investment decisions other than the self-serving evidence, discussed earlier, that they "trusted" the financial institutions. The financial advisors knew the intended investment programs of the plaintiffs and they were in a position under the applicable regulatory requirements to develop and recommend and implement those investment programs for the applicants and to monitor them over time. The financial institutions were not in this position. No basis for an analogy between the advisors and the lenders is apparent.

On this basis, the relationship between the financial institutions to the plaintiffs in this case does not fit within an existing category that is recognized as giving rise to a duty of care and it is not analogous to an existing category of that kind. So the claim that the lender has a duty of care to advise is a claim to recognize a new duty of care. A new duty of care could be recognized only if it satisfied, first, the Anns test as to proximity. For the reasons given above, that test is not satisfied here. The plaintiffs made submissions about the applicability of the second stage of the Anns test but, since the proposed new duty of care does not get past the first stage of the Anns test, the second stage does not become applicable. So this approach to the issue of duty of care based on recognized and new categories of duty of care does not yield a duty of care. (at paras. 87-8)

**86**  On the assumption that Mr. Glockl made the statements attributed to him, I could not necessarily conclude that the statements were untrue. There is nothing in evidence which would allow me to conclude that a B.B.T.P. was not "legitimate". There is nothing in evidence which would allow me to conclude that the ordinary inquiries available to a banker would have allowed Mr. Glockl to conclude that Messrs. Sailer and Strom and Tri-Sal were not also "legitimate". While subsequent events may well allow a contrary conclusion to be drawn, there is nothing in evidence that such a conclusion could not be drawn at the time.

**87**  Even if I could conclude that the statement was made negligently at a time that it is clear that Mr. Glockl could not have made appropriate inquiries about Messrs. Strom and Sailer and about Tri-Sal so that he would be in a position between the morning of June 10 and the evening of June 10 or the evening of June 11 to advise Mr. Renard that Tri-Sal, Messrs. Strom and Sailer, and the B.B.T.P. were "legitimate", I could not conclude that the Renards in any way relied on the misrepresentations of Mr. Glockl and that the reliance led to the financial detriment of the Renards.

**88**  The Renards had already decided to invest in the B.B.T.P. when they purposely misled Mr. Glockl about the value of the Property and their income. The Renards provided the $3,000.00 to Tri-Sal even before receiving advice from Mr. Glockl. I have concluded that it was not reasonable for the Plaintiff and Mr. Glockl to foresee that the Renards would rely on any representation about Tri-Sal, Messrs. Strom and Sailer, or the B.B.T.P. as the Renards applied for the loans on June 10, 1996 so that they could make the Investment and I am satisfied that anything that Mr. Glockl might have said would not have dissuaded the Renards from proceeding with the Investment.

**89**  I have also concluded that any reliance on the statements alleged to have been made by Mr. Glockl did not result in a financial detriment to the Renards. Even if I could conclude that Mr. Glockl said what he is reported to have said to Mr. Renard, I would also find that his statement about the legitimacy of Tri-Sal and a B.B.T.P. would be based on the assumption that any money lent to the Renards would be put in trust and appropriately protected until all of the documentation had been received so that the funds could not be released until it was known that the money was safe and would be advanced only for the purposes intended.

**90**  There is no suggestion that Mr. Glockl was asked to or actually gave advice to the Renards about how the Renards should protect the funds being borrowed from the Plaintiff. In fact, it was Mr. Renard's testimony that he immediately handed the money over to Tri-Sal. When he did so, Mr. Renard lost control of the funds borrowed. The funds were lost, not because Mr. Glockl advised the Renards regarding the legitimacy of the B.B.T.P., but, because of the ***negligence*** of Mr. Renard in providing the funds to Tri-Sal without taking appropriate steps to safeguard the disbursement of the funds. The proximate cause of any loss is the carelessness of Mr. Renard rather than any statements alleged to have been made by Mr. Glockl.

**91**  The onus of demonstrating that a duty of care exists rests on the Renards. I am satisfied that they have not established that Mr. Glockl and the Plaintiff owed them a duty of care. The relationship between Mr. Glockl and the Renards was simply that of lender and borrower. Even if the Renards did not know that they did not qualify for the loans which were made to them, it cannot be said that approving the loans induced them into taking the money and providing security for the repayment of the money: ***Westminster Savings Credit Union v. 442391 B.C. Ltd.***, [*[2000] B.C.J. No. 795*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X0MK-00000-00&context=) (B.C.S.C.); ***Anand v. Medjuck***, [*[1995] O.J. No. 2571*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCW1-FBV7-B21P-00000-00&context=) (Ont. C.J. - G.D.); and ***Re Mastercraft Group Inc.***, [*[1994] O.J. No. 941*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCT1-JP4G-60HR-00000-00&context=) (Ont. C.J. - G.D.).

**92**  The onus of establishing on a balance of probabilities that there was negligent misrepresentation lies with the Renards. I am satisfied that they have not established the necessary elements to show that there was negligent misrepresentation by Mr. Glockl. In view of that finding, it is not necessary to deal with the alternate claim that the Renards advance that Mr. Glockl made fraudulent misrepresentations other than to say that I could make no such finding.

**93**  After providing a $3,000.00 U.S. bank draft to Tri-Sal on the morning of June 11, 1996, the Renards then made arrangements with Mr. Glockl to meet with him.

**DOCUMENTS EXECUTED BY THE RENARDS ON JUNE 13, 1996**

**94**  The Renards went to the Tsawwassen branch of the Plaintiff on June 13, 1996 and met with Mr. Glockl in order to sign a number of documents. These documents were computer generated. I find that it would not have been possible for these documents to have been signed by the Renards in blank and the computer generated forms then created. Accordingly, I reject their testimony that they signed documents in blank. I find that the information on the forms was all inputted prior to the forms being printed and that the forms contained the printed information prior to being signed by the Renards. I find that the following were signed on June 13, 1996:

1. TERM LOAN AGREEMENT

In a computer generated document dated by the computer June 13, 1996, Mr. and Mrs. Renard as "Borrowers" acknowledged receipt of a loan in the amount of $35,000.00, at an interest rate of 10.75% per annum with payments of $756.63 commencing on July 13, 1996. The signatures of Mr. and Mrs. Renard are witnessed by Mr. Glockl. The "Term Loan Agreement" contained this specific acknowledgment:

THE Borrower acknowledges receipt of a loan from the Lender in the amount of $35,000.00 dollars (the "Principal") and agrees to repay same with interest calculated and payable monthly thereon at the rate of 10.750% per annum, at the branch of the Lender above named, by equal monthly instalments which include principal and interest of $756.63 each, commencing on the day of July 13, 1996 and on the same day of each month thereafter, to and including the 13 day of Dec 1996, and the balance of the principal and interest thereon shall be paid on the date last mentioned (the "Maturity Date").

1. COMMITMENT LETTER FOR A MORTGAGE

In a document signed by the Renards, witnessed by Mr. Glockl and with the handwritten date June 13, 1996, the mortgage amount is said to be $250,000.00, open for a six-month term, and interest at 6.75% with payments of $1,712.47 per month. This Commitment Letter was produced by the Renards from their own documents and, accordingly, I am satisfied that the document was fully completed when it was provided to them and that it was not signed in blank as is suggested by the Renards. Under the heading "Other Conditions" is a notation:

ADMINISTRATION FEE TO ASSIGN THIS MORTGAGE/CHARGE TO ANOTHER INSTITUTION WILL BE $200.00. SUBJECT TO APPRAISED VALUE OF NO LESS THAN $333,000.

SUBJECT TO CONFIRMED EMPLOYMENT CONTRACT.

1. GROUP CREDITOR INSURANCE APPLICATION

In a document signed by the Renards and hand dated June 13, 1996, the Renards waived the opportunity "... to become insured for Group Credit Insurance with respect to the above loan ....". There is no amount set out in the document relating to the loan amount. There is a similar document headed "Group Creditor Insurance Application-Mortgage" which is also signed by the Renards, hand-dated as June 28, 1996 where they waive the opportunity to apply for a Group Creditor Insurance with regard to the Mortgage. On that document, the mortgage amount of $250,000.00 is set out.

1. CANADA TRUST ACCOUNT #0574-503943 IS ESTABLISHED

That account was set up as a daily interest chequing account with the notation that it was set up on June 13, 1996 with an initial deposit of $35,000.00. Any documents that needed to be signed by the Renards in order that this account could be set up are not in evidence. However, I am prepared to find that this account could not have been established unless the Renards had provided sample signatures as the Account which was established allowed the Renards chequing privileges.

1. LOAN DISCLOSURE STATEMENT

This Statement dated by the computer as June 13, 1996 with that same date handwritten on the statement has been signed by the Renards and witnessed by Mr. Glockl. This Loan Disclosure Statement was produced by the Renards from their own documents and, accordingly, I am satisfied that the document was fully completed when it was provided to them and that it was not signed in blank as is suggested by the Renards. The loan amount is noted to be $35,000.00, the term of the loan is noted as six months, and the interest rate is noted as 10.75%. The monthly payment amount is noted as being $7,056.63.

1. CREDIT APPLICATION

A handwritten "Credit Application" dated June 12, 1996 and signed by the Renards and witnessed by Mr. Glockl on June 13, 1996 contains the following information: social insurance numbers of the Renards, their dates of birth, the address of the Property, the home phone number of Renards, the employment of Mr. Renard by "Salton Agri Enterprises" as a "Manager" for 10 years at an income of $100,000.00, details relating to the bank accounts maintained with the Toronto Dominion Bank and the "Hongkong Bank" and the "current value" of the Property of $350,000.00 with $45,000.00 "current balance" against the Property as a result of a "bus. L of C" (supposedly a business line of credit). There is no reference in this document to a $35,000.00 or $50,000.00 separate loan. I find that the information set out in what was written by Mr. Glockl on this Credit Application was obtained directly from the Renards by Mr. Glockl.

**BORROWING POWER CALCULATIONS**

**95**  Also in evidence are two forms headed "BORROWING POWER CALCULATIONS" both of which set out both computer generated printed and handwritten notations.

**96**  The first document relates to the application for the Mortgage and is noted as being "Recommended By" Mr. Glockl on June 13, 1996 and "Approved ... By" Ms. Radford on June 13, 1996. The total income for the Renards is noted as being "$100,000.00", the "total borrowings" are noted as "$35,000.00", and the amount "applied for" is noted as being "$250,000.00". Also shown as "Existing/Pending" is "$5,500.00" relating to "CREDIT CARDS". All of those amounts are from the computer generated portion of the document. There is this further printed notation: "THE TOTAL AMOUNT BORROWED OF $255,501.00 WILL REPRESENT 65% OF OUR RECOMMENDED MAXIMUM." The "Closing Date" for the Mortgage is shown as June 27, 1996 and the principal amount is shown as $250,000.00, the amortization of 25 years, a term of six months, an interest rate of 6.75%, and a monthly payment amount of $1,712.47 (principal and interest). The "Loan to Val. %" is shown as 71.428% which I calculate would indicate a value given for the Property as being $350,000.00.

**97**  Under a number of printed headings on the form, there are hand-printed notations. I find that those notations were added by Mr. Glockl. Under the heading "Rationale for Credit Decision (i.e., Character, Capacity, etc.)" Mr. Glockl has written the following: "GOOD JOB STABILITY & INCOME", "LOW L/V", "WELL WITHIN GDS/TDS MAXIMUMS". "NEW TO C.T. - GOOD RELATIONSHIP OPPORTUNITIES." "R1 [CREDIT] BUREAU", "$250,000.00 1ST 6 MO OPEN 6 3/4% 25 yr Ammort." Under the printed heading "Approval/Conditions", Mr. Glockl has written the following: "BOTH TO SIGN" "SOLICIT LIFE INS." "APPRAISED VALUE OF 333K MIN." "FIRM EMPLOYMENT CONTRACT" "ALL DOCS TO BE SIGNED AT SOLICITOR'S". I find that the hand-printed notations made by Mr. Glockl are all consistent with what was told to Mr. Glockl by the Renards and that the representations made by the Renards in these regards were largely without foundation. However, I am satisfied that the Plaintiff committed itself to making the Mortgage loan when Mr. Glockl and Ms. Radford signed the Borrowing Power Calculations form relating to the Mortgage on June 13, 1996.

**98**  There is no "BORROWING POWER CALCULATIONS" document in evidence relating to a $35,000.00 loan to the Renards. The document in evidence relates to a $50,000.00 loan. In this form which is generated partially by computer and which contains what I find to be the handwriting of Mr. Glockl, the document is signed as being "Recommended by" Mr. Glockl and Ms. Radford on June 24, 1996. In the computer generated portion, the following is set out: "Income" for Mr. and Mrs. Renard at $135,000.00, "the Total Borrowings" of $50,000.00 "Applied For". Under the heading "EXISTING/PENDING" is the sum of $5,500.00 relating to "CREDIT CARDS". It is noted that the total amount borrowed of $305,501.00 would represent "73% of our recommended maximum". The "EXISTING/PENDING" mortgage is noted as being "$250,000.00. Regarding the $50,000.00 loan, the amortization is noted as being 60 months, the interest rate at 10.750 FIXED", the term six months and the payment amount monthly of $1,080.90" ("P&I").

**99**  Under the printed heading "Rationale for Credit Decision (i.e. Character, Capacity, etc.)" Mr. Glockl has written "73% of credit maximum", "Excellent income. - good job stability", "Current R1 on Bureau" [being a R1 rating from the Credit Bureau reports that were obtained on June 13, 1996], "$ For investment purposes" and "Loan to be paid in full in 40 days time". Under the printed heading "Approval/Conditions are the computer generated words: "DEAL HAS BEEN APPROVED BY CREDIT SCORING" as well as the following handwritten notes made by Mr. Glockl: "BOTH TO SIGN ALL DOCS", "SOLICIT LIFE INSURANCE", "PAD 503943", "PAYOUT FOR 40 DAYS FROM ADVANCE".

**100**  When the Renards advised Mr. Glockl and the Plaintiff that the balance owing under the Mortgage in favour of H.S.B.C. was $45,000.00, this information was advertently or inadvertently incorrect. In fact, the balance owing was in excess of $51,000.00. I find that the amount owing to the Plaintiff under the unsecured portion of the loan to the Renards had to be increased from $35,000.00 to $50,000.00 in order to make sure that there was sufficient funds available to the Renards not only to allow them to invest $175,000.00 (U.S.) in the B.B.T.P. but also to satisfy the balance owing under their existing Mortgage in favour of H.S.B.C. Although there is not in evidence a Term Loan Agreement relating to the borrowing of $50,000.00 or a Loan Disclosure Statement relating to a $50,000.00 loan, I am satisfied that nothing turns on this absence of evidence or the ability of the Plaintiff to recover the advances made to the Renards.

**101**  I find that Mr. Glockl would not have had the sole ability to approve these loans and that the loans were properly authorized by the Plaintiff. At her Examination for Discovery, Ms. Lowden on behalf of the Plaintiff stated that an employee like Mr. Glockl having a "CSO6" authorization would not be in a position to make a loan of $50,000.00 unsecured to new customers of the bank without getting authority from someone more senior. I find that Ms. Radford on behalf of the Plaintiff approved both the Mortgage and the borrowing of the $50,000.00.

**102**  Regarding the BORROWING POWER CALCULATIONS documents, Ms. Lowden confirmed that the approval of loans would ordinarily be noted on this document when two employees of the Plaintiff signed the form. Ms. Lowden testified that these forms would only be signed and the loans approved once all of the of the information was available and that Ms. Radford, Manager of Customer Sales and Services (basically the assistant manager) had approved the loan. She indicated that a supervisor such as Ms. Radford would not ordinarily sign the document unless the appraisal was available for her review. However, it should be noted that the document approving the Mortgage was signed on June 13, 1996 and the appraisal obtained was dated June 17, 1996. In this regard, Ms. Lowden testified at trial: "Not unusual to sign subject to the conditions but the appraisal should have been brought back - usually we would have initialled the condition then the deal would be sent to head office." She agreed that it was unusual for the supervisor to sign beforehand. "Yes it is unusual - I would not do it myself."

**103**  Ms. Radford confirmed that she had signed both of the BORROWING POWER CALCULATIONS documents although she did not recall signing them. She indicated that a loans officer such as Mr. Glockl would prepare them, would input information into the system, would fill out the details and make the underwriting decision on it, and then would bring it to her for signature. Ms. Radford stated that she would only sign the document if she was satisfied with the answers given. She would not necessarily see an appraisal but would sign it and leave to Mr. Glockl the responsibility to see that all of the conditions were met. I find that this is what happened with the loans evidenced by the Mortgage and the Note.

**PROBLEMS WITH THE DOCUMENTS OF JUNE 13, 1996**

**104**  Many of the documents in evidence were produced by Mr. Glockl or the Renards rather than being produced by the Plaintiff. While the Renards attempted to cast suspicion on Mr. Glockl because he had taken copies of some of the documents home and was therefore in a position to produce them, I am satisfied that I can draw no negative inference or finding against Mr. Glockl in this regard. First, I accept the explanation of Mr. Glockl that much of the work that he did was not done at the Branch of the Plaintiff as he had no office space assigned to him so that he kept many records with him. Second, I find that Mr. Glockl did not have in his possession any original documents relating to the Note and the Mortgage as the originals of the documents would have had to been available to Ms. Radford before she would have approved the two loans. Third, when the employment of Mr. Glockl was terminated by the Plaintiff, those who were investigating the alleged wrongdoing of Mr. Glockl had access to the documents of the Plaintiff. Accordingly, if the documents relied upon by the Plaintiff went missing, I find that the documents went missing some time between July 16, 1997 when the employment of Mr. Glockl was terminated and 2002 when the Plaintiff delivered its first List of Documents.

**105**  In his July 15, 2004 Examination for Discovery, Mr. Glockl confirmed that there was one file on the Renards at the Branch of the Plaintiff and that he took copies of the contents of the file. Regarding the timing of his photocopying, I accept the evidence he gave at Trial: "In the course of, as I stated, in the process of the loan application and the funding of the mortgage." At his July 15, 2004 Examination for Discovery, Mr. Glockl stated that he probably took the documents home during June of 1996. At Trial, he stated that he never copied all of them at one time. He denied that he took copies because the loan was in default and that he might get into trouble as a result of making the loan. Mr. Glockl testified that he never took originals home but took copies "to keep track of clients at the time." I accept the evidence of Mr. Glockl about when and why he took copies of the documents which were in his possession relating to the Renards.

**106**  However, there are a number of difficulties associated with the documentation which is in evidence and signed by the Renards.

1. THE LOAN OF $50,000.00

**107**  The Plaintiff claims for the balance owing under a Note which is in the original principal balance of $50,000.00 and not one in the original principal balance of $35,000.00. There is no Term Loan Agreement or Loan Disclosure Statement in evidence relating to the $50,000.00 Note which is the subject matter of the claim of the Plaintiff. In this regard, the initial deposit into the Account was $35,000.00 but a further $14,886.92 was deposited into the Account on June 24, 1996. Ms. Lowden who approved both loans testified regarding the procedure of what should happen if the Renards were to receive $50,000.00 instead of $35,000.00. Ms. Lowden stated that it would be necessary to "close out" the previous loan and "write a new one". She stated that the interest would be deducted from the new advance, the branch would pay out the previous loan using the new funds and then would deposit the new funds available into the account of the client. I find that the interest which would have accrued on the $35,000.00 which was advanced on June 13, 1996 would have been equal to the difference between $15,000.00 and the $14,886.92 which was deposited into the account of the Renards on June 24, 1996. Under cross-examination, Ms. Lowden stated that there would usually be new documentation showing that the original amount was paid out and a new advance made. However, while a total of $50,000.00 (less the interest which had accrued on the $35,000.00 loan) was advanced, no TERM LOAN AGREEMENT evidencing such a loan and no acknowledgment of a loan of $50,000.00 signed by the Renards is in evidence. As well, the $35,000.00 advanced under the promissory note signed by the Renards is not paid out and a new advance of $50,000.00 then made.

**108**  Ms. Radford of the Plaintiff testified that a promissory note in favour of the bank ordinarily would be prepared, and it would be signed by the customer, the loans officer would bring it to a second person "to make sure no one was creating a fictitious loan to himself" and, once approved by the second person, the money would then be put into the account of the customer. Ms. Radford indicated that two people needed to advance the loan and it was "not a teller but someone who had the ability to co-sign - a loans' person." Ms. Lowden at Trial confirmed that Mr. Glockl would have had no authority to make any loan on his own and that it would take two people in the Branch to institute a new loan. She further confirmed that it would require two people to approve of any loan before any funds could be advanced. I find that two people did approve the $50,000.00 - Mr. Glockl and Ms. Radford when they "recommended" the $50,000.00 on June 24, 1996 as evidenced by the Borrowing Power Calculations document in evidence.

**109**  At Trial, both Mr. and Ms. Renard denied that they had applied for a $50,000.00 loan, although they both admitted that this approximate amount had been received by them. In particular, Ms. Renard confirmed that this amount had been received: "According to the bank statement we did." While Mr. Renard at Trial indicated that he did not know about the deposit of $14,886.92 on June 24, 1996 on the date when the $50,000.00 loan was approved by Ms. Radford, the Renards never protested this amount being deposited into their account and subsequently made payments pursuant to an advance of $50,000.00.

**110**  In the Statement of Defence filed October 21, 1998, the following admissions were also made by the Renards: "... The Defendants admit that they signed a Promissory Note on or about June 24, 1996 ... however deny that they are indebted to the Plaintiff." There is nothing in subsequent pleadings on behalf of the Renards to change this admission. While counsel stated that the Renards may wish to seek leave to withdraw that admission, that statement was only made after all evidence was concluded and during submissions. In the circumstances, I am satisfied that the Renards should not be in a position to withdraw that admission.

**111**  Even if it was ordered that the admission could be withdrawn, I find on the balance of the evidence available to me that a total of $50,000.00 was advanced to the Renards by the Plaintiff and, unless the Defence or the Counterclaim of the Renards is otherwise successful, the balance presently due and owing under that advance of $50,000.00 must be repaid by the Renards.

**112**  Regarding the interest rate under that advance, the Plaintiff claims interest at the rate of 12.20% per annum. However, the interest rate set out under the "TERM LOAN AGREEMENT" leading to the $35,000.00 loan is 10.75%. There is a similar reference to the interest under the $50,000.00 loan as set out in the June 24, 1996 BORROWING POWER CALCULATIONS. Accordingly, any balance owing under the $50,000.00 advance will bear interest at no more than 10.75% per annum.

**113**  Despite the fact the usual procedure of the Plaintiff regarding the payout of a previous loan when a loan amount was to be increased appears not to have been followed and despite the denial of the Renards that they ever applied for a loan of $50,000.00, I find that they did make that request to the Plaintiff, that such a loan was made by the Plaintiff and that $50,000.00 was advanced to them.

1. THE APPRAISAL OF THE PROPERTY

**114**  The Property was never appraised at $333,000.00. Pursuant to the June 11, 1996 appraisal request form forwarded by Mr. Glockl, Fraserway Appraisal Ltd. ("Fraserway") prepared an appraisal appraising the Property at $185,000.00 ("Appraisal"). The billing material available from Fraserway Appraisals indicates that the appraisal was ordered on June 12, 1996 and was billed by invoice #96H049 on June 18, 1996. The appraisal charge was $160.50. On the form which is in evidence, someone has printed the notation: "Direct Deposit to Acct 115-804422".

**115**  The Appraisal was not found in the files maintained by the Plaintiff and had to be obtained by the Renards directly from Fraserway. Although Mr. Glockl admitted under cross-examination that it was a bit unusual for the appraisal to be missing from the files maintained by the Plaintiff, Mr. Glockl denied taking the appraisal out of the file.

**116**  The "Appraisal Amount" in the Appraisal is shown as $185,000.00, the "Appraisal Completion Date" is shown as June 17, 1996. The "Appraiser's Comments" include the following: "The value of improvements (Mobile Home) plus 3 Acre only." The appraisal that was prepared is described as "residential" and having been requisitioned by "Andre". The tax assessment is shown as "Land" at $180,000.00, the Bldg as $32,100.00 for a total of $212,100.00. The "purpose of appraisal" is shown as "lending value" and the "property rights appraised" is shown as "House Plus 3 Ac. Only" rather than "fee simple". Under the "Site Description" it is noted that the site size is "10 acres". In this regard, it is agreed by all parties that the Property is actually 10 acres. In addition to the 10' x 60' mobile home on the Property, the "other improvements" were stated to include a 16' x 26' "shop on concrete slab", a 20' x 60' "shop on concrete slab" and a "10' x 20' "office on blocks." There are photographs attached to the appraisal.

**117**  There is nothing in evidence to show that the cost of the Appraisal was borne by the Renards despite the fact that I accept that it was the usual practice of the Plaintiff that the cost of any appraisal was to be borne by the borrowers. At his July 15, 2004 Examination for Discovery, Mr. Glockl testified that it was his experience that a lender would do an appraisal for new customers in connection with a mortgage application and would incur the costs of an appraisal without any funds being put up by the new clients. However, he also stated: "I would say half the time a customer may pay a deposit ahead of time for the appraisal. The other half of the time the appraisal fee might be deducted from the original loan advanced." At Trial, Ms. Lowden had no explanation why neither the account nor the mortgage proceeds had been charged with the cost of the Appraisal. She had no explanation regarding why the normal practice would not have been followed.

**118**  It appears that the cost of the Appraisal was borne by the Plaintiff. I make no adverse findings against either the Plaintiff or Mr. Glockl in this regard. I find that Mr. Glockl had the discretion to and did waive the requirement that the cost of the Appraisal be borne by the Renards. The Renards submit that Mr. Glockl purposely hid the Appraisal so that the Mortgage would proceed and that the usual procedures followed by the Plaintiff were not followed with the Mortgage.

**119**  I do not accept the testimony of Mr. Glockl that any appraisal would usually go to the unit of the Plaintiff called the "MOSU" being the "Money Out Service Unit". In this regard, Mr. Glockl testified: "They go through a check-list and fund the cheque to the solicitor." Mr. Glockl confirmed that the appraisal was one of the pre-conditions which needs to be satisfied with a mortgage application. He also confirmed that the appraisal would not go to MOSU until the branch of Canada Trust "has the documents complete".

**120**  Ms. Chatterton testified that if the hard copy of the appraisal was received by MOSU they would not look at it or wait for it for funding. "If it came in after, we would get a number and it would be sent for filing in London, Ontario with other documents on the loan." She confirmed that no one at MOSU "vets the documents" and verification is done at the branch. If there was no appraisal, they would not phone Mr. Glockl as it was "a branch responsibility", "we would not check".

**121**  I find that the appraisal would ordinarily go to the branch, that a loans officer such as Mr. Glockl would then check the appraisal against the requirements and pre-conditions set out in the "Borrowing Power Calculations" for a mortgage, that an application to MOSU would only be forwarded once all the pre-conditions had been met, and that MOSU had no responsibility to review any appraisal and check it against Borrowing Power Calculations.

**122**  Ms. Chatterton confirmed that the mortgage to value ratio would have been inputted at the branch and that they would not have checked it at MOSU. She also confirmed that if $350,000.00 was inputted, that is what they would calculate the ratio on "regardless of what the appraisal says". She confirmed that it was correct to say "So whatever information inputted by loans officer whether or not told to him by the customer".

**123**  Mr. Glockl denied that he ordered the Appraisal or that he ever saw the Appraisal. I am not prepared to accept Mr. Glockl's testimony in this regard. At his July 15, 2004 Examination for Discovery, Mr. Glockl stated that he was the only "Andre" at that Canada Trust branch and that the appraisal was addressed to his attention and it was in the Canada Trust form because he had ordered the appraisal. Mr. Glockl had no explanation as to why his name and contact number was on the request for the appraisal rather than the name and contact number of another loans officer. He also had no explanation as to why the appraisal would not come back to him "a normal course would not come back to me." He indicated that he had no recollection of seeing the appraisal but he could not deny that he saw it. He confirmed that if he had seen it, it would have stopped the process of getting $250,000.00 because it was only for $185,000.00. As to the value of the Property, Ms. Lowden stated: "The value according to the customer and what they want to borrow." She also confirmed that, in the normal course, if the value came in under what the customer stated the mortgage would not go through at that level. She was asked whether, if the appraisal of the Property was $185,000, "it would kill the deal" and she replied: "That's right." She confirmed that the appraisal would ordinarily go to the loan officer who took the application (Mr. Glockl).

**124**  I find that Mr. Glockl knew of the $185,000.00 Appraisal as early as June 14, 1996 and, in any event, no later than June 17, 1996. There was a second part to the "mortgage appraiser's application" which was generated by the computer request form by Mr. Glockl on June 11, 1996. Under the heading "Update Detail", I find that Mr. Glockl has written the following: (a) beside the printed words "Appraisal Amount": "$185,000.00"; (b) beside the printed words "Appraisal Completion Date": "96.06.17"; (c) beside the printed words "App Fee": $160.52"; (d) and under the heading "Appraiser's Comments": "value of improvements (mobile home) plus 3 acre only."

**125**  Whether or not the Appraisal was forwarded to the Plaintiff or whether or not it came to the attention of the Plaintiff and/or Mr. Glockl after June 17, 1996, I am satisfied that Mr. Glockl had the information that the Appraisal would be for $185,000.00 as early as June 17, 1996. As well, the printed form in evidence appears to be dated June 14, 1996 and, accordingly, it may well have been that Mr. Glockl was advised as early as June 14, 1996 that the Appraisal would be in the amount of $185,000.00.

**126**  While the Commitment Letter for the Mortgage and while all other documents prepared by the Plaintiff made it clear that the Mortgage was "subject to" an appraisal showing an appraised value of no less than $333,000.00 and while the information that was provided by the Renards was to the effect that their Property was worth $350,000.00, it is clear that the Appraisal fell far short of the minimum appraised value required.

**127**  Despite Mr. Glockl and the Plaintiff having knowledge as early as June 14, 1996 that the Property had been appraised at $185,000.00, the Mortgage application was forwarded to MOSU and MOSU subsequently instructed the notary to proceed. While it may be the case that Mr. Glockl and Ms. Radford took into account the fact that the $185,000.00 appraisal related only to three of the 10 acres of the Property so that they were able to conclude that the Property might well be worth in excess of $600,000.00, there is nothing in evidence which would allow me to conclude that they reached that conclusion and then decided that the Mortgage should proceed.

**128**  However, while it was made a pre-condition of the making of the mortgage loan that the appraised value of the Property was no less than $333,000.00, the loan of $250,000.00 secured by the Mortgage was ultimately made by the Plaintiff. I find no reason why the Plaintiff and the Renards should not be bound by the terms of the Mortgage. Mr. Glockl as the agent of the Plaintiff was in a position to waive any pre-conditions of the Mortgage. I am satisfied that the Renards are not in a position to rely upon any deficiencies in the approval process as a result of steps taken or not taken by Mr. Glockl. The Renards are not now in a position to take the position that their Property is not mortgaged to secure the advance of the $250,000.00 they received.

**129**  The recollections of Mr. Glockl and Ms. Radford as to what happened almost 10 years ago are sketchy at best. The corporate policy of the Plaintiff in retaining documents for only a certain period of time and destroying them thereafter has not assisted in the attempts of the parties and the Court to unravel what might have led to the apparent waiving of the pre-conditions of the Mortgage so that the registration of the Mortgage could proceed. If there is any onus on the Renards to show that the Mortgage and the Note were made because of the improprieties of Mr. Glockl, they have not met that onus. Instead, I find that the Plaintiff has met the onus of showing that the Mortgage and the Note can be enforced in accordance with their terms. The Mortgage is enforceable in accordance with the terms set out in the Mortgage subject only to the further matters raised in the Defence and the Counterclaim of the Renards.

1. CONFIRMATION OF INCOME

**130**  The Commitment Letter on the Mortgage required confirmation of an "Employment Contract". What was eventually provided falls far short of what would ordinarily be required by the Plaintiff. What is in evidence is a June 18, 1996 letter to Mr. Renard from the Kildonan Foundation Society ("Kildonan") where Mr. Donley Lehman as President wrote:

The **KILDONAN FOUNDATION SOCIETY** hereby appoints Reg Renard, representing AgFo Tech, as consultant and operating manager, for the establishment of an ostrich and emu ranching project located in British Columbia, Canada.

Reg Renard will oversee all aspects of purchasing and development of the ostrich and emu project.

Additionally, ongoing responsibilities shall encompass marketing strategies pertaining to breeding stock and consumer goods in domestic and foreign markets.

Therefore, beginning July 1st, 1996, Reg Renard's fee for services shall be $9,000.00 US per month and continue for consulting services, Managerial and staff training.

The **KILDONAN FOUNDATION SOCIETY** agrees to pay Reg Renard/AgFo Tech the sum of $25,000.00 US per month for consulting services, Managerial and staff training.

This appointment for professional services is effective on scheduled dates as above noted, provided funds for the ostrich-emu project are received on or before June 30, 1996, and continues for 48 months.

In the event of a delay in funding which offsets the starting date, the effective appointed dates shall be moved correspondingly.

**131**  That letter has been "witnessed" by a "Legal Secretary" on June 19, 1996. Mr. Renard went to a notary public on June 17 to have the notary prepare an employment contract but, as the June 17, 1996 diary entry notes, the notary public was not prepared to prepare such a contract. Accordingly, the June 18, 1996 letter from the Kildonan Foundation Society was prepared. Apparently, that is why it was witnessed by a legal secretary and why an employment contract would be not available for the benefit of the Plaintiff.

**132**  The June 18, 1996 letter to Mr. Renard from Kildonan was accompanied by a June 17, 1996 from Tri-Sal to Kildonan (to the attention of Mr. Lehman) with that letter providing as follows:

We are pleased to advise you that negotiations for funding the Ostrich and Emu Ranch with Mr. Reg Renard have progressed to a point where we are certain that the time conditions can be met. There are, however, some conditions which we feel must be met in order for this project to be a success. They are as follows:

1. A Mission Statement for the ranch shall be drawn up to give direction and operating philosophy.
2. The Ranch will be owned by Kildonan Foundation, but operated as a separate profit centre managed by its own management committee.
3. A management committee be appointed to give direction for operations of the Ostrich and Emu Ranch. It shall consist of a minimum of three people and a maximum of six people. The committee members should be made up of the following:
4. Kildonan Foundation Representative
5. Mr. Reg Renard
6. Farm Manager (when appointed)
7. Finance Group Representative (Year 1 only)
8. Accounting Representative

The function of this committee is to do the long range planning, meeting the mandate of the Kildonan Foundation, providing funds and vocational training for challenged citizens.

1. Land acquisition appropriate for successful Ostrich and Emu Ranching and meeting all requirements for power, water and environmental standards be approved by Mr. Reg Renard.
2. Time requirements for acquisition of land, birds, fencing and funding be laid out in a critical time path.
3. Funding arrangements will be the sole responsibility of Tri-Sal International, Inc. in cooperation with Mr. Renard, et al.
4. Initial investment will be as a loan to Kildonan Foundation.
5. Mr. Reg Renard to oversee all aspects of purchasing and developing the ranching project for the first year. All banking to be his responsibility in order to insure the proper financial controls are maintained. Mr. Reg Renard will have complete authority to operate farm during this time. Schedule of fees, as agreed upon, must be maintained.
6. An updated financial operations plan be drawn up, as soon as possible, using acquired land, proposed personnel, and first three years of operating costs, cash flow and required profit projections.
7. Should the present funding process be continued over a longer period of time, it is the intention of the funding group to provide Kildonan Foundation with an adequate loan to acquire its own money management program in order to fund other projects in the future. The amount of funds provided by the funding group and timing of same will be at their discretion in keeping with other funding commitments and money programs available at that time.

**133**  That document is signed by Messrs. Strom and Sailer on behalf of Tri-Sal, is noted as being "Accepted by" Kildonan by Mr. Lehman and on behalf of "AGFo T.E.C.H." by Mr. Renard whose signature is witnessed by Mr. Sailer.

**134**  I find that the June 18, 1996 letter to Mr. Renard from Kildonan was received by Mr. Glockl on behalf of the Plaintiff and was relied upon when the Plaintiff increased the "TOTAL INCOME" from $100,000.00 as shown on the Borrowing Power Calculations document which was "Approved" on June 13, 1996 to $135,000.00 as shown on the Borrowing Power Calculations document which was "Approved" on June 24, 1996 relating to the $50,000.00 loan.

**135**  After the Mortgage was granted and all funds advanced, a July 11, 1996 letter from Kildonan was forwarded to the Plaintiff. The letter was addressed to Salton Agri Enterprises, attention Mr. Renard as president, was from Mr. Lehman as the "Chief Executive Officer", and contained the following "re": "Ostrich and Emu Propagation Program". The letter stated:

Please be advised that your services for Consultancy for the program and management-employee training pertaining to our Vancouver Island Project has been confirmed as follows:

Upon completion of supply and placement of 200 trios of Ostrich - and 200 pair of Emu for breeding stock - your monthly income on a permanent basis in this capacity appears to work out around $ 8,333.00 per month.

We look forward to working with you on this most interesting portion of our project - and trust our relationship hereby created will represent accomplishment and satisfaction to all parties involved.

**136**  Regarding the "income verification" that was received, Ms. Lowden testified that what she saw did not confirm the income of Mr. Renard so that what was on file was insufficient: "letters but not what I would consider income verification" and that she would expect letters from the actual employer. Ms. Lowden referred to the June 18, 1996 letter that was on the file as being "completely useless" because the letter referred to future earnings: "we would not accept it". She expected to see the last three years' income tax returns. None were produced to the Plaintiff.

**137**  As the Commitment Letter for the Mortgage required a "confirmed employment contract", I find that no such confirmation was received and what was received does not constitute appropriate confirmation of past and likely income for the Renards. In this regard, I find that the actual income available to the Renards would have been less than $25,000.00 a year.

**138**  Even though it was the opinion of Ms. Lowden that the "income verification" was "completely useless" and even though I am of a similar opinion, the loans as evidenced by the Note and the Mortgage were approved on behalf of the Plaintiff and the loans were funded. In this regard, there was no evidence that Ms. Radford had or would involve herself in anything untoward. I am satisfied that the fact that the employment information subsequently received by the Plaintiff would not satisfy the requirements of the Plaintiff does not permit the Renards to avoid the repayment of the balance owing under the Note and the Mortgage.

**139**  On behalf of the Plaintiff, Mr. Glockl and Ms. Radford must be taken to have been satisfied with the income "verification" received. While there may well have been a number of reasons why Mr. Glockl was anxious to see these two loans made by the Plaintiff, I am satisfied that any deficiencies in the internal procedures of the Plaintiff cannot be relied upon by the Renards who seek to be in a position that none of the funds advanced are repaid and to be awarded damages equal to that which was advanced to them. Subject to the matters set out in the Defence and Counterclaim of the Renards, I find that the failure of the Plaintiff to obtain appropriate income verification does not otherwise make the Mortgage and the Note unenforceable.

**THE PROCESSING OF BRANCH LOANS BY THE CENTRAL OFFICE OF THE PLAINTIFF**

**140**  MOSU serviced each branch and handled the funding of mortgages. MOSU would receive a "Branch Mortgage Documentation Checklist" on any mortgage loan ("Checklist"). In the Checklist which is in evidence, the "Staff Contact" is noted as "Andre" with the "Closing Date" noted as being June 28, 1996. The documents which must be available for "All Mortgage Files" are noted as being the "Appraisal per matrix" has been "ordered" as has the "Credit Approval". There is a notation on the document as follows: "Rush funds Rq-D For Investment on June 28/96. A." June 28, 1996 is noted as the date that "File Completed By" and the receipt stamp indicates June 25, 1996 as the "Mortgage Dept. Received".

**141**  Once an application was forwarded to MOSU and once various documents were available to the branch, the branch was no longer involved in the decision regarding whether a loan application would be allowed or not.

**142**  The documentation for any loan is generated by MOSU and not the branch. Loans are approved through a "credit scoring" which is done automatically on the basis of the information set out in the application forwarded by the Branch. Ms. Chatterton stated that MOSU would not have the documents to check before funding and would not check any appraisal. She stated that, when MOSU generated the solicitor's instructions, if the loan to value ratio of property exceeded 75% or 100% they would get a computer message. They would not check the appraisal as "branch could not send on [the loan request] unless it had been checked".

**143**  I am satisfied that the Mortgage and the Note loans were approved by MOSU on the basis of the assurances received from Mr. Glockl that all pre-conditions set out in the Borrowing Power Calculations had been met and that MOSU then authorized Howard McCarthy as the notary public who would act for the Plaintiff to proceed with the registration of the Mortgage and the advance of funds under the Mortgage.

**DOCUMENTS EXECUTED BY THE RENARDS ON JUNE 28, 1996**

**144**  A letter of instruction was sent to Howard McCarthy on June 25, 1996 with the notation that the "Mortgage Closing Date" was June 28, 1996." Mr. McCarthy is a distant relative by marriage of Mr. Glockl. However, he was often used by the Plaintiff to represent the Plaintiff in mortgage transactions as his office was close to the Branch of the Plaintiff. I draw no adverse inferences as a result of the use of Mr. McCarthy by the Plaintiff through MOSU.

**145**  While the Renards could not recall exactly what they signed before Mr. McCarthy, I find that the Renards signed a Commitment Letter, an Acknowledgment of Receipt of standard mortgage terms, and the Mortgage on June 28, 1996. The Commitment Letter signed indicated a mortgage with a principal amount of $250,000, an open term of six months, the principal amount to bear interest at 6.75% per annum calculated half-yearly not in advance and monthly payments of $1,712.47.

**146**  Mr. and Mrs. Renard acknowledged in writing on June 28, 1996 that they had received "a true copy of the standard set of Mortgage Terms - Fixed Rate Mortgage filing number: MT900436". The Mortgage which was signed by the Renards and witnessed by Mr. McCarthy was filed in the New Westminster Land Title Office on June 28, 1996 at 13:17 under number BK203782.

**147**  While I can make no finding in this regard, the Renards submit the funds they required were advanced by the Plaintiff prior to receiving confirmation from Mr. McCarthy that the Mortgage had been accepted for registration in the New Westminster Land Title Office. The Renards submit that there appears to be no other explanation as to how else three bank drafts payable to Tri-Sal would have been available to the Renards, provided by the Renards to Tri-Sal, and then deposited by Tri-Sal into a bank account maintained in the State of Washington when the Mortgage was not even presented for registration until 13:17 on June 28, 1996. Unfortunately, it is not known when that deposit was made in the bank in Blaine.

**148**  While there is a dispute about when and how the funds were received by the Renards, it is clear that three bank drafts payable to Tri-Sal were made available by the Plaintiff to the Renards on June 28, 1996 and that these three bank drafts were deposited into an account maintained by Tri-Sal in a bank in Blaine, Washington on June 28, 1996.

**149**  After signing the documents in the office of Mr. McCarthy, the Renards went to the branch of the Plaintiff and obtained three bank drafts payable to Tri-Sal for the total amount of $175,000.00 (U.S.). There was no explanation as to why three bank drafts were required. Despite his testimony, Mr. Glockl would have known by June 28, 1996 at the latest about the existence of Tri-Sal. Regarding the three U.S. drafts, Mr. Glock stated that he did not have authority to issue the drafts and that they could only be authorized by a senior person and that, if asked, he would refer to a senior person like the Manager or the Assistant Manager. While that may be the case, I find that Mr. Glockl was aware that the Renards were obtaining bank drafts in favour of Tri-Sal and that he assisted them in obtaining those three bank drafts.

**150**  While Mr. Renard stated that he gave the three bank drafts to Tri-Sal at about noon on June 28, 1996, I cannot accept that testimony. There is nothing before me which would allow me to conclude that Mr. McCarthy would not have followed the usual procedure and advise the Plaintiff that the funds could be released to the Renards only after Mr. McCarthy had received confirmation of the presentation of the documentation relating to the Mortgage to the New Westminster Land Title Office. Accordingly, I find that the three bank drafts were not delivered to Tri-Sal until after 13:17 on June 28, 1996, that the Renards gave the three bank drafts to Tri-Sal after that time, and that there was enough time for the three bank drafts to be deposited in Blaine, Washington before the bank there closed for the day.

**EVENTS SUBSEQUENT TO OBTAINING $175,000.00 (U.S.) FOR TRI-SAL**

**151**  The initial bank account was one for which Mr. Renard had joint signing authority. Eventually, most of the funds were transferred out of that account into a new account at the same bank for which Mr. Renard did not have signing authority. Once the funds were transferred into the new account, Mr. Renard lost any control he had over the distribution of the funds. Even if Mr. Glockl made the statements regarding the reliability of Tri-Sal, Messrs. Strom and Sailer and the B.B.T.P., I could not conclude that Mr. Glockl gave the Renards any advice as to how they might protect those funds from unscrupulous dealings. It was incumbent upon the Renards to take appropriate steps to make sure that the funds were not disbursed by Tri-Sal other than in accordance with their wishes to invest in a fully protected B.B.T.P. Mr. Glockl and the Plaintiff gave no advice about how this might be done and there could be no reason why the Renards should not have taken appropriate steps to safeguard their Investment.

**152**  In a March 16, 1998 letter to the B.C. Securities Commission, Mr. Renard states that, after indicating that a bank account had been set up in Blaine, after he stated he was one of the signing authorities on the bank account, and after he stated he had signed a form authorizing transferring of the funds from Account #13301619 (in which $12,500 remained) to Account #53708764 into which $162,500 was transferred, he stated that Mr. Strom then asked him to sign a cheque with Mr. Sailer for the amount of $84,800.00 to "Third Party Accommodators" explaining "... this was our investment amount required for the previous discussed trading program." After stating that Mr. Strom indicated that the amount initially required had been reduced from $175,000.00 to $84,800.00, Mr. Renard stated:

I suggested that the balance of the $175,000.00 deposit be immediately transferred back to the Canada Trust mortgage loan thereby significantly reducing our indebtedness. Strom reacted by suggesting that another additional program may be in the making however he could not elaborate on it and said he did not know exactly how much money it would entail to enforce it. Strom strongly denied that there was any irregularity in this incident but then immediately voided the $84,800.00 cheque and stated the said amount would instead be wire transferred to Third Party Accommodators later on.

I suspected that a run on this account was about to be made for unexplained reasons by Strom. I asked Sailer to sign a cheque for me that I could later legally sign for the yet undetermined purchase price of a 1996 Ford truck I had ordered at Cherry Ford Sales in Chilliwack. Strom suggested that I just make a very low down payment on a used truck thereby leaving more money in the bank account but I said "no" firmly and proceeded to buy the truck from Cherry Ford Sales in the total amount of $30,922.00 U.S. funds on July 8, 1996. When my wife and I checked the Seafirst savings account balance at this time, we discovered that Mr. Strom had diverted $18,894.00 by wire transfer to a Trust Account he established in England.

We now came to the full realization that Strom and his associates, but particularly Strom had diverted $12,500.00 from the initial $175,000.00 deposit, by transferring $162,500.00 to the new savings account #53708764, plus another $18, 894.00 for his personal purposes. Also, we never did get any accountability of the $3,000.00 U.S. funds given to Strom and Sailer in Chilliwack on June 11, 1996. Strom and Sailer seemingly went out of their way to assure Velma and I that everything was quite alright. When I questioned why he only committed $84,800.00 instead of $175,000.00, Strom stated that another investor had wanted in on the program and that although it only cost half the original amount, our profit returns were the same as previously stated and all terms agreed to initially remained as agreed.

At the end of July, 1996, Strom suggested that due to the fact that there was money in the savings account and our investment program would be concluded with a healthy profit within three or four weeks at the longest, we should take a personal income to tide us over. Therefore, Richard Strom took another $3,000.00 U.S. funds, Ed Sailer received $3,000.00 U.S. funds and I received $4,400.00 U.S. funds, part of which served to make mortgage payments to Canada Trust.

**153**  Despite the possibility that the removal of the funds from the accounts of Tri-Sal may well constitute breach of trust, there is nothing in evidence which would allow me to conclude that Mr. and Ms. Renard have pursued either Tri-Sal or Mr. Strom for the balances which were advanced to Tri-Sal. There is no good explanation as why such an action has not been pursued.

**WHAT WAS RECOVERED BY THE RENARDS?**

**154**  I find that the Renards were less than forthright about what amounts had been recovered by them from the funds that were provided to Tri-Sal. In an August 3, 2001 Affidavit filed in these proceedings, Mr. Renard stated:

Subsequent to the events as set out above, neither my wife nor I have received the return of any of the Mortgage Loan Proceeds notwithstanding repeated demands.

**155**  A number of payments were received from Tri-Sal including payments to the Renards for fuel, hydro, etc. Mr. Renard described them as "the cost of necessities" payments. He indicated that he would phone Mr. Strom or go to White Rock to see him but would never get all of the amounts that he requested.

**156**  While initially indicating that Tri-Sal had not made payments on their behalf to the Plaintiff, the Renards eventually had to admit that this was not the case. Ms. Renard stated that she tried to keep track of the payments that Tri-Sal made to the Plaintiff on their behalf but, "lost track of what they paid as not know who paid and when". "Strom said he would make all the payments and we trusted him to do it. We thought he would." As to why they were depositing cash received in the Toronto Dominion account rather than in the account with the Plaintiff, Ms. Renard stated: "Because easier to put in Chilliwack at Toronto Dominion Bank personal account rather than driving to Tsawwassen." This statement is inconsistent with the statement made by Mr. Renard as to why they went to the Tsawwassen branch of the Plaintiff in the first place. The Renards also used that account for other purposes relating to the B.B.T.P..

**157**  It was the evidence of the Renards that it was necessary to establish an off shore bank account to accommodate the B.B.T.P. Accordingly, $1,500.00 U.S. (June 25, 1996) and $1,200.00 (June 27, 1996) cheques were drawn on The Toronto Dominion Bank account payable to "International Company Services Ltd." for this purpose.

**158**  In her evidence, Ms. Renard attempted to set out the funds that had been received directly by them from Tri-Sal or had been paid by Tri-Sal for their benefit. Ms. Renard also attempted to account for the funds that were deposited in the bank account maintained by the Renards with the Plaintiff which were not required by the Renards to pay out the balance owing under their existing Mortgage to H.S.B.C. and to fund the Investment.

**159**  I find it impossible to come to the conclusion that the Renards have fully accounted for all of the funds which were available to them and for all of the funds which were returned to them by Tri-Sal either directly or indirectly. If I am found to be incorrect regarding the conclusions that I have reached in this litigation, then I order an accounting before the Registrar to establish the amounts which must be credited against the damages claimed by the Renards in their Counterclaim. However, I can make a number of findings regarding what was recovered from Tri-Sal either directly or indirectly.

**160**  I can make a finding regarding the July 30, 1996 withdrawal from the bank account of Tri-Sal in the amount of $31,473.00 (U.S.). That sum was made available so that the Renards could pay the balance remaining owing on a Ford Truck. The Ford Truck was ordered by the Renards in April of 1996 before the Renards had any dealings with the Plaintiff and before Mr. Renard states he was aware of Tri-Sal and Messrs. Strom and Sailer. The truck was to be used to haul equipment and emus and ostriches for the Project. Mr. Renard admitted that the $31,473.00 (U.S.) came out of the Blaine account of Tri-Sal but had no explanation about where the money would have come from if the money had not been available from the Plaintiff, Mr. Lehman or Tri-Sal.

**161**  I also find that the Renards received considerable funds from an action they commenced against Mr. and Ms. Sailer and that the Renards have been less than forthright about what they were able to recover from Mr. Sailer directly. At her December 11, 2003 Examination for Discovery, Ms. Renard was asked about a possible action against Messrs. Sailer and Strom and was asked the following question and gave the following answer:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you chose not to sue them; is that correct, Ms. Renard? You're not suing them to try to get your money back? |  |
|  | A |  | No, because Andre Glockl is the one that told us it was an excellent programme, how can he get in on it, and it was just such a good deal. |  |

**162**  Regarding this question and answer where Ms. Renard inferred that they had not sued Sailer and Strom, at Trial Ms. Renard had to admit: "Correct, it isn't."

**163**  Regarding the Interrogatories which were sworn under oath and the question about the dates and the amounts of all payments made to her and her husband "or for the benefit of you or Regis Renard" by Tri-Sal or Mr. Strom or Mr. and Ms. Sailer, Ms. Renard had no explanation as to why she would have answered "I believe my previous answers have accounted for the disbursements of the mortgage funds." When asked specifically whether the answer to this Interrogatory question was correct, Ms. Renard after a long pause answered: "Obviously not." I find that this was all part of a concerted effort to mislead and that a false affidavit was sworn in the Interrogatories regarding payments received.

**164**  A considerable amount of money was obtained by the Renards from Tri-Sal and subsequently loaned to Mr. and Ms. Sailer. In a Statement of Claim in Action C986714 (Vancouver Registry) the Renards claimed against the Sailers for the sum of $3,000.00 (U.S.) "loaned on or about June 1, 1996", $6,500.00 (U.S.) "loaned on or about July 1, 1996" and $10,000.00 (Cdn.) "loaned on or about October 1, 1996". Mr. Sailer indicated that he needed $10,000 to save his home and advised that he knew where they could get a loan for $20,000.00 against the Ford vehicle that had been purchased. $20,000.00 was borrowed and when $10,000.00 was given to Mr. Sailer and the remainder was used by the Renards.

**165**  Acknowledging repayment of the sum of $2,800 on April 22, 1998, the Plaintiffs then claimed against the Sailers for the principal amount of $23,876.05 (Cdn. funds). That Writ of Summons and Statement of Claim was served on January 2, 1999 but no Appearance was filed. Default judgment in the amount of $21,974.40 plus interest pursuant to the ***Court Order Interest Act*** in the amount of $2,107.99 plus costs to be assessed was taken on January 15, 1999.

**166**  In a June 29, 1999 Affidavit, the former solicitor for the Renards acknowledged that a payment was made by Mr. Sailer of $5,000.00 on March 1, 1999. At a September 25, 2003 Subpoena to Debtor, an order was made that Mr. Sailer pay $1,000.00 by October 15, 2003; $2,000.00 by November 15, 2003; $5,000.00 by December 15, 2003; $5,000.00 by January 5, 2004; and the balance on February 15, 2004. A $1,000.00 payment was received on November 17, 2003, $500.00 on December 9, 2003 and payments of $250.00 each were received on December 10, 2003; January 30, February 15, March 31, April 30, May 31, June 30, July 31, August 31, September 30, October 31, November 30, December 31, 2004 and January 31 and February 28, 2005.

**167**  Pursuant to an Assignment dated December 18, 2003, the Renards irrevocably signed amounts recoverable under the Judgment against the Sailers "... to Clark, Wilson for payment of outstanding accounts and unbilled time, disbursements and taxes incurred in relation to the above-noted action."

**168**  If I am found to be incorrect regarding the conclusions that I have reached in this litigation, then I order an accounting before the Registrar to establish the amounts which must be credited against the damages claimed by the Renards in their Counterclaim in order to take into account the amounts received directly by them or by their former solicitors from the litigation commenced against Mr. and Ms. Sailer or otherwise from the Sailers. The question which must then be answered is whether the matters set out in the Defence or the Counterclaim of the Renards allows them to avoid payment of the balances owing under the Note and the Mortgage as well as enabling them to obtain substantial damages against the Plaintiff and Andre Glockl.

**THE "ILLEGAL" TRANSACTIONS ALLEGED BY THE RENARDS**

**169**  The Renards defend the action on the Note and the Mortgage and state that they have a Counterclaim against Mr. Glockl and, on the basis of vicarious liability, against the Plaintiff based on two transactions which they say constitute the only reason why Mr. Glockl arranged the approval of the loans made to the Renards.

**170**  Regarding the conversation that Mr. Renard states that he had with Mr. Glockl on June 10, 1996, Mr. Renard testifies that, during the conversation, Mr. Glockl stated: "Are you sitting down? - I don't think your 10 acres would qualify for $175,000.00 U.S. but I have a client whose confidentiality I cannot disclose who is willing to put up the remainder if you give me personally $110,000.00 U.S., and that, when Mr. Renard told Mr. Glockl "it is out of the question - no way", Mr. Glockl stated: "that we'd make millions of dollars so don't be so quick - just a minute - don't come to conclusions so fast - they should be prepared to make the $110,000.00 U.S. promissory note repayment." Mr. Renard states that he then said to Mr. Glockl: "I would talk to them [Strom and Sailer] to see if they would do that." Mr. Renard also testified that Mr. Glockl requested the payment of $5,000.00 cash in order to expedite the appraisal which would be required before the Mortgage could proceed.

**171**  In his August 3, 2001 Affidavit in these proceedings, Mr. Renard gave this testimony regarding what he said was a June 10, 1996 telephone conversation with Mr. Glockl:

In summary, Glockl advised me that:

1. Canada Trustco would be prepared to finance the Investment;
2. the Farm would have to be appraised, but would not in any event be sufficient security for the Loan;
3. the Loan could nonetheless be advanced with security from both me and my wife and security from an undisclosed third party;
4. to obtain the third party security, we would have to sign a promissory note for an additional $110,000 (USD) to accommodate the Loan over and above providing mortgage security over the Farm; and
5. to expedite an appraisal of the Farm and to expedite the Loan the sum of $5,000 would be required.
6. PAYMENT OF $5,000.00

**172**  Mr. Renard states that Mr. Glockl stated in their June 10, 1996 conversation at about 8:00 p.m. that to: "expedite the appraisal - the usual one [Appraiser] was busy for at least three weeks and therefore it would cost $5,000.00 in cash to pay him to come away from his duties." "If paid the $5,000.00 and loan rejected we would have lost the $5,000.00 so Tri-Sal should absorb those costs."

**173**  The Toronto Dominion Bank records of the Renards indicate a withdrawal of $5,200.00 cash which the Renards state was given to Mr. Glockl "which he requested to expedite the appraisal from the appraiser who ordinarily does the bank's appraisals." The Renards state the $5,200.00 represented $5,000.00 for Mr. Glockl and $200.00 for other expenses. Mr. Renard states that they placed $5,000.00 in an envelope and told Mr. Glockl he could count it but that Mr. Glockl said: "it wasn't necessary" and that is "the last of it." In this regard, the Renards point to the June 13 entry in their daytimer: "meeting Andre ($5,000)".

**174**  The Renards were in the habit of withdrawing very large amounts of cash from time to time from the account they maintained with the Toronto Dominion Bank. For instance, the following cash withdrawals were made by the Renards: $6,886.30 (May 2, 1996), $800.00 (May 21, 1996), and $2,800.00 (June 7, 1996). I find that the Renards were in a position to pay Mr. Glockl $5,000.00 as they had withdrawn more than enough funds prior to June 13, 1996 when they state that they made the $5,000.00 payment.

**175**  There is an alternative explanation that was not explored by counsel. Both BORROWING POWER CALCULATIONS indicate a "EXISTING/PENDING" entry of $5,500.00 for "CREDIT CARDS". It may well be that the reference in the June 13, 1996 daytimer entry relates to the approval of the limits on a new credit card made available to the Renards. However, I can make no finding in that regard.

**176**  Regarding the $5,000.00 that was paid, Mr. Renard stated: "Thought Andre Glockl would record it in the documents." "No documents were sent to me." As to why there was no receipts, Mr. Renard stated: "I don't understand either why I didn't get one." However, I note that no complaint was made by Mr. Renard that the $5,000.00 alleged payment was not recorded in the document subsequently received by the Renards.

**177**  Mr. Sailer testified at Trial that he was aware that Mr. Glockl required the payment of $5,000.00 and Tri-Sal agreed to pay this "expense" relating to the borrowing of funds for the investment in the B.B.T.P.

**178**  Mr. Glockl denies receiving or requesting the $5,000.00 cash. After denying that he received $5,000.00 to expedite the appraisal, Mr. Glockl agreed that a cheque for the cost of the appraisal or cash for the cost of the appraisal would usually be deposited into the account, that nothing was ever deposited into the account of the Renards, that there was no debit against their account for the cost of the appraisal, and that there was no deduction from the mortgage proceeds for the cost of the appraisal. While Mr. Glockl stated that he had the ability to waive the appraisal fee as this authority was a "sales tool given to us to use from time to time", he could not recall whether or not he had done that. Mr. Glockl admitted that there would be an advice to the accounting department of the Plaintiff if he had waived the fee. No such advice is in evidence. I am satisfied that the reason why no appraisal cost was levied against the Renards was that Mr. Glockl was prepared to waive the cost in order to hide the fact that he had received the $5,000.00 cash as the Renards would have protested any other charge levied for the cost of the appraisal.

**179**  Based on the testimony of Messrs. Sailer and Renard, the availability of sufficient cash to make such a payment to Mr. Glockl, and the subsequent finding that I make regarding the Promissory Note to Mr. Glockl, I am satisfied that Mr. Glockl requested $5,000.00 prior to June 13, 1996 and that this amount was paid by the Renards to Mr. Glockl.

1. PROMISSORY NOTE TO MR. GLOCKL

**180**  In evidence was the following document:

PROMISSORY NOTE

FOR VALUE RECEIVED:

We, the undersigned, REGIS EUGENE RENARD and VELMA ELAINE RENARD, both of 540 Columbia Valley Highway, Lindell Beach, in the Province of British Columbia, V0X 1P0, do jointly and severally promise to pay to the order of ANDRE GLOCKL of 5337 1A Avenue, in the Municipality of Delta, in the Province of British Columbia, the sum of ONE HUNDRED TEN THOUSAND U.S. DOLLARS (110,000.00 US) plus interest at the rate of TWELVE PERCENT (12%) per annum calculated [sic] monthly from October 1, 1996 and thereafter compounded monthly. Principal shall be due and payable in full on the 1st day of October, 1996.

It is agreed by the undersigned that costs, charges and expenses of or connected with recovery, collection or enforcing payment of any money payable on this note, including Solicitor's fees and collection commissions whether or not taxes, and whether or not suit is commenced, shall be an additional charge on this note.

PROVIDED FURTHER that the Borrower not being in default hereunder shall have the privilege of prepaying all or any part of the said principal sum at any time and from time to time without notice or bonus upon payment of interest at the rate aforesaid accrued to the date of any such prepayment.

DATED at the Municipality of Delta, Province of British Columbia this 13 day of June, 1996.

**181**  That document is signed by Mr. and Mrs. Renard and appears to be witnessed by Mr. McCarthy on June 13, 1996. The document in evidence is noted as being "CLIENT'S COPY". As Mr. McCarthy would have been acting either for Mr. Glockl or the Plaintiff, it is mysterious why the Renards would have a copy that should have gone to the "CLIENT". Those words are marked in blue on the document in evidence.

**182**  I find that a copy of the Promissory Note was forwarded by facsimile to Mr. Strom in a June 19, 1996 facsimile transmission on the letterhead of Salton Agri Enterprises from the home address of Mr. and Mrs. Renard to Mr. Sailer and that Mr. Renard states in the cover letter:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Re: | Promissory note |  |

Ed.

This is what Richard asked to have.

Please govern yourself accordingly for my sake.

Reg

**183**  At his July 15, 2004 Examination for Discovery, Mr. Glockl denied ever seeing the Promissory Note until it was produced by the Renards after the litigation commenced when a copy of the Promissory Note was forwarded by counsel for the Renards to counsel for Mr. Glockl in a September 26, 2006 letter. At Trial, Mr. Glockl testified that the first time he saw the Promissory Note was in the course of the law suit and that he never asked the Renards for it and never discussed this or any other note like it with the Renards. He admitted that the address on the note was his parents' address. Mr. Glockl stated that he did not know who had prepared the note and denied ever telling them that the Property did not qualify but would through the vehicle of the Promissory Note.

**184**  Mr. Glockl described himself as "surprised" when he saw the document, that he contacted Mr. McCarthy who advised him that he had no recollection of preparing the document, but that he did not fax a copy of the Promissory Note to Mr. McCarthy because "He did not ask to see it." He confirmed that this was the case even though, after he left the employ of the Plaintiff, Mr. Glockl had further dealings with Mr. McCarthy through his own mortgage brokerage business and through some "social interaction.

**185**  I have concluded that the Promissory Note was either prepared by Mr. Glockl or was prepared on the instructions of Mr. Glockl. First, the address shown on the Promissory Note for Mr. Glockl is the address of his parents. I am satisfied that only Mr. Glockl would know this address. Mr. Glockl testified that he had sold his own property and was "in transition" and that he was at his parents' home "for about six weeks" during 1996 before obtaining an apartment with his wife.

**186**  During cross-examination, Mr. Glockl advised that he did not believe that he had provided the Renards with the address of his parents. However, in evidence is a September 27, 1996 letter from Tri-Sal to Mr. Glockl which used the address of his parents. Although it is not clear whether Mr. Glockl ever received this letter, there is no explanation why this letter would have used his parents' address other than if it had been provided by Mr. Glockl to the Renards who, in turn, provided it to Tri-Sal. While at Trial Mr. Glockl denied that he was living at his parents' address in June of 1996, he had stated at his Examination for Discovery that it was his business address in June of 1996, although he was not living there.

**187**  Second, his stated reaction to being shown the Promissory Note is simply not believable. While he admitted that the Promissory Note was a serious matter and "I was shocked" and although it created a serious allegation that might cost him his license as a mortgage broker, Mr. Glockl also stated that he did not call the police, did not call the Superintendent of Brokers and did not contact Mr. McCarthy immediately. In this regard, Mr. Glockl stated at Trial that he called Mr. McCarthy within a day or two but, at his Examination for Discovery on July 15, 2004, stated that he contacted Mr. McCarthy "Within the week or two following the receipt of the document". For something that he considered was a serious matter, it is incomprehensible why Mr. Glockl would have only contacted Mr. McCarthy either within a day or two or within a week or two following seeing the Promissory Note for the "first time".

**188**  Third, the follow-up undertaken by Mr. Glockl regarding the Promissory Note is also indicative of a person who had knowledge of the Promissory Note. His decision not to send a copy of the Promissory Note to Mr. McCarthy because "he did not ask to see it" and his testimony that he never showed Mr. McCarthy the Promissory Note as there was "no reason to show it to McCarthy" is ludicrous. If the signature of Mr. McCarthy on the Promissory Note had been forged, Mr. McCarthy would want to know about that and would want to follow-up on the fact that his signature and address were shown on a document that should not have reflected his involvement.

**189**  Fourth, the postal code for the Property of the Renards shown on the Promissory Note is incorrect. The postal code is noted as "BOX 1PO" whereas the correct postal code and the one which is shown on the computer generated Credit Application for the $35,000.00 loan is "V2R 4X6" The only other place where the incorrect postal code is shown is on the Credit Application that was handwritten by Mr. Glockl, dated June 12 and signed by the Renards on June 13, 1996. It is too much of a coincidence that the Promissory Note would use the incorrect postal code for the address of the Renards. This would have been the only postal code available to Mr. Glockl when the Promissory Note was prepared as it was witnessed by Mr. McCarthy on June 13, 1996.

**190**  Fifth, while Mr. McCarthy could not remember the transaction, Mr. McCarthy did confirm that the signature on the document was his signature. In this regard, I rely on a November 21, 2003 letter that Mr. McCarthy wrote to counsel for the Plaintiff where he states:

I received your letter and the above noted promissory note today and while I cannot recall the exact file or people I thought you might benefit from the following:

it would appear that I did in fact witness the enclosed document as I confirm that it is my writing in the date area of the document and my signature and stamp in the witness area. However, I doubt that I prepared the document itself as there are a number of spelling errors, incomplete address re Mr. Glockl and the wording in paragraph one with respect to the interest and due dates would have been set out differently to clarify the meaning.

it was my customary practice when witnessing promissory notes to provide copies to all parties concerned - therefore, in view of the fact that the document you provided to me is stamped with my usual "Client Copy" stamp, it is likely that Mr. Glockl would have attended with the Renard's and received the original document as the Renard's have the clients copy.

**191**  Mr. McCarthy suffered a stroke in August, 2004 and, accordingly, I accept that as the reason why Mr. McCarthy would have had no memory of the transaction at Trial and why his November 21, 2003 letter to counsel for the Plaintiff most accurately represents what occurred when Mr. McCarthy witnessed the signature of the Renards on the Promissory Note.

**192**  In coming to the conclusion that it was Mr. Glockl and not Mr. McCarthy who prepared the Promissory Note, I rely on an Affidavit filed in these proceedings where Mr. McCarthy states:

I have no recollection of dealing with Mr. and Mrs. Renard and no longer have my daily diaries from 1996. It appears from the material in my file on the Renards that I saw them only once to execute the mortgage documents on June 28, 1996. There is no promissory note in the file and no extra charge for execution of a promissory note.

The signature and the stamp and the writing of the date on the promissory note now produced and shown to me and attached as Exhibit "A" to this my Affidavit ("Promissory Note") appear to be mine. I cannot tell if the Promissory Note is authentic or all one document without seeing the original.

Normally if I witnessed a promissory note, my office would have prepared it. However, I do not believe that my office prepared the Promissory Note because there are a number of spelling errors and the address for Andre Glockl is incomplete because it does not include his postal code. My practice was to include completed addresses for all parties including postal codes. If I had been provided with an address without a postal code one of my staff would have looked up the postal code in a postal code book we had at the office.

If I had drafted the Promissory Note, I would have used different wording than that contained in paragraph one of the Promissory Note with respect to the interest and the due dates to clarify the meaning. The Promissory Note is not in the standard form used by my office.

If my office had prepared the Promissory Note my name would be typed and the month would likely also have been typed. I would not have needed to use my stamp.

**193**  Mr. McCarthy testified that he ordinarily would not have given a Promissory Note to the Renards as: "I would have said I can't give it to you because it is made out to Andrew Glockl. It is the security." He indicated that he probably would have opened a file, kept a copy of the promissory note on his own file, would have kept the original and then made arrangements to provide the original to Mr. Glockl.

**194**  The file materials of Mr. McCarthy were produced, but there is nothing in his file indicating that he witnessed the Promissory Note or that he forwarded it to Mr. Glockl. However, there appears to be no document in evidence which would duplicate the placement of the signature of Mr. McCarthy and the stamp he used to identify his office, his address, and his phone number in a form identical to the information in the Promissory Note when he appears to have witnessed the signature of Mr. and Mrs. Renard.

**195**  I find that both Mr. Renard and Mr. McCarthy were confused about when the Promissory Note was signed and whether the Renards went to the office of Mr. McCarthy on June 13, 1996. Mr. Renard stated at Trial that he must have met Mr. McCarthy on June 13 as that was the day the promissory note was dated. He indicated that he was in error at his Examination for Discovery when he said that they only met Mr. McCarthy on June 28 and he was sure of this because they sent a copy of the note by facsimile transmission to Mr. Sailer and Strom on June 19. As to why they had waited until later to give a copy to Mr. Strom when they met with him on June 13, Mr. Renard said that "Strom saw it" and "that they did not want me to leave the original but wanted to send a copy". He later was asked why they did not give Mr. Strom a copy of it on June 18 and he made a mistake by saying: "Because I already faxed to him." He was questioned why he had said at his Examination for Discovery that the Promissory Note was signed when they signed the mortgage and he gave the same answer he had given to many questions: "Best of my ability at the time." "True to best of ability - but the fact that I faxed it to Strom on the 19th means I must have had it."

**196**  I find that the recollection of Mr. Renard as set out in his August 3, 2001 Affidavit sworn in these proceedings is to be preferred over his later testimony at his Examination for Discovery. In this regard, Mr. Renard stated in his August 3, 2001 Affidavit:

On or about June 13, 1996, the same date as the $5,000 payment and the preparation of the Commitment Letter, my wife and I attended before the Notary Public and executed the Promissory Note which had apparently been prepared upon Glockl's instructions to be made payable to him on October 1, 1996, and in the amount of $110,000 (USD).

**197**  Despite the inconsistencies in the testimony at Trial, I am satisfied that neither of the Renards prepared the Promissory Note. I find that they signed the Promissory Note in front of Mr. McCarthy on June 13, 1996, they obtained a copy of the Promissory Note at the time they signed it, and they obtained the agreement of Tri-Sal that they would be reimbursed out of the proceeds from the B.B.T.P. that would ordinarily be available to Tri-Sal for what needed to be paid to Mr. Glockl pursuant to the Promissory Note. Mr. Renard indicated that he and his wife had never met Mr. McCarthy at the branch of the Plaintiff so that the Promissory Note must have been signed at the office of Mr. McCarthy. I accept this to be true.

**198**  Sixth, I find that a copy of the Promissory Note was forwarded by facsimile transmission to Tri-Sal on June 19, 1996 long before the loss of funds in the B.B.T.P. occurred and the Renards were looking to blame someone for the Investment. Mr. Sailer was asked whether he had ever seen the Promissory Note before and he confirmed at Trial that the Promissory Note was what had been forwarded to him by facsimile transmission.

**199**  I have no hesitation in concluding that Mr. Glockl not only insisted on receiving the Promissory Note but that he prepared it in order that it could be signed by the Renards on June 13, 1996.

**WHY THE DEFENDANTS (PLAINTIFFS BY COUNTERCLAIM) SUBMIT THAT THE PROMISSORY NOTE AND THE MORTGAGE ARE NOT ENFORCEABLE**

**200**  The Renards submit that the Promissory Note and the Mortgage are not enforceable as they were part of a contract to commit a criminal or civil wrong. In this regard, the Renards submit that the contract violates not only statutory provisions but also common law rights and obligations.

1. CRIMINAL INTEREST RATES

**201**  The Renards defend the enforceability of the Mortgage on the basis that the effect of including as a cost of borrowing the $175,000.00 (U.S.) Promissory Note and the $5,000.00 payment is to create a criminal rate of interest. Pursuant to s. 347 of the ***Criminal Code***, every one who enters into an agreement or arrangement to receive interest at a criminal rate is guilty of an offense. Section 347(2) of the ***Criminal Code*** defines "criminal rate" to mean an effective annual rate of interest that exceeds sixty per cent on the credit advanced under an agreement or arrangement and defines "interest" as follows:

... means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes.

**202**  In this regard, the term "fee" was defined as following in ***Creswell v. Raven Bay Hldg. Ltd.*** [*(1987), 53 B.C.L.R. 183*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2M0-00000-00&context=) (B.C.S.C.):

The "fee" mentioned in the above definitions must be a fee which is not ordinarily payable by a borrower and which directly or indirectly results in a benefit to the lender personally or to someone whom he designates. Further, it must be a condition of the agreement, imposed by the lender, that he will lend only if the borrower agrees to pay that fee or that the borrower will agree to enter into a collateral agreement to pay the fee. The payment of such a fee or fees is an additional cost of borrowing money and is by the definition considered to be interest paid or payable for the advancement of the loan. Parliament obviously defined "interest' and "credit advanced", as above set out, in order to prevent unscrupulous lenders from circumventing the provisions of s. 305.1 by means of making the payment of such fees as a condition of lending money. (at p. 192)

**203**  There is no actual evidence showing the effective rate of interest if the $175,000.00 (U.S.) and the $5,000.00 are included but, in any event, I am urged by the Plaintiff to take into account the following factors set out in ***New Solutions Financial Corp. v. Transport North American Express Inc.*** [*(2004), 235 D.L.R. (4th) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B10C-00000-00&context=) (S.C.C.) in determining whether public policy ought to allow an otherwise illegal agreement to be partially enforced rather than declaring it void *ab initio*: (a) whether the purpose or policy of s. 347 would be subverted by severance; (b) whether the parties entered into the agreement for an illegal purpose or with an evil intention; (c) the relative bargaining position of the parties and their conduct in reaching the agreement; and (d) the potential for the debtor to enjoy an unjustified windfall.

**204**  The clear purpose or policy behind s. 347 is to deter loan-sharking and this is not something for which the Plaintiff could be criticized. However, Mr. Glockl as the agent of the Plaintiff may well have entered into the arrangement with the Defendants for an illegal purpose or with an evil intention. Regarding the third factor, there is nothing in evidence which would allow me to conclude that there was a relative imbalance in the bargaining position of the parties. The Renards sought out Mr. Glockl, were well acquainted with dealings with a financial institution, controlled much of the information that was available to Mr. Glockl when he reached the decision that he would recommend the loans for approval, and were in a position to "take their business elsewhere". Regarding the fourth factor, it is obvious that the Renards will receive a substantial windfall as they have had the use of the funds of the Plaintiff, minimally to the extent that their loan with H.S.B.C. was paid off and there were considerable funds available to them for the purchase of the Ford Truck, and for lending money to Mr. and Ms. Sailer and, at a maximum, the entire proceeds from the loans which they invested foolishly. They received in excess of $51,000.00 to obtain the discharge of the H.S.B.C. mortgage, approximately $50,000.00 for the truck purchase, $3,000.00 directly, $4,500.00 directly to Mr. Renard as a signatory on the Blaine account; $8,000.00 approximately in the account maintained with the Plaintiff which was spent by the Renards, sums paid by Tri-Sal, and the amounts available to them which they then lent to Mr. and Ms. Sailer.

**205**  It might be argued that the $110,000.00 Promissory Note was an advance of principal never advanced so that it is not a cost of borrowing. Rather, it was the "cost" of an additional security being made available so that the main loan was granted (i.e. a "cost" of getting a guarantee but never called upon). It should also be noted that the payment of $5,000.00 and the provision of the Promissory Note did not benefit the Plaintiff but, rather, Mr. Glockl personally.

**206**  Section 347(2) of the ***Criminal Code*** states that it is a total of all charges and expenses "paid or payable for the advancing of credit ... irrespective of the person to whom any such charges and expenses are or are to be paid or payable ...". In the circumstances of this case, I am satisfied that the $5,000.00 payment made by the Renards to arrange for an "expedited" appraisal comes within the definition of "interest" as would the $110,000.00 payable under the Promissory Note if that amount had ever been payable or paid to Mr. Glockl. As the latter amount was not paid, I find that it is only the $5,000.00 payment made by the Renards which constitutes "interest". However, I find that the additional $5,000.00 which is interest does not result in the interest payable under the Mortgage becoming a criminal rate of interest. Accordingly, I find that the Mortgage is enforceable despite this additional interest being payable by the Renards.

**207**  However, if I am found to be incorrect in finding that the balance owing under the Promissory Note was not "interest", I am satisfied that it would be appropriate to sever that part of the effective interest rate to reduce the effective rate on the loan to below 60%. I would find that the Promissory Note is unenforceable and that the balance owing under it on the assumption that it constitutes "charges and expenses" under the loan transaction with the Renards should be severed from the transaction.

**208**  I am also satisfied that the Plaintiff should not be in a position to recover more interest than was chargeable under the Note and the Mortgage executed by the Renards in June of 1996. Accordingly, I sever that portion of the interest in excess of those rates. As well, the $5,000.00 payment made to Mr. Glockl will be subtracted from the principal balance owing under the Mortgage so that the balance then owing under the Mortgage will bear interest at the rate of interest provided under the Mortgage.

1. ILLEGAL MORTGAGE - ***TRUST AND LOAN COMPANIES ACT*** AND ***BANK ACT***

**209**  The Renards also submit that the Mortgage violates the provisions of the ***Trust and Loan Companies Act*** and the ***Bank Act*** so that it is not enforceable at the instigation of the Plaintiff. Section 418 of the ***Trust and Loans Companies Act***, R.S.C. 1991, c. 45 states:

418.(1) A company shall not make a loan in Canada on the security of residential property in Canada for the purpose of purchasing, renovating or improving that property, or refinance such a loan, if the amount of the loan, together with the amount then outstanding of any mortgage having an equal or prior claim against the property, would exceed 75 per cent of the value of the property at the time of the loan.

**210**  The same 75% lending limit is set out in s. 418 of the ***Bank Act***, R.S.C. 1991, c. 46.

**211**  Ms. Lowden confirmed that it was a rule in the industry that mortgages could not exceed 75% of the residential value of property. Regarding the June, 1996 appraisal of $185,000.00, Ms. Lowden stated: "Error - the only way I could think of it." "Bank never knowingly do that." In cross-examination, Ms. Lowden stated that it was the policy of the Plaintiff to only value three acres if the property was residential and, because the Property was 10 acres, the value would be "significantly" greater than $185,000.00.

**212**  I cannot conclude that the Mortgage was "on the security of residential property in Canada for the purpose of purchasing, renovating or improving that property". Accordingly, I cannot reach the conclusion that the Mortgage violated the provisions of ss. 418 of the ***Trust and Loans Companies Act*** and the ***Bank Act***. First, the Property cannot be described as "residential". Under s. 2 of the ***Trust and Loans Companies Act***, "residential property" is defined as meaning "... real property consisting of buildings that are used, or are to be used, to the extent of at least one-half of the floor space thereof, as one or more private dwellings." The evidence before me is that the residence that was occupied by the Renards had a floor space which was less than half of the total floor space of all buildings on the Property. Second, even though the Renards resided on the Property, the 10 acres had been used previously for other purposes including an electroplating business and the raising and selling of ostriches. In this regard, I note that the previous mortgage on the Property was described by the H.S.B.C. as securing a business loan. Third, the loan was not for the purpose of "purchasing, renovating or improving that property" (emphasis added). Rather, the funds were advanced by the Plaintiff to allow the Renards to pay off the balance owing under their business loan with H.S.B.C. and to make available sufficient funds for the Investment.

**213**  Even if the loan was made in excess of the lending limits set out under those two ***Acts***, I am satisfied that it would still be enforceable against the Renards because the purpose of the statute is to protect customers and creditors of banks and trust and loan companies not the customers who have received more credit than is permitted under the ***Act***: ***Royal Bank of Canada v. Grobman et al*** [*(1977), 83 D.L.R. (3d) 415*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0VG-00000-00&context=) (Ont. H.C.J.); ***Re Lambton Farmers Ltd.*** [*(1978), 21 O.R. (2d) 516*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-DYFH-X48N-00000-00&context=) (Ont. S.C.); ***Koski v. Quadra Credit Union*** [*[1999] B.C.J. No. 2965*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1M4-00000-00&context=) (B.C.S.C.); and ***Westminster Savings Credit Union v. 441391*** [*(2000), 32 R.P.R. (3d) 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X0MK-00000-00&context=) (B.C.S.C.).

**214**  In this regard, s. 436 of the ***Trust and Loans Companies Act*** and s. 988 of the ***Bank Act*** contain the following identical provisions: "Unless otherwise expressly provided in this ***Act***, a contravention of any provision of this ***Act*** or the regulations does not invalidate any contract entered into in contravention of the provision." This section was first put into force in the new ***Trust and Loans Companies Act*** in 1991 and was not contained in the preceding legislation. In addition to that provision, s. 15 of the ***Trust and Loans Companies Act*** and s. 16 of the ***Bank Act*** contain a further similar provision: "No act of a company, including any transfer of property to or by a company, is invalid by reason only that the act or transfer is contrary to the company's incorporating instrument or this Act."

**215**  In this regard, the provisions under the ***Bank Act*** were considered in ***Continental Bank Leasing Corp. v. Canada***, [*[1998] 2 S.C.R. 298*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M408-00000-00&context=) where McLachlin J., as she then was, on behalf of the Court stated:

In 1980, the Bank Act was amended to provide, in s. 18(1), that "[a] bank has the capacity and, subject to this Act, the rights, powers and privileges of a natural person". Section 20(1) states that "[n]o act of a bank, including any transfer of property to or by a bank, is invalid by reason only that the act or transfer is contrary to this Act". These amendments parallel the amendments to corporations Acts and their aim is also to abolish the ultra vires doctrine. As a result of s. 18(1), banks were given the legal capacity to perform any act, even if it would constitute an offence under the Bank Act. M.H. Ogilvie, Canadian Banking Law (1991), states, at p. 35:

When a bank engages in any conduct - including the transfer of property to or by a bank - which is contrary to the Bank Act, the conduct is not invalid, rather merely contrary to the Act. At common law, when a company had been found to have engaged in an ultra vires transaction, the legal effect was to render that transaction void and unenforceable. Since 1980, that is no longer the case in relation to transactions with banking corporations. Legal rights and duties created in transactions prohibited to banks by the Act and conferred on third parties are valid and no longer subject to disturbance by judicial avoidance of the original prohibited transaction. Rather, the bank is subject to the penalties set out in the Bank Act, and probably also those existing in the general law, for engaging in prohibited actions.

Crawford and Falconbridge, Banking and Bills of Exchange (8th ed. 1986), vol. 1, states a similar principle, at p. 94:

It will be noted that the Bank Act bestows on the banks the capacity of a natural person, without limitation or qualification. The reference to the other provisions of the Act qualifies only the rights, powers and privileges of the banks. In other words, the banks now have the legal capacity to perform any act, even though it may constitute an offence under the Bank Act or some other law. Like man, in Milton's view, they have been created capable of standing, but free to fall. A good illustration of this is provided by sub-s. 174(2), which prohibits the banks from engaging in the activities therein described. A violation of one of those prohibitions by a bank would not result in the transaction involved being void - or even necessarily voidable . . . . It would, however, subject the bank, and possibly also the directors, to the penalties set out in sub-ss. 174(17) to (20) and sub-s. 54(2) respectively.

(at paras. 58-9)

**216**  The sanctions set out in ss. 533-5 of the ***Trust and Loans Companies Act*** are directed towards directors, officers or employees and this further reinforces the view that the purpose of the ***Act*** is to protect the financial institution rather than allowing those who have received more credit than is permitted under the ***Act*** to escape the enforcement of the security held.

**217**  Accordingly, I cannot accede to the submission made on behalf of the Renards that the mortgage was "illegal" because it violated the provisions of the ***Trust and Loans Companies Act*** and the ***Bank Act***.

1. CONTRACT TO COMMIT A CRIMINAL OR A CIVIL WRONG

**218**  Under the doctrine of illegality, a contract prohibited by statute or entered into for an illegal purpose will be declared void even if it conforms to all other requirements of a valid transaction. In ***Continental Bank Leasing Corp.***, *supra*, McLachlin J. considered the doctrine of illegality and quoted an earlier decision of the Supreme Court of Canada in ***Neider v. Card of Peace River District Ltd.***, [*[1972] S.C.R. 678*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B029-00000-00&context=):

In fact, the rigidity of the doctrine of illegality first gave rise to exceptions which dealt with the return of property transferred under an illegal contract (Fridman, supra, at p. 424). This development was nevertheless considered insufficient. In Sidmay Ltd. v. Wehttam Investments Ltd. [*(1967), 61 D.L.R. (2d) 358*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJT1-JK4W-M44X-00000-00&context=) (Ont. C.A.), aff'd on other grounds, [*[1968] S.C.R. 828*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22V7-00000-00&context=), Laskin J.A. (as he then was) held that the court must take into account the harmful effect on the parties for whose protection the law making the bargain illegal exists before deciding to enforce or rescind the bargain. This approach was also adopted by Krever J. (as he then was) in Royal Bank of Canada v. Grobman [*(1977), 18 O.R. (2d) 636*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0VG-00000-00&context=) (H.C.), at pp. 652-53.

The doctrine of illegality was recently examined by the Federal Court of Appeal in Still v. Minister of National Revenue [*(1997), 221 N.R. 127*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-FJM6-609T-00000-00&context=). Robertson J.A. noted at the outset that the doctrine of illegality is divided into two categories: common law illegality and statutory illegality. With regard to statutory illegality, he noted that the classic approach affirmed in Neider v. Carda of Peace River District Ltd., [*[1972] S.C.R. 678*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B029-00000-00&context=), had given rise to many avoidance techniques in the courts, particularly where the illegality resulted from the performance of the contract rather than its formation. On the issue of formation, Robertson J.A. was prepared to expand the modern approach to illegality further, stating, at p. 139, that "a finding of illegality is dependent, not only on the purpose underlying the statutory prohibition, but also on the remedy being sought and the consequences which flow from a finding that a contract is unenforceable". (at paras. 66-7)

**219**  The practice of considering the consequences that flow from a finding that a contract is unenforceable has been applied in numerous cases regarding the illegality of a mortgage transaction: ***Kosky v. Quadra Credit Union***, [*[1999] B.C.J. No. 2965*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1M4-00000-00&context=) (B.C.S.C.); ***Westminster Savings Credit Union v. 442391 B.C. Ltd.*** [*(2000), 32 R.P.R. (3d) 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X0MK-00000-00&context=) (B.C.S.C.); and ***Royal Bank of Canada v. Grobman et al*** [*(1977), 83 D.L.R. (3d) 415*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0VG-00000-00&context=).

**220**  As noted above, I have concluded that the Mortgage does not fall under a statutory illegality. The Mortgage is not a contract prohibited by any statute such as the ***Bank Act***, the ***Trust and Loan Companies Act***, or the ***Criminal Code***. The question which arises is whether there is a common law illegality such as to make the Mortgage unenforceable.

**221**  The Renards submit that Mr. Glockl took advantage of them and that his "breach of trust" is a civil wrong which makes the resultant transactions "unconscionable" and not enforceable against the Renards. In this regard, the Renards refer to the decision in ***Zimmerman v. Letkeman*** [*(1977), 79 D.L.R. (3d) 508*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-2506-00000-00&context=) (S.C.C.) where Martland J. refers at p. 519 to the decision in ***Alexander v. Rayson*** [1936] 1 K.B. 169 (C.A.).

**222**  I can make no finding that Mr. Glockl took advantage of the Renards in the transactions which saw the Plaintiff make loans to the Renards. I can make no finding that there was a breach of trust. I can make no finding that the transactions were "unconscionable" either as that term is used at common law or is used in Provincial legislation. I find that the Renards have not satisfied the heavy onus on them to prove a fraud. If anything, the Renards and Mr. Glockl participated in a scheme to circumvent the lending policies of the Plaintiff so that the Renards could have the use of the money of the Plaintiff and so that Mr. Glockl could receive the $5,000.00 payment immediately and receive the benefit of payment of the balance owing under the Promissory Note once the proceeds from the B.B.T.P. were available. The Renards are complicit in any fraud or illegality and are now seeking to benefit from their own illegal acts in conspiring with Mr. Glockl to defraud the Plaintiff. I am satisfied that the Renards should not retain the fruits of any illegal dealings and that they are estopped from raising illegality as a defence to the claims of the Plaintiff. Voiding the Mortgage would unjustly enrich the Renards and, accordingly, even if the overall transaction was illegal, I am satisfied that it is enforceable: ***Brazier v. Columbia Fishing Resort Group Corp.*** [*(1997), 33 B.C.L.R. (3d) 293*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B159-00000-00&context=) (B.C.S.C.), affirmed [*(1997), 33 B.C.L.R. (3d) 293*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B159-00000-00&context=) (B.C.C.A.).

**223**  As well, I am satisfied that the Defence alleging repudiation of the Mortgage and the Note as being procured by fraud is inadequate because it does not allege that the Renards, within a reasonable time after they had notice of the fraud and before they received any benefit under the Mortgage and the Note, repudiated and abandoned the same.

**224**  The Mortgage and the Note were not contracts to commit a civil wrong. Rather, they were documents evidencing a legitimate advance of funds to the Renards from the Plaintiff. The object of the transaction was not the deliberate commission of a civil wrong. In dealing with common law illegality and a consideration of the consequences that would flow from a finding that the Mortgage was unenforceable, I am satisfied that the serious consequences of invalidating the Mortgage, the lack of social utility in doing so, and the fact that I am satisfied that all Provincial and Federal legislation is for the protection of individuals and entities other than the Renards, I find that the Mortgage is enforceable.

**225**  If anything, I find that the appropriate solution is to treat the agreements for the payment of $5,000.00 and the granting of the Promissory Note as separate transactions from the transactions involving the Plaintiff: ***Faraguna v. Storoz***, [*[1993] B.C.J. No. 2114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B11P-00000-00&context=) (B.C.S.C.) and ***Elford v. Elford*** (1922) 69 D.L.R. 284 (S.C.C.).

**WHAT IS THE BALANCE OWING UNDER THE MORTGAGE?**

**226**  A Mortgage Renewal Notice dated November 28, 1996 was forwarded to the Renards indicating a current payment amount of $1,712.47, an interest rate of 6.75%, a current maturity date of December 28, 1996, a proposed term of a further six months, a new interest rate of 5.7%, new monthly payment amount of $1,557.00 and a new maturity date of June 28, 1997. The terms of that renewal were accepted by the Renards on December 18, 1996.

**227**  A Mortgage Renewal Notice was sent to the Renards on May 29, 1997 indicating a new maturity date of June 28, 1997, a current interest rate of 5.7%, a future interest rate at 5.65%, the current payment amount of $1,557.00 and a new payment amount of $1,549.00 with a new maturity date of December 28, 1997.

**228**  A June 28, 1997 Mortgage Statement was provided to the Renards indicating a new interest rate under the Mortgage of 5.7% and a maturity date of June 28, 1997 with the balance owing of $248,586.48. The payments reflected on that statement are as follows:

MORTGAGE ACCOUNT

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| 06-28 |  | ADVANCE | 250,000.00 |  | 250,000.00 |  |
| 07-29 |  | PAYMENT |  | 1,712.47 | 248,287.53 |  |
| 07-29 |  | PAYMENT |  | 1,712.47 | 246,575.06 |  |
| 10-15 |  | PAYMENT |  | 1,712.47 | 244,862.59 |  |
| 10-31 |  | PAYMENT |  | 1,712.47 | 243,150.12 |  |
| 12-28 |  | INTEREST | 8,322.53 |  | 251,472.65 |  |
| 01-22 |  | PAYMENT |  | 1,712.47 | 249,760.18 |  |
| 01-24 |  | PAYMENT |  | 1,712.47 | 248,047.71 |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 01-27 |  | PAYMENT | 1,712.47 | 246,335.24 |  |
| 03-21 |  | PAYMENT | 1,557.00 | 244,778.24 |  |
| 04-23 |  | PAYMENT | 237.00 | 244,541.24 |  |
| 04-29 |  | PAYMENT | 16.00 | 244,525.24 |  |
| 05-06 |  | PAYMENT | 1,318.95 | 243,206.29 |  |
| 06-06 |  | PAYMENT | 1,557.00 | 241,649.29 |  |
| 06-06 |  | PAYMENT | 43.002 | 41,606.29 |  |

**229**  A mortgage renewal notice dated November 30, 1997 was forwarded to the defendants indicating current payment amount of $1,525.00, an interest rate of 5.45%, current maturity date of December 28, 1997, a proposed term of "six month open", a new interest rate of 6.2%, and a new payment amount of $1,627.00, and a new maturity date of June 28, 1998.

**230**  The Renards made no protest regarding the changes in the rates provided under the Mortgage and made a number of payments pursuant to not only the original payment amounts but later amounts as modified. In the circumstances, I am satisfied that it would be inappropriate for the Renards to now deny the legitimacy of the Mortgage. However, I am satisfied that the Plaintiff is bound by the interest rate provided under the last renewal notice set out in the various mortgage renewal notices forwarded to the Renards. I take that interest rate to be 6.2% as set out in the November 30, 1997 mortgage renewal notice. However, the parties are at liberty to seek further directions in that regard if they cannot come to an agreement regarding the interest rate which is in effect.

**231**  There are various balances said to be owing under the mortgage. The Statement of Claim indicated $263,920.45 at April 10, 2002 and $296,807.09 at January 1, 2002. In an August 25, 1998 demand letter under the Mortgage, the sum of $247,978.98 said to be owing as at August 21, 1998 is demanded along with interest at $41.95 thereafter. The mortgage statements indicate a balance as of December 31, 1998 at $247,044.55 and $249,363.00 as at December 31, 1999. The differences are probably explained by the fact that legal fees actually paid by the Plaintiff were added to the mortgage account. It was totally inappropriate for the Plaintiff to add the legal fees actually paid by the Plaintiff and, accordingly, any balance owing under the Mortgage must exclude legal fees actually paid.

**232**  Additionally, the cost of a demand letter ($75.00) should be deleted although the charges for fire insurance ($72.40), insurance (charges of $230.00, $67.00, and $200.00) should properly be allowed. There appears to be no payment of property taxes but that should be allowed if it is incurred. There is also $200 for a "discharge fee" which should not be allowed.

**233**  The accounting presented by the Plaintiff is confusing, misleading and hardly in keeping with what one expect from a major financial institution. Accordingly, there will be a reference to the Registrar to establish the balance owing for redemption purposes and for the purposes of establishing the balance owing by the Renards under their covenant to pay the balance owing under the Mortgage.

**234**  As at September 4, 2004, Fraserway appraised the subject property at $260,000.00 noting that the land assessment was $193,000.00, the improvements were $35,200.00 for a total of $228,200.00 in 2004 with 2004 taxes of $1,201.72. The site areas were described as "ten acres". The "Improvements" were noted as being "Standard quality mobile home with aluminum siding exterior" having an estimated remaining economic life of 20 years.

**235**  There is no more current information regarding the value of the Property. While it may well be that the unknown balance owing under the Mortgage is far in excess of the value of the Property, I am not presently in a position to make that finding. As the onus of establishing that the redemption period in foreclosure proceedings should be shortened lies with the Plaintiff and as I am satisfied that the Plaintiff has not met that onus, I will set the redemption period at six months to commence on the date of these Reasons for Judgment.

**COUNTERCLAIM OF THE RENARDS**

**236**  In view of my findings as noted above, I also dismiss the Counterclaim of the Renards. I cannot be satisfied that the Renards suffered any damages as a result of the actions of Mr. Glockl. Accordingly, I cannot be satisfied that the Plaintiff should be held vicariously liable for what was said and done by Mr. Glockl. In dismissing the Counterclaim I am not unmindful of the effect that this litigation has had on the Renards. Ms. Renard indicated that this litigation has been "very stressful" and caused "both of us health problems". She indicated that she was on Lorezapam for panic attacks and, since shortly after her Examination for Discovery, she was depressed, couldn't sleep and had anxiety attacks. She stated that, since the litigation, we "no longer have a social life", "sold off everything to pay for legal fees". "Maximized credit cards". She indicated that their living conditions were "not too good" as the trailer was suffering dry rot, the water pump quit, and the water line broke so must carry water from the neighbours' property. While they had a balanced diet before 1998, they are now living on "rice and beans".

**237**  In this latter regard, it should be noted that the Renards no longer have to service a $50,000.00 mortgage with the H.S.B.C., they had some funds available for personal expenses out of the amounts borrowed from the Plaintiff, and they now have $1,800.00 per month old age security and pension. The mortgage payments were $900 a month before the H.S.B.C. mortgage was discharged. On balance, their economic situation is better than what they alleged it was when they entered into the transactions with the Plaintiff. As well, this litigation and the economic woes of the Renards can be traced not to any action taken by Mr. Glockl or the Plaintiff but to their own greed in making the Investment after being beguiled by the assurances received from Messrs. Strom and Sailer. While I can be satisfied that this litigation has been very stressful for the Renards and may well have affected their health, I am satisfied that the stress is one which is often on debtors who are not in a position to pay what is owing to their creditors.

**238**  Even if I am found to be incorrect in my finding that the Counterclaim of the Renards must be dismissed, I could not arrive at a finding that the Renards should be entitled to punitive damages against the Plaintiff. The phone calls to the home of the Renards, the attempts by the Plaintiff to collect the balance due and owing under the Mortgage and the Note and this litigation are not sufficient to establish a claim for punitive damages.

**239**  If I am found to be incorrect in ruling that the Counterclaim of the Renards should be dismissed, I would not be in a position to determine the pecuniary damages available to the Renards. Under cross-examination, Ms. Renard admitted that they did not lose $175,000.00 U.S. as they did get truck proceeds and their Hong Kong Bank mortgage was paid off "I believe we gained there." When asked, "What is your loss?" Ms. Renard stated: "I don't know." When asked to explain her answer at her December 11, 2003 Examination for Discovery that "Well, we gave him the money and we didn't see anything back", Ms. Renard could only state "Not from the B.B.T.P. - nothing." "Depends on how you calculate it." "I don't think we got anything back." However, she had to admit that they had reported income from Tri-Sal on their income tax returns.

**240**  If I am found to be incorrect in my finding that the Counterclaim should be dismissed, I would order an accounting before the Registrar as to the balances received by the Renards directly or indirectly from Tri-Sal and Messrs. Strom and Sailer in order to assess the balance which would be available for damages out of what was not recovered.

**SUMMARY**

**241**  Subject to an assessment before the Registrar to establish the balance owing under the Mortgage and the Note, the claim of the Plaintiff is allowed. The Plaintiff will be entitled to an Order *Nisi* of foreclosure for the balance subsequently found to be owing under the Mortgage by the Registrar and there will be a six month redemption period starting on the date of these Reasons for Judgment.

**242**  The Counterclaim of the Renards is dismissed.

**COSTS**

**243**  I am advised by counsel that the provisions of Rule 37 of the ***Rules of Court*** may apply and, accordingly, the parties will be at liberty to speak to the question of costs.

BURNYEAT J.

**End of Document**

[***Charlton v. Abbott Laboratories, Ltd., [2013] B.C.J. No. 22***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M2XM-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

R. Johnston J.

Heard: November 2 and 9, 2012.

Judgment: January 9, 2013.

Docket: 11-0721

Registry: Victoria

**[2013] B.C.J. No. 22** | 2013 BCSC 21 | 224 A.C.W.S. (3d) 267 | 44 C.P.C. (7th) 316 | 2013 CarswellBC 10

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50 Between Terry Charlton, Mayra Charlton, Angela Leone, Paula Smith-Turner, Carl Turner and Mark Mandell, Plaintiffs, and Abbott Laboratories, Ltd., Abbott Laboratories, and Apotex Inc., Defendants

(72 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Class or representative actions — Procedure — Discovery — Production and inspection of documents — Objections and compelling production — Application by defendants for pre-certification production of plaintiffs' medical records dismissed — Plaintiffs, who experienced heart problems after taking drug manufactured and marketed by defendants, commenced proposed class action claiming damages under consumer protection and competition and for various torts — Records would not assist in determination of whether proposed class was sufficiently well-defined — While records might show whether there was some basis in fact for claims pleaded, such evidence was not necessarily relevant to certification process as plaintiffs were not required to prove merits of claims.**

**Tort law — Practice and procedure — Parties — Representative or class actions — Discovery — Application by defendants for pre-certification production of plaintiffs' medical records dismissed — Plaintiffs, who experienced heart problems after taking drug manufactured and marketed by defendants, commenced proposed class action claiming damages under consumer protection and competition and for various torts — Records would not assist in determination of whether proposed class was sufficiently well-defined — While records might show whether there was some basis in fact for claims pleaded, such evidence was not necessarily relevant to certification process as plaintiffs were not required to prove merits of claims.**

|  |
| --- |
| Application by the Abbott defendants for an order for production of documents. The defendants manufactured and marketed a drug, Sibutramine, that was originally intended to treat depression, but was approved for appetite suppression. The product monograph listed a number of suggested precautions and set out a list of health conditions, including history of coronary artery disease, congestive heart disease, arrhythmia or cerebrovascular disease, and inadequately controlled or unstable hypertension, which, if present, contraindicated use of the drug. In addition, Sibutramine was contraindicated if other drugs were being taken. The four principal plaintiffs alleged that they experienced heart problems, including heart attacks or strokes, after they began taking Sibutramine. They commenced a proposed class action alleging that Sibutramine caused them injury and advanced claims for damages under consumer protection, competition and trade legislation, as well as strict liability, ***negligence*** and negligent misrepresentation, breach of warranty and waiver of tort. They proposed a number of common issues including whether Subutramine caused or contributed to adverse cardiovascular events, whether it was fit for its intended purpose and whether the defendants breached duties or acted negligently or recklessly in their marketing of Sibutramine. The Abbott defendants applied for an order that the four plaintiffs who claimed they were injured by the defendants' products produce various medical and pharmaceutical records, including records of physicians who treated them for obesity or prescribed Sibutramine, records of heart-related incidents occurring prior to their use of Sibutramine, medical records showing the treatment they received for any heart-related events occurring after their first use of Sibutramine, and records showing when and in what amounts they received Sibutramine and any other medications received contemporaneously. The defendants alleged that the records were relevant to the certification issues of whether a class proceeding was the preferable procedure, whether there was sufficient evidence for the existence of common issues and whether the plaintiffs could fairly and adequately represent the interests of the proposed class.  HELD: Application dismissed.  The records sought were not necessary at the certification hearing to enable determination of whether a class proceeding would be the preferable proceeding for the fair and efficient resolution of the common issues and the defendants had not established that the records were necessary to enable the court to determine whether there was sufficient evidence for the existence of common issues or to determine whether the representative plaintiffs could fairly and adequately represent the interests of the proposed class. Medical or pharmacy records would not assist in the determination of whether the proposed class was sufficiently well-defined. While the records might show whether there was some basis in fact for the claims pleaded, such evidence was not necessarily relevant to the certification process as the plaintiffs were only required to produce sufficient evidence to show there was some basis in fact to establish the requirements for certification and were not required to prove the merit of their claims. |

**Statutes, Regulations and Rules Cited:**

Class Proceedings Act, [*RSBC 1996, CHAPTER 50, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5TBM-3RN1-FBV7-B0M1-00000-00&context=), s. 4(1), s. 4(1)(b), ss. 4(1)(b)-(e), s. 4(1)(c), s. 4(1)(d), s. 4(2), s. 4(2)(a)

Class Proceedings Act, R.[*S.O. 1992, c. 6*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W07-7G31-DY33-B016-00000-00&context=),

**Counsel**

Counsel for the Plaintiffs: A. Sadaghianloo, E.F.A. Merchant, Q.C., and G.D. Williams.

Counsel for Abbott Laboratories, Ltd. and Abbott Laboratories: W.B. Milman and C. Zayid.

Counsel for Apotex Inc. Appearing, by Teleconference: S. Hosseini.

**Reasons for Judgment**

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| --- |
| **R. JOHNSTON J.** |

**1**   This action is brought under the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50*, by four plaintiffs -- Mr. Charlton, Mr. Mandell, Ms. Leone, and Ms. Smith-Turner -- who allege that drugs manufactured and marketed by the defendants caused them injury. Two other plaintiffs, Ms. Charlton and Mr. Turner, allege that they suffered loss and damage flowing from the injuries to their spouses. The plaintiffs advance their claims under consumer protection, competition and trade legislation, as well as in strict liability, ***negligence*** and negligent misrepresentation, breach of warranty, and waiver of tort.

**2**  The Abbott defendants, supported by Apotex, apply for an order that the four plaintiffs who allege they were injured by the defendants' products produce the following medical and pharmaceutical records:

1. all records of any physician who treated them for obesity or prescribed Sibutramine to them, relating to such treatment or prescription;
2. all records of heart-related incidents occurring prior to their use of Sibutramine;
3. all records of any physicians and hospitals showing the treatment they received for any heart-related events occurring after their first use of Sibutramine; and
4. all PharmaNet and Medical Services Plan records showing when and in what amounts they received Sibutramine and any other medications received contemporaneously.

**3**  In its Notice of Application, Abbott argues that the records it seeks should be produced because they will be relevant to these certification issues:

1. whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, having regard in particular to the relative importance of the proposed common issues and the remaining individual issues;
2. whether there is sufficient evidence for the existence of common issues; and
3. whether the representative plaintiffs can fairly and adequately represent the interests of the proposed class.

**4**  Counsel for Abbott argued that the records are necessary to enable it to argue at the certification hearing that the claim, as set out in the Notice of Civil Claim, is not suitable for class proceedings because there is no basis in fact establishing a real issue between the plaintiffs and the Abbott defendants, and if there is, that individual issues overwhelm any common issues between plaintiffs and defendants.

**5**  Abbott further argued that the records sought are relevant to the suitability of the plaintiffs as representatives of the classes on behalf of which they seek certification.

**6**  That the records sought in this application will eventually have to be disclosed is understood: the question is whether disclosure should be ordered now, before the certification hearing, or later, when their relevance to the merits of the plaintiffs' claims will make them compellable.

**7**  From the evidence provided on the application, it appears that the drug Sibutramine was originally intended to treat depression, and while it was undergoing clinical trials, weight loss was noted in those taking it.

**8**  Drugs containing Sibutramine were approved by Health Canada for appetite suppression in or around 2000, and the defendants distributed compounds containing Sibutramine under different brand names for about 10 years. Health Canada also approved a product monograph that listed a number of suggested precautions, as well as setting out a list of health conditions which, if present, contraindicated use of the drug.

**9**  Some of those contraindicating conditions included history of coronary artery disease, congestive heart disease, arrhythmia or cerebrovascular disease, inadequately controlled or unstable hypertension. Sibutramine was also contraindicated if other drugs, set out in the monograph, were being taken.

**10**  The plaintiff Mr. Charlton pleads that he had no heart problems that he knew of when he started taking Sibutramine, but that he started experiencing shortness of breath within a month or two of starting the drug, and chest pains around four months after starting the drug. He says he now has heart damage as a result of taking Sibutramine.

**11**  The plaintiff Mr. Mandell pleads that he had his first heart attack about three months after he started taking Sibutramine, and that has affected his employment and his lifestyle.

**12**  The plaintiff Ms. Leone pleads that she had her first heart attack about four months after she started taking Sibutramine, and that has affected her business and lifestyle.

**13**  The plaintiff Ms. Smith-Turner alleges she had a stroke about a month after she started taking Sibutramine, which affected her employment, and continues to affect her physically.

**14**  None of these four plaintiffs have purported to rely on medical or pharmacy records, although Mr. Charlton has sworn to what he has been told by doctors who have investigated his post-Sibutramine chest pains and shortness of breath.

**15**  The plaintiffs Ms. Charlton and Mr. Turner plead that they suffered losses as a result of the effects of Sibutramine on their spouses.

**16**  The plaintiffs propose the following as common issues:

1. Does Sibutramine cause or contribute to adverse cardiovascular events, such as non-fatal heart attacks, non-fatal strokes, and other heart-related events?
2. Was Sibutramine fit for its intended purpose?
3. Did the defendants breach a duty of care owed to the class in manufacturing, testing, marketing, selling or distributing Sibutramine in Canada?
4. Did the defendants knowingly, recklessly or negligently breach a duty to warn class members or their physicians of the risks of harm from the use of Sibutramine?
5. Did the defendants knowingly, recklessly or negligently misrepresent to class members or their physicians the risks and benefits from the use of Sibutramine?
6. Did the defendants engage in unfair or deceptive trade practices?
7. If any of questions 1 to 6 are answered in the affirmative, does the defendants' conduct warrant an award of punitive damages?
8. If any of questions 1 to 6 are answered in the affirmative, should the defendants be ordered to disgorge any or all of the profits they received from the sale of Sibutramine?

**17**  Abbott points to the plaintiffs' pleadings, and the reference there to a study conducted by Abbott called the Sibutramine Cardiovascular Outcome Trial ("SCOUT study"). Abbott says that by pleading that the study results indicated that Sibutramine increased the risk for cardiovascular disease, the plaintiffs have raised issues of fact that include whether those who took Sibutramine had a history of cardiovascular disease, whether they took the drug as directed or recommended, for the time recommended, as well as the temporal relationship between taking Sibutramine and the first occurrence of certain cardiovascular events. Abbott argued that the SCOUT study showed that many or most of those who took Sibutramine either should not have been taking it, or took it incorrectly, and that the records it seeks will complete the evidentiary record on the certification hearing.

**18**  Abbott relies on the affidavit of Dr. Myers, a cardiologist where, at para. 5, Dr. Myers swears:

In my opinion, for reasons set out herein, in order to determine the cause of any cardiovascular injuries, an examination of each person's personal and family medical histories and a review of the following factors for each individual would be required.

**19**  Dr. Myers then lists 19 factors, including patient age, sex, medical history of cardiovascular disease or hypertension, any patient diabetes, cholesterol levels, smoking history, nutrition, alcohol consumption, stress levels, and more.

**20**  Dr. Fitchett is the expert cardiologist consulted by the plaintiffs: his affidavit does not refer to the plaintiffs' medical or pharmaceutical records as information on which he relied.

**21**  This action has not yet been certified; that hearing is set for early April 2013.

**LEGAL FRAMEWORK**

**22**  The *Class Proceedings Act* provides:

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

**23**  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=), at para. 25, the Supreme Court of Canada held that in a class action certification hearing "the class representative must show some basis in fact for each of the certification requirements ... other than the requirement that the pleadings disclose a cause of action."

**24**  In its Notice of Application, Abbott argues that "this Court has held that it is appropriate in certain cases to order the applicant to produce further evidence in advance of the hearing of the motion, where such evidence would assist in resolving the issues arising on the motion." It cites several decisions in support of this assertion. However, I note that most of the cited cases from this jurisdiction did not ultimately order disclosure.

**25**  One is *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [*2007 BCSC 1663*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1Y5-00000-00&context=). In that case, the plaintiff sought production of documents it said were relevant to the certification process, including documents produced by the defendant in class proceedings in the United States, which documents had been made the subject of a confidentiality order by the court there. Justice Myers dismissed the application, saying in part:

[25] ... It appears to me that at the certification stage of a class proceeding, a party must justify the need for document disclosure. It must show that the sought-after documents would inform the certification process. I do not say the onus is a high one: that is not an issue I need address because I do not think the plaintiffs have even met a low threshold here.

**26**  Justice Meyers relied on two of the other authorities cited by Abbott in this application: *Mathews v. Servier Canada Inc.* [*(1999), 65 B.C.L.R. (3d) 348*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-2200-00000-00&context=), [*86 A.C.W.S. (3d) 486*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-2200-00000-00&context=) (S.C.), where the application was for an extension of the time to apply for certification and the court's comments on document disclosure appear to be *obiter*, and *Samos Investments Inc. v. Pattison*, [*2001 BCSC 440*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2R1-00000-00&context=), where an application for document disclosure was adjourned to after the certification application was heard, and those apparently *obiter* comments in *Mathews* were cited with approval.

**27**  In *Samos* there was evidence that the disclosure sought would require a great deal of time and effort. Similar considerations applied in *Matthews,* where the court described the effort required as "an enormous task" (para. 5). In both cases, as in *Pro-Sys,* it was the plaintiffs seeking access to defendants' records before the certification hearing.

**28**  Whereas in *Pro-Sys, Mathews,* and *Samos*, the proposed plaintiffs were seeking disclosure of a large number of documents from defendants before certification, it is not obvious in the case before me that the disclosure sought would be as onerous. In cases where document discovery can be expected to be onerous, pre-certification production might be less readily ordered than where the cost and effort of production are more manageable.

**29**  Abbott also relies on *Stanway v. Wyeth*, [*2010 BCSC 1497*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B30S-00000-00&context=), which raised issues similar to those in this application. The action there sought certification of common issues that included whether there was a causal connection between the use of certain drugs and certain adverse medical conditions. Prior to the certification hearing, the defendant sought medical and prescription records of the representative plaintiff. The court canvassed authorities from other Canadian jurisdictions, and at para. 21 summarized:

The principles thus derived are:

1. Precertification disclosure is ordered in the exceptional case where the defendant demonstrates that the record before the court for the certification hearing will be inadequate for consideration of the issues at that stage of the proceedings.
2. In considering whether an order for disclosure ought to be made the court must address the goals of judicial economy, access to justice, and behaviour modification.
3. It can be assumed that each individual's medical record will be unique. However, the medical evidence suggesting the significance of the individual factors of those who may have been prescribed and ingested the prescription drug may be necessary to furnish the evidentiary record;

and specifically in British Columbia,

1. There is no right to examine the representative plaintiff or other affiants in British Columbia; an order of the court is required.
2. In British Columbia, in accordance with the *Act*, the court must consider whether the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members, and whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members.

**30**  The court in *Stanway* concluded at para. 22 that the case before it was "... the exceptional case where precertification disclosure of medical records must be made", because the information in the records was necessary for "... my determination of the predominance of common issues and whether this class proceeding ought to be certified."

**31**  It appears that the court assumed that the records sought would contain information about:

The individual risk factors identified in those records, and notes of the prescribing physician of the discussion he or she had with the patient concerning the benefits and risks of HRT and of Premarin and Premplus specifically, and the records of the examinations undertaken, test ordered and the results ...

And the court considered the information necessary for the certification process.

**32**  It does not appear from the reasons in *Stanway* that *Mathews, Samos,* or *Pro-Sys* were brought to the court's attention.

**33**  This court came to a different result than in *Stanway* in *Jones v. Zimmer GMBH,* [*2010 BCSC 1504*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B321-00000-00&context=), and in *Bartram (Litigation guardian of) v. Glaxosmithkline Inc.*, [*2011 BCSC 1174*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6229-00000-00&context=), leave to appeal ref'd [*2011 BCCA 539*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1CJ-00000-00&context=).

**34**  In *Jones*, decided the day before *Stanway* was argued, Loo J. reviewed the authorities, and said at para. 28:

From my review of authorities, I accept that generally the courts in Canada have refused to order that medical records be produced prior to certification, except in exceptional circumstances, including where the record on the certification issue may be inadequate. The party requesting production has the onus of demonstrating that the documents are necessary for the certification application.

**35**  This passage establishes that the applicant for document disclosure bears the onus of establishing the case for such disclosure, and that the standard required of the applicant is proof that the documents sought are necessary for the certification application.

**36**  One of the authorities relied on in *Jones* was *Pearson v. Inco Ltd.,* [*22 C.P.C. (5th) 167*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDG1-JGPY-X27V-00000-00&context=), [*[2002] O.J. No. 1842*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDG1-JGPY-X27V-00000-00&context=), where the court said at para. 12:

In the end result, there are likely to be two results if the medical records are produced. One is that they will reveal nothing more than the defendants already know and will be of no use on the certification motion at all. The other is that they will reveal information which might cast doubt on the merits of the plaintiff's claim but that is an impermissible use of the records at this stage of the proceeding.

**37**  In *Bartram*, N. Smith J. distinguished *Stanway* on the basis that in the case before it, the issues and class were more narrowly defined, as was the temporal connection between drug use and time of injury. It also noted the different results in *Stanway* and *Jones*. Justice Smith then quoted from an authority relied upon in both *Stanway* and *Jones*, *Pardy v. Bayer Inc.*, [*2003 NLSCTD 130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8W1-F900-G476-00000-00&context=), and added this emphasis to the final sentence in the quote: "Indeed the Court must be vigilant to ensure that the certification application does not become mired down in the merits of an individual claim" (*Bartram* para. 16).

**38**  More recently, Punnett J. of this court made the same point in *Miller v. Merck Frosst Canada Ltd.*, [*2011 BCSC 1759*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B19H-00000-00&context=), when he said at para. 4:

Applications for disclosure before certification often raise subtle distinctions between evidence relevant to the certification process and evidence which goes to the merits of the claim. The former evidence is permissible, the latter is not.

**39**  He elaborated on the difference in para. 40:

The Supreme Court of Canada in *Hollick* did not state "some basis in evidence." It stated "some basis in fact." The difference is important. One goes to the merits of the claim, the other to whether the assertions made are sufficient to allow the court to determine if the proceeding is of the type that is suitable for certification.

And further, "the assertion of facts is still restricted to facts and not the evidence needed to prove them" (para. 39).

**40**  Abbott also relies on the reasoning in *MacMillan v. Abbott Laboratories Laboratoires Abbott Limitée Apotex Inc.*, [*2011 QCCS 3749*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JMB1-JT42-S3R0-00000-00&context=), while acknowledging that it is not directly applicable because of differences between class proceeding legislation in Quebec and British Columbia. That case was an attempt to obtain authorization in Quebec to commence a class action related to Sibutramine. The plaintiff there agreed that his pharmacy records should be disclosed, but objected to disclosure of his medical records. The court ordered production of the medical records, in part, it appears, on the assumption that an expert medical opinion the plaintiff indicated his intention to rely on at the certification hearing would probably be based on his medical records (para. 9). It is not clear on what this assumption was based. Mr. MacMillan's application for certification was later denied, partly on the information in his medical record: see *MacMillan v. Abbott Laboratories Laboratoires Abbott Limitée Apotex Inc.*, [*2012 QCCS 1684*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JMV1-FJTD-G2HR-00000-00&context=).

**41**  In part, authorization to proceed as a class action was refused in that case because: the plaintiff's medical records did not support his claim to have suffered a myocardial condition; the records indicated that the plaintiff was prescribed another drug that was contraindicated while taking Sibutramine; they did not show that his blood pressure was checked regularly as recommended for Sibutramine users; and the records indicated that he took Sibutramine for longer than the year recommended.

**42**  Two principles emerge from the British Columbia authorities: first, that the burden of showing that records should be disclosed before the certification hearing is on the party applying for it; second, the standard to be met on such an application is to show that the records sought are necessary to inform the certification process.

**43**  In *Pro-Sys,* Myers J. left open the question of where to set the threshold that must be met to warrant pre-certification document disclosure.

**44**  I conclude that necessity under the second principle must mean more than merely helpful or informative. I say that because of the clear separation between the procedural aspects of class proceedings, and the certification application is purely procedural, and the consideration of the merits of the claims, which comes after certification, if it is granted. So wherever the threshold is set, it must be high enough to protect the procedural certification process from becoming bogged down by evidence that goes to the merits.

**ANALYSIS**

**45**  As to what information is necessary for the certification hearing, and whether the defendants have made out a case that the records sought will contain it, a starting point is the Notice of Application by which the plaintiffs seek certification.

**46**  Section 4(1)(b) of the Act requires that there be an identifiable class of two or more persons. In its Notice of Application, the plaintiffs propose that the classes be defined as:

1. All persons resident or situated in British Columbia who have used or purchased Sibutramine ("Resident Primary Subclass");
2. All persons resident or situated in British Columbia who assert a derivative claim on account of a family relationship with a Primary Subclass member ("Resident Family Subclass");
3. All persons resident or situated in a Canadian province or territory other than British Columbia who have used or purchased Sibutramin ("Non-resident Primary Subclass"); and
4. All persons resident or situated in a Canadian province or territory other than British Columbia who assert a derivative claim on account of a family relationship with a Primary Subclass member ("Non-resident Family Subclass").

**47**  Whether these proposed classes are sufficiently well defined, or whether someone can be identified as being in or outside the class by objective criteria, will be determined at the certification hearing. For present purposes, I have not been persuaded that medical or pharmacy records would assist in that determination.

**48**  The defendants' primary argument is that the records are necessary to enable the court to determine whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, in accordance with s. 4(1)(d), having regard in particular to the relative importance of the proposed common issues and the remaining individual issues. Here the defendants' argument focuses on whether common issues predominate over individual questions, a requirement of s. 4(2)(a) of the *Act*, which reads:

1. 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:
2. whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

**49**  Section 4(2) of the *Act* lists considerations relevant to whether "a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues."

**50**  Predominance is but one of a number of factors to be considered in the analysis of preferable procedure, which in turn is just one of five preconditions to certification, all of which must be met, under s. 4(1). Its relative importance among the s. 4(2) considerations might be affected by the provisions of s. 4(1)(c), which reads:

1. (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 claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

[emphasis added]

**51**  An applicant for certification must show "... some basis in fact to support the certification order": *Hollick* at para. 25. In saying this, the Supreme Court of Canada agreed with the court appealed from that the Ontario *Class Proceedings Act,* [*S.O. 1992, c. 6*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W07-7G31-DY33-B016-00000-00&context=), "... requires the representative plaintiff to provide a certain minimum evidentia[ry] basis for a certification order" (para. 24, emphasis in original).

**52**  Reading ss. 4(1)(c) and (d) together with s. 4(2) of the *Act* demonstrates that an applicant must show some basis in fact to support the conclusion that claims of class members raise common issues, without those common issues having to predominate over individual issues (s. 4(1)(c)), as well as some basis in fact to support the conclusion that a class proceeding would be the preferable procedure to fairly and efficiently resolve the common issues (s. 4(1)(d)). To assist in the determination of the latter requirement, the *Act* sets out a non-exhaustive list of factors to be considered under s. 4(2).

**53**  *Hollick* must be viewed with some caution where it deals with the preferability inquiry, which is phrased in the Ontario statute in terms identical to s. 4(1)(d) of the British Columbia *Act* because, as the court points out in *Hollick*, the Ontario statute did not provide any legislative guidance to the preferability inquiry, whereas the British Columbia *Act* provides guidance in s. 4(2).

**54**  Whether the plaintiffs can show "some basis in fact", or on a "minimum evidentiary basis", that the claims of class members raise common issues is a question for the certification hearing. The defendants have not shown that the records they seek are necessary at this stage for the determination of that question. Instead, the Abbott defendants focus their arguments on whether the records sought are needed to determine at the certification hearing whether common or individual issues predominate.

**55**  The defendants argue at para. 37 of their Notice of Application:

If the cause of the Plaintiffs' injuries can be attributed to multiple factors -- such as lifestyle choices, medical background, degree of adherence to doctors' recommendations, and consumption of the drug without adherence to labeled guidelines -- then confining the inquiry to the question of "general" causation (as the Plaintiffs propose) may be of limited assistance in resolving the claims of the proposed class. The medical records of the proposed representatives will allow Abbott to advance that argument with concrete examples, rather than in the abstract.

**56**  This argument is based upon a prediction -- perhaps hope is a better word -- as to what the records sought will contain. It seems to me to be an invitation to the sort of fishing expedition to which Prowse J.A. referred when she refused leave to appeal in *Bartram v. Glaxosmithkline*, [*2011 BCCA 539*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1CJ-00000-00&context=) at para. 10. The affidavit of Dr. Myers, the cardiologist advising the defendants, who swears that the medical records are necessary "... in order to determine the cause of any cardiovascular injuries," illustrates the point.

**57**  The defendants argue that its application does not cross the line into consideration of the merits, but in doing so, says that with the records in hand, the court at the certification hearing can look at any conflicts or inconsistencies between what the plaintiffs assert and what the records show and, without going into the merits of the claims, weigh the evidence to determine whether there is some basis in fact on each of the considerations required for certification.

**58**  Recognizing that this argument is based on what the defendants hope will be revealed in the records sought, it seems to me that they are caught in the kind of analytical difficulty described by Nordheimer J. in *Pearson* at para. 12:

In the end result, there are likely to be two results if the medical records are produced. One is that they will reveal nothing more than the defendants already know and will be of no use on the certification motion at all. The other is that they will reveal information which might cast doubt on the merits of the plaintiff's claim but that is an impermissible use of the records at this state of the proceeding. Either way, the medical records will not advance the consideration of the issues which are relevant to the certification motion, in that they will not assist in determining whether there are common issues nor will they assist in determining whether a class action is the preferable procedure for the resolution of any common issues.

**59**  It seems to me, with respect, that the Abbott defendants attempt to draw too fine a line between considering whether some basis in fact has been established for the requirements of ss. 4(1)(b) through (e), on the one hand, and a consideration of the merits of the plaintiffs' claims, particularly as to causation, on the other.

**60**  At the certification hearing, the plaintiffs will have to produce sufficient evidence to show that there is some basis in fact satisfying the requirements of s. 4(1)(b) through (e) of the *Class Proceedings Act*. The requirement of s. 4(1)(a) -- that the pleadings disclose a cause of action -- is based on a review of the pleadings and requires no evidence.

**61**  The plaintiffs will not be required at the certification hearing to establish some basis in fact establishing a real issue as between the plaintiffs and defendants, as argued by the Abbott defendants.

**62**  The difference is important: the requirements of ss. (b) through (e) of s. 4(1) are focused more on the procedural validity of the claims advanced by the plaintiffs if the action is to be certified, and not on the factual underpinnings of the claims against the defendants. By procedural validity I mean whether the claims as advanced satisfy the requirements of the subsection, and that is to be distinguished from whether the claims advanced can succeed. The former aspect is procedural, the latter goes to the merits of the claim. The former aspect is the proper subject of a certification hearing, the merits are not.

**63**  It therefore follows that evidence that might tend to shake the evidentiary foundation of the claims against the defendants by showing whether there is some basis in fact for the claims pleaded is not necessarily relevant to the certification process, and ought not to be ordered produced on that basis.

**64**  The Ontario Superior Court of Justice has said "It is not always easy to separate, prior to the certification hearing, where an examination of the 'basis in fact' ends and an impermissible excursion into the merits begins": *Roveredo v. Bard Canada Inc.,* [*2010 ONSC 5240*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFC1-FG12-619N-00000-00&context=) at para. 9.

**65**  Two reasons for ordering production of documents before certification are to enable the defendant to properly respond to the plaintiff's evidence and to ensure that there is an adequate evidentiary record. See *Roveredo* at para. 8.

**66**  Here, the Abbott defendants say the records sought are needed for the second purpose, to ensure an adequate evidentiary record. It seems to me that if the plaintiffs proceed to a certification hearing on an inadequate evidentiary record, risking denial of their application to certify because of the inadequacy, that is their risk to run, and it is not an argument strong enough to overcome the disinclination of the courts to order pre-certification production of records such as those sought here.

**67**  There is an anomaly in some of the cases cited. In *Schroeder v. DJO Canada Ltd.*, [*2009 SKQB 169*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K751-F22N-X10D-00000-00&context=), at para. 60, the court says: "I note that pre-certification disclosure of documents, such as medical records, was ordered in a number of cases." The court then cites several such cases, including this court's decision in *Pro-Sys Consultants.* As I read *Pro-Sys Consultants*, however, the reverse appears to be true. At para. 25, Myers J. says:

It appears to me that at the certification stage of a class proceeding, a party must justify the need for document disclosure. It must show that the sought-after documents would inform the certification process. I do not say the onus is a high one: that is not an issue I need address because I do not think the plaintiffs have even met a low threshold here.

And at para. 33:

Accordingly, except to the extent of the documents which have been referred to by Microsoft in its reply materials, the plaintiffs' motion is denied.

**68**  I note that *Roveredo* has relied upon the statement in *Schroeder*, including the apparent misreading of *Pro-Sys Consultants*.

**69**  I am not persuaded that the records sought are necessary at the certification hearing to enable determination of whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, having regard in particular to the relative importance of the proposed common issues and the remaining individual issues.

**70**  The same reasoning leads me to conclude that the Abbott defendants have not met the burden of showing that the records are necessary to enable the court to determine whether there is sufficient evidence for the existence of common issues or that the records are necessary to enable the court to determine whether the representative plaintiffs can fairly and adequately represent the interests of the proposed class.

**71**  The application is dismissed.

**72**  Unless either party wishes to argue otherwise, costs are in the cause.

R. JOHNSTON J.

**End of Document**

[***Clock Holdings Ltd. v. Braich Estate, [2008] B.C.J. No. 2395***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B33V-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G. Dickson J.

Heard: February 4-8 and 11-15, 2008.

Judgment: December 8, 2008.

Docket: S023255

Registry: Vancouver

**[2008] B.C.J. No. 2395** | 2008 BCSC 1697 | 54 B.L.R. (4th) 37 | 44 E.T.R. (3d) 271 | 2008 CarswellBC 2648 | 173 A.C.W.S. (3d) 656

Between Clock Holdings Ltd., Plaintiff, and Surjeet Kaur Braich and Herman Singh Braich Jr. as Executors and Trustees of the Estate of Herman Singh Braich, Deceased, Surjeet Kaur Braich, Herman Singh Braich Jr., H.S. Kenny Braich, Herbishan S. Braich, Herjiwan S. Braich, Reita Kaur Braich, Bridgewater Properties Inc. and Herman Enterprises Ltd., Defendants

(201 paras.)

**Case Summary**

**Corporations, partnerships and associations law — Corporations — Directors and officers — Standard of care of directors and officers — Interests of corporation — Sale of undertaking — Elements — Action for declaration that a waterfront property was estate asset and that transfer of real property to defendant Bridgewater Properties was voidable — A residual beneficiary had assigned his interest in estate to plaintiff — Property transferred without notice to plaintiff or beneficiary — Action dismissed — Property was corporate asset, not estate asset — Plaintiff had equitable interest in trust, but no legal interest in trust property — Transfer of property did not constitute disposition of substantially the whole of company's undertaking and special resolution of members not required — Transfer was conducted in ordinary course of business.**

**Wills, estates and trusts law — Executors and administrators — Actions against — *Negligence* — Powers — Powers of sale of assets — Sale of real property — Action for declaration that a waterfront property was estate asset and that transfer of real property to defendant Bridgewater Properties was voidable — A residual beneficiary had assigned his interest in estate to plaintiff — Property transferred without notice to plaintiff or beneficiary — Action dismissed — Property was corporate asset, not estate asset — Plaintiff had equitable interest in trust, but no legal interest in trust property — Transfer of property did not constitute disposition of substantially the whole of company's undertaking and special resolution of members not required — Transfer was conducted in ordinary course of business.**

**Wills, estates and trusts law — Trusts — The trustee — Duties of — Action for declaration that a waterfront property was estate asset and that transfer of real property to defendant Bridgewater Properties was voidable — A residual beneficiary had assigned his interest in estate to plaintiff — Property transferred without notice to plaintiff or beneficiary — Action dismissed — Property was corporate asset, not estate asset — Plaintiff had equitable interest in trust, but no legal interest in trust property — Transfer of property did not constitute disposition of substantially the whole of company's undertaking and special resolution of members not required — Transfer was conducted in ordinary course of business.**

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| --- |
| Action for a declaration that a waterfront property was an estate asset and that the transfer of the property to the defendant Bridgewater Properties was voidable and for an order transferring the property back to the defendant Herman Enterprises. The defendants Surjeet and Herman were executors and trustees of the estate of Surjeet's husband, Herman's father. The defendant Herman Enterprises was an estate owned holding company. The plaintiff alleged that the defendant executors acted negligently when they transferred the waterfront property from Herman Enterprises to Bridgewater Properties without notice to Erwin, a residual beneficiary and executor, or the plaintiff. Bridgewater was owned by five of the six residual beneficiaries of the estate. Erwin had no interest in Bridgewater. He had assigned his interest in the estate to the plaintiff and was petitioned into bankruptcy thereafter. The plaintiff alleged the property was transferred for less than market value and that the purpose of the transfer was to reduce the value of Erwin's residual interest in the estate. The plaintiff argued that the transfer involved the sale of substantially the whole of Herman Enterprise's undertaking and a special resolution of the company members was required but not obtained. The defendants denied any wrongdoing in connection with the transfer. The defendants argued the property was a corporate asset of Herman Enterprises and that the transfer was made in good faith for the proper business purpose of preserving the value of the company' s principle asset, an outstanding receivable.  HELD: Action dismissed.  The main reason for the property transfer was to raise funds for Herman Enterprises to apply immediately to the outstanding tax obligation and to the ongoing costs of maintaining a New York property until it could be sold and to avoid foreclosure. The plaintiff, as a remainder beneficiary through Erwin, had an equitable interest in the trust, but no legal interest in trust property. It had no interest in specific trust assets or the assets of a corporate entity owned by the trust. The property was a corporate asset of Herman Enterprises, and not an estate asset. It belonged, legally and beneficially, to Herman Enterprises alone. When the executors decided to sell it, they acted as corporate directors and not as estate trustees. In so doing, they fulfilled their first duty to protect the best interests of Herman Enterprises. The decision to sell the property was a reasonable business alternative for addressing the immediate and ongoing problem of the New York Property costs. Bridgewater paid more than fair market value for the property. In these circumstances, there was no proof that the plaintiff, or anyone else, suffered a loss. Herman Enterprises did not dispose of substantially the whole of its undertaking when it sold the property to Bridgewater. A special resolution of members was not required. The transfer was conducted in the ordinary course of business. The executors were not obliged to consult the estate's beneficiaries when they concluded the sale. Although they assumed a risk the transaction might later be successfully challenged when they did not obtain prior court approval, their assumption of that risk did not amount to a fiduciary breach. The claim of conspiracy was not made out as the defendants' predominant purpose was not to reduce the value of Erwin's residual interest in the estate and thus to cause injury. There was no evidence that the value of Herman Enterprise shares was diminished as a result of the transfer. It could not be said that Erwin or his assignees suffered any loss or damage. |

**Statutes, Regulations and Rules Cited:**

Company Act, RSBC 1996, CHAPTER 62, s. 1, s. 114(1)(d), s. 118(1)(a), s. 118(1)(b), s. 118(2), s. 126(1), s. 126(2), s. 126(3)

**Counsel**

Counsel for the Plaintiff:

Michael D. Murphy.

Counsel for the Defendants:

Surjeet Braich: Shelley C. Fitzpatrick.

Herman Braich Jr. and Herman Enterprises Ltd.: James G. Carphin, Q.C.

Bridgewater Properties Inc.: Marko Vesely and Yong-Jae Kim.

Kenny Braich and Bobby Braich: Appearing on Their Own Behalf.

[Editor's note: A corrigendum was released by the Court March 19, 2009; the correction has been made to the text and the corrigendum is appended to this document.]

**Reasons for Judgment**

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| **G. DICKSON J.** |

**INTRODUCTION**

**1**  Surjeet Braich and her sons Erwin and Herman Jr. are executors and trustees of the estate of Herman Braich Sr. (the "Estate"). The plaintiff, Clock Holdings Ltd., claims Surjeet and Herman Jr. acted negligently, in breach of their fiduciary duties, contrary to s. 126(1) of the ***Company Act***, [*R.S.B.C. 1996, c. 62*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FJM6-61MX-00000-00&context=) and in conspiracy with the other defendants when they transferred property from an Estate owned company, Herman Enterprises Ltd. ("HEL"), to the defendant Bridgewater Properties Inc. ("Bridgewater"), in March, 2001.

**2**  The transferred property is known as the Waterfront Property. It is located in Mission, British Columbia.

**3**  Bridgewater is owned by five of the six residual beneficiaries of the Estate. The five are defendants in the action, together with Surjeet, Herman Jr., Bridgewater and HEL.

**4**  Erwin is the sixth residual beneficiary of the Estate, as well as an executor and trustee. He has no ownership interest in Bridgewater. In 1999, he assigned his interest in the Estate to Clock. Shortly thereafter, he was petitioned into bankruptcy.

**5**  HEL transferred the Waterfront Property to Bridgewater without giving notice to Erwin or Clock. According to Clock, the $650,000 paid was below fair market value and the purpose of the transfer was to reduce the value of Erwin's residual interest in the Estate. In addition, the transfer involved the sale of substantially the whole of HEL's undertaking and, pursuant to s. 126(1) of the ***Company Act***, a special resolution of HEL's members was required but not obtained.

**6**  Clock seeks a declaration that the Waterfront Property is an Estate asset and says the transfer is voidable at its behest in its capacity as Erwin's assignee. Clock also seeks an order transferring the Waterfront Property back to HEL, clear of encumbrances, and an accounting of lease payments received by Bridgewater as a result of the transfer.

**7**  The defendants deny any wrongdoing in connection with the Waterfront Property transfer. They say Surjeet and Herman Jr. acted in their capacity as directors of HEL when they transferred the Waterfront Property to Bridgewater and not as trustees of the Estate.

**8**  According to the defendants, the Waterfront Property was a corporate asset of HEL, not an Estate asset, and Bridgewater paid fair market value for its acquisition. They say the transfer was made in good faith for the proper business purpose of preserving the value of HEL's principle asset, an outstanding receivable.

**9**  In addition to defending the propriety of the transfer, the defendants challenge Clock's standing to advance a claim under s. 126(1) of the ***Company Act***. They also give notice of their intention to seek special costs in connection with Clock's claim of conspiracy and abandoned claims of fraud.

**ISSUES**

**10**  There are many contested factual questions for determination. In addition, the following issues arise:

1. Was the Waterfront Property an Estate asset or a corporate asset of HEL?
2. Were Surjeet and Herman Jr. acting as Estate trustees or corporate directors when HEL transferred the Waterfront Property to Bridgewater?
3. If Surjeet and Herman Jr. were acting as corporate directors did they act negligently by failing to expose the Waterfront Property to the open market?
4. If Surjeet and Herman Jr. were acting as corporate directors did they breach s. 126(1) of the ***Company Act***? If so, can Clock apply to set the sale aside?
5. Did Surjeet and Herman Jr. breach their trust and fiduciary duties when HEL transferred the Waterfront Property?
6. Did the defendants commit the tort of conspiracy in agreeing to the Waterfront Property transfer?

**FACTS**

***Background***

**11**  Herman Singh Braich Sr. was the patriarch of the Braich family of Mission, British Columbia. He died on his sixty-fifth birthday, May 21, 1976. At the time of his death he was married to Surjeet Kaur Braich, with whom he had six children: Erwin, Herman Jr., Bobby, Kenny, Jimmy and Reita. He also had three daughters in India from a previous marriage.

**12**  Mr. Braich Sr. was a successful businessman throughout the course of his lifetime. When he died he owned one half of the shares in Herman Sawmill Ltd. ("Sawmill"), a Mission area sawmill operation. He also owned and controlled HEL, a holding company which owned the other half of the shares in Sawmill.

**13**  Mr. Braich Sr.'s will was probated in the Supreme Court of British Columbia on August 3, 1977. It was varied thereafter and certain assets were transferred to Mr. Braich Sr.'s first wife and their daughters. By this means, the first family's interest in the Estate was bought out.

**14**  The will, as varied, provided for a life interest in the matrimonial home in Mission to Mr. Braich Sr.'s widow, Surjeet, together with a life interest in the income from 37.5% of the Estate residue. It also provided for distribution of 62.5% of the residue to the six Braich children at certain ages and, on Surjeet's death, the remainder interest in the matrimonial home and 37.5% of the residue.

**15**  When Mr. Braich Sr. died Surjeet became an officer and director of HEL, now an Estate owned company. In addition, she became the sole executrix and trustee under the will, as varied, until her sons Herman Jr. and Erwin were also appointed executors and trustees. Herman was appointed in 1988. Erwin was appointed in 1989.

**16**  The will provides the trustees with extensive powers and discretions with respect to trust property. It does not contain a majority clause. Accordingly, the trustees are required to act unanimously in the discharge of their duties and obligations.

**17**  Over the years, HEL advanced substantial loans to the Estate beneficiaries. By 2002, financial statements indicate that advances in excess of $7,900,000 had been made.

**18**  Family members and their companies also borrowed money from and loaned money to one another on a regular basis. Estate distributions to the Braich children were made from time to time. Surjeet, however, did not receive all of the income from the 37.5% of the residue to be set aside for her pursuant to the provisions of the will. According to the Estate's accountants, over $1,000,000 is owed to her in this regard.

**19**  In his testimony at trial Bobby described the relationships between members of his family as dysfunctional. Sadly, this description is apt. Since reaching adulthood some Braich family members have struggled with alcohol abuse, poor anger control and chronic interpersonal conflict. Battles between family members erupt frequently and often relate to business and Estate matters. Many have been played out in court.

**20**  Since her husband's death, Surjeet has continued to live in the matrimonial home in Mission. She has taken an interest in her corporate and trustee roles but, as before, her primary focus has remained on her family. For this reason, Surjeet has always relied heavily on assistance from her sons and the professionals she, HEL and the Estate have engaged.

**21**  One of the professionals engaged by the Braich companies and Estate over the years was Graham C. MacKenzie, Q.C. Mr. MacKenzie is also a principal of the plaintiff, Clock Holdings Ltd.: a holding company that he and his children own.

**22**  Mr. MacKenzie is a senior solicitor with the law firm MacKenzie Fujisawa LLP. He was called to the bar in 1957 and practices primarily in the areas of commercial and business law, as well as wills and estates.

**23**  It is not clear precisely when Mr. MacKenzie first became involved with the Braich family's corporate and Estate matters. He was acquainted with Mr. Braich Sr., for example, but did not know him well. It is clear, however, that by 1987 Mr. MacKenzie had acted for Surjeet in the first passing of Estate accounts. He also acted for Surjeet, Herman and Erwin in 1995 in the second passing of accounts.

**24**  Although Mr. MacKenzie acted for all three Estate trustees until 1998, he consulted with and took instructions primarily from Erwin. By 1995, in addition to working together on Braich corporate and Estate matters, Mr. MacKenzie and Erwin had become close personal friends.

**25**  In December, 1995 Mr. MacKenzie caused Clock to provide Erwin with a $400,000 personal loan. Erwin signed a promissory note and, as part of the transaction, executed a loan agreement by which he agreed to provide security suitable to Clock.

**26**  Mr. MacKenzie did not advise Surjeet and Herman Jr. of the $400,000 personal loan to Erwin in 1995.

**27**  On March 31, 1999, Clock provided Erwin with a further loan of $110,000. Again, a promissory note was signed. On this occasion, however, Clock also obtained an assignment of Erwin's right, title and interest in and to the will, the Estate and Erwin's entitlement in respect of the will or the Estate as security for the loans. That interest is 18.65% of any remaining undistributed residual interest in the Estate upon the death of Surjeet.

**28**  On April 1, 1999, ***Personal Property Security Act*** registration of the security was filed. In addition, on April 7, 1999 Mr. MacKenzie gave notice of the Clock assignment to the other Estate trustees, Surjeet and Herman Jr.

**29**  Although Clock is Erwin's creditor, it is not a creditor of HEL.

**30**  On October 1, 1999, Erwin was petitioned into bankruptcy. KPMG Inc. was appointed the trustee of his estate.

**31**  In its report of October 29, 1999 (the "KPMG Report"), KPMG listed Erwin's interest in his late father's Estate amongst his assets. Clock and KPMG have concluded an agreement to share in Erwin's interest in the Estate.

**32**  In the KPMG Report, KPMG estimated Erwin's liabilities as being in excess of $20,000,000. Erwin hotly contests the accuracy of this contention.

***Preliminary Comment on Contested Facts***

**33**  Many other facts alleged by the parties are also hotly contested. Given the nature and extent of the contest it is appropriate, at this juncture, to comment on one of its aspects and on the general credibility of the witnesses.

**34**  Clock presented its evidence at trial by various means: *viva voce* testimony, documentary evidence and read-ins of questions and answers from the examinations for discovery of certain defendants. In final argument, however, it disputed the truth of some answers given by Surjeet at her discovery and read in as part of its own case.

**35**  Clock read in portions of Surjeet's discovery evidence in which she claimed she did not know how to contact Erwin in 2000 and 2001. Clock's witness, Erwin, testified, however, that he was accessible to family members throughout this period and Clock argued contact could and should have been made.

**36**  Clock also read in Surjeet's discovery evidence that she was not obliged to contact Estate beneficiaries regarding the Waterfront Property transfer because she was acting only as an HEL director: a proposition Clock contests. In addition, it read in Surjeet's discovery evidence to the effect that the Waterfront Property is landlocked and was sold to Bridgewater for more than fair market value to preserve the value of HEL's outstanding receivable. In final argument, Clock took the position that these assertions were inaccurate and untrue.

**37**  The defendants submit that Clock cannot attempt to contradict by other evidence the discovery evidence it chose to read in as part of its own case. Rather, by so doing, the defendants submit Clock must be taken to have adopted the evidence read in as accurate and true. In support of this proposition they cite ***Welsh Enterprises Ltd. v. M. Milligan & Assoc. Ltd.***, [*2005 BCSC 1095*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B125-00000-00&context=).

**38**  I do not agree that ***Welsh*** stands for the proposition advanced by the defendants. In ***Welsh***, Chamberlist J. held that, by reading in the defendant's discovery evidence, the plaintiff made the defendant's explanation of its actions part of his own case. He noted that no contradictory evidence was led by the plaintiff and, given the nature of the explanation read in, concluded there was no case to be met by the defence.

**39**  There is no general rule as to the extent to which a party is bound by using in evidence the examination of an opposing party: ***Sherlock v. Burnett and Bullock*** [*(1938), 1 W.W.R. 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JGPY-X0PS-00000-00&context=). In ***Wilson v. Boltezar***, [*[1989] B.C.J. No. 592*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JF75-M3PG-00000-00&context=) Vancouver Registry No. C873747, Bouck J. stated:

Usually a plaintiff only reads into evidence those parts of the discovery of the defendant which assists his case. Now, the plaintiff elected to include as part of his case discovery evidence of the defendant which contradicts his claim. I must assume that counsel for the plaintiff read in the discovery on the instruction of his client. The weight of authority is to the effect that a plaintiff is not necessarily bound by reading in discovery evidence which is against him. It all depends upon the circumstances.

**40**  Generally speaking, the Court can accept some, all or none of the evidence of a witness. In some cases, when a plaintiff presents contradictory accounts of a crucial event by way of *viva voce* testimony, on one hand, and discovery evidence, on the other, the two competing versions, without more, simply cancel one another out. In such circumstances, the burden of proof is not met and the claim will be dismissed: ***Tsatsos v. Johnson***, [*[1970] B.C.J. No. 115*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-DXHD-G11V-00000-00&context=). In other cases, however, the Court is able to consider and analyse the competing accounts together with the other evidence presented in order to determine the appropriate weight to be attached to each: ***Noel v. Mayer***, [*2007 BCSC 1892*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X3J0-00000-00&context=).

**41**  In this case, I conclude that Clock is not bound by the discovery evidence it read in at trial. Erwin, Surjeet, and several other witnesses, including an appraiser, testified at length regarding the contentious matters with which the discovery evidence is concerned. Although it was, in my view, unusual for Clock to read in unhelpful discovery evidence, I am able to weigh it, together with the other evidence, to decide whether it is reliable or otherwise: see ***Atkins v. Ulrichsen*** [*(1973), 37 D.L.R. (3d) 368*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-F7G6-61JC-00000-00&context=).

***General Comments on Witness Credibility***

**42**  Surjeet, Erwin, Herman Jr., Kenny, Bobby and Graham MacKenzie all testified at trial. Their evidence on key factual points often conflicted and must, therefore, be scrutinised with particular care. The credibility of each should be analysed taking into account the words of O'Halloran J.A. in ***Faryna v. Chorny*** [*(1951), 4 W.W.R. (NS) 171*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (B.C.C.A.):

In short, the real test of the truth of a 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.

**43**  Devon Pallman, a surveyor, and Donn Bennett, an appraiser, also testified. Their evidence was consistent, careful and clear. To varying extents and for differing reasons, however, the same cannot be said for all of the evidence given by the other witnesses.

**44**  Surjeet is an intelligent, independent-minded 81-year-old woman. She is not, however, sophisticated in matters of business and her memory was, at times, obviously weak. Throughout her testimony, Surjeet demonstrated confusion and uncertainty regarding the factual and legal details of relevant corporate and estate transactions. Although much of her testimony as to family interactions was reliable, her testimony as to corporate and estate matters sometimes was not.

**45**  Erwin was not a credible witness. He was grandiose, tangential and self-serving in his direct testimony and unresponsive, inconsistent and evasive on cross-examination. His account of events often contrasted sharply with that of all other witnesses involved and occasionally approached the bizarre. Except in so far as Erwin's evidence was independently corroborated I accord it no weight.

**46**  Herman Jr. was not a particularly credible witness either. Although his demeanour in the witness stand was much more restrained than Erwin's, his answers to questions on discovery were sometimes unresponsive and inconsistent with his testimony at trial. In addition, his explanation for certain consulting fees charged to HEL was implausible and self-serving. I approach his evidence with caution.

**47**  Kenny was also not a particularly credible witness. He testified that he lied in 2002 when he told Mr. MacKenzie, amongst other things, the purpose of the Waterfront Property transfer to Bridgewater was to "screw" KPMG. He claimed he made this statement because he was furious with his family and wanted Mr. MacKenzie's attention and help. After Clock commenced the action, however, Kenny disavowed his statements and challenged some of Mr. MacKenzie's account of the surrounding circumstances. I approach his evidence with caution as well.

**48**  Bobby was significantly more credible than his brothers and more reliable than his mother. He responded to questions directly, carefully, and without undue elaboration. In my view his evidence was generally reliable, although he claimed not to remember all aspects of his thinking regarding the Waterfront Property transfer, which, in the circumstances, is surprising. He also took inconsistent positions with the Canada Customs and Revenue Agency ("CCRA"), on one hand, and at trial, on the other, as to the nature of the transfer. I approach his evidence with respect to the Waterfront Property transfer with a measure of caution.

**49**  Some of Graham MacKenzie's evidence was also surprising. Under cross-examination Mr. MacKenzie acknowledged failing to produce, in the litigation, detailed notes of his 24 conversations with Kenny in 2002. He also acknowledged failing to produce a draft affidavit regarding those conversations, which draft affidavit Kenny refused to sign.

**50**  The circumstances and content of the conversations between Mr. MacKenzie and Kenny in 2002 were important factual issues. Although counsel claimed responsibility for Clock's failure to produce the notes, the failure to produce the draft affidavit was unexplained. Given Mr. MacKenzie's legal training, the failure to produce these highly relevant documents suggests an unsettling attitude toward Clock's litigation obligations. His failure to mention, in direct evidence, the draft affidavit and Kenny's refusal to sign it is also unsettling. Although I accept most of Mr. MacKenzie's evidence, I approach his testimony regarding Kenny's statements in 2002 with a measure caution as well.

***Sale of Sawmill and Retention of Waterfront Property***

**51**  In June 1994, the Braich family decided to sell their interest in Sawmill to West Coast Forest Products Ltd. ("West Coast"). At the time, Surjeet, Herman and Erwin were officers and directors of HEL, as well as executors and trustees of the Estate. Mr. MacKenzie and his firm acted for the Braich companies in the sale.

**52**  The sale was accomplished by HEL and the Estate selling their shares in Sawmill to West Coast. Prior to the sale's conclusion, however, four properties owned by Sawmill and Surjeet were transferred to HEL for the total sum of $290,000. These are the properties known collectively as the Waterfront Property.

**53**  When Sawmill transferred the Waterfront Property to HEL it also purported to transfer certain chattels, including an office building, lunchroom and workshop, for $222,000. The chattels were not located on the Waterfront Property, however, and the purported basis for the transfer is unexplained.

**54**  The Waterfront Property comprised, in combination, 30.25 acres. It is located north of the Fraser River and west of Commercial Street in Mission and was used for a log sorting operation.

**55**  Surjeet owns, in fee simple, properties located north of and adjacent to the Waterfront Property ("Surjeet Braich Land"). The Surjeet Braich Land is not part of the Estate. As a result of its location, the Waterfront Property is essentially land-locked.

**56**  After the Waterfront Property was transferred to HEL, Sawmill, now owned by West Coast, arranged to lease it back. The lease was for a seven-year period, ending June, 2001, with an option to renew. Pursuant to the terms of the lease, Sawmill paid rent of $100,000 per annum to HEL.

**57**  When the Waterfront Property lease was concluded Surjeet also executed a non-exclusive easement and licence with Sawmill to run concurrently with its term. The easement allowed for access to the Waterfront Property across the Surjeet Braich Land. The licence allowed for use of the office and certain chattels.

**58**  In March, 1996, Sawmill assigned the lease and easement to West Coast. From that time forward until 2005, West Coast continued to occupy the Waterfront Property and gain access to it through the Surjeet Braich Land.

**59**  Between June, 1994 and March 30, 2001, when HEL transferred the Waterfront Property to Bridgewater, it managed the West Coast lease and received the $100,000 annual income stream.

**60**  After West Coast purchased Sawmill, members of the Braich family continued to engage in a wide range of business activities. Bobby, for example, worked as general manager for Sawmill and its new owners, West Coast, until 1999. Erwin and Kenny, on the other hand, pursued other business and investment opportunities.

***The New York Property***

**61**  Reita lives in Woodstock, New York. In 1996, after visiting her there, Erwin learned of a large property that was listed for sale (the "New York Property").

**62**  The New York Property is a 12.5 acre estate with a grand 12,000 square foot stone mansion, beautiful gardens and guest apartments. Erwin considered it an excellent investment opportunity and developed a strong desire to own it. He asked Reita to keep her eye on the property in case an opportunity to purchase it should arise.

**63**  In August, 1996 the New York Property was offered for sale by auction. Reita alerted Erwin, who made arrangements to bid for it over the telephone. When the auction proceeded Erwin placed a successful bid of US$1,500,000 plus tax.

**64**  Although Erwin bid on the New York Property he did not have the funds required to complete the purchase. When his bid was accepted he contacted Bobby, who loaned him US$159,000 for the non-refundable deposit needed to secure the sale. The loan was advanced based on Erwin's assurance that it would be repaid quickly because full financing would soon be obtained or the property would be flipped.

**65**  After the deposit was paid Erwin discovered that, to his chagrin, he could not easily obtain the financing necessary to complete the New York Property purchase. In response to this turn of events, he became very distraught. Eventually, he called Herman Jr. and asked that the Estate or HEL lend him the necessary funds.

**66**  When Erwin approached Herman Jr. he claimed he would be able to obtain financing for the purchase shortly, but could not do so before the impending closing date. Unless the requested funds were provided immediately, however, the non-refundable deposit would be lost. As with his approach to Bobby, Erwin promised Herman Jr. that any loan advanced would be quickly repaid.

**67**  Although Herman Jr. was sceptical about Erwin's proposal he agreed to raise it with Surjeet and the other family members. He did so and, while he and Surjeet were discussing the matter, they received an urgent telephone call from Kenny, who lived in California at the time.

**68**  Kenny reported that Erwin had called him in a state of extreme distress and threatened to commit suicide if the family did not help him complete the New York Property purchase. Erwin denies making this statement. I am satisfied that he did.

**69**  Most of the family took Erwin's suicide threat seriously. A poll was taken and they decided to rescue Erwin by ensuring the New York Property purchase would complete. Herman Jr. proposed, however, that, rather than lend Erwin money, the Estate should take title to the New York Property through a numbered company. HEL would lend the necessary funds to that company and Erwin would purchase the property from it when the anticipated financing was obtained. This was the course that was finally agreed upon.

**70**  As agreed, the Estate obtained a shell company, 519058 B.C. Ltd. ("519"), from Mr. MacKenzie's law firm to complete the purchase of the New York Property. HEL advanced US$1,590,000 to 519, which paid the purchase price and took title. Bobby's loan for the non-refundable deposit was also repaid.

**71**  Erwin, however, did not hold up his end of the agreement. Although he continued to offer to buy the New York Property from 519 at full cost, including expenses, his offer was effective only when funds for the purpose should become available. That never occurred.

**72**  It was expensive for 519 to maintain the New York Property. The main house remained vacant and, until August, 1998, there were monthly caretaker costs of approximately $5,000, property taxes, insurance and general maintenance costs to be met. After August, 1998, the caretaker costs were avoided because Reita moved into the guest house and took over the task. Costs associated with taxes, insurance and general maintenance, however, continued to mount.

**73**  519 had no resources of its own to cover the costs of maintaining the New York Property. To ensure that they were met, HEL repeatedly advanced funds to 519. According to HEL's financial statements, from February, 1997 to February, 2001 expenses amounted to $291,766. By February 28, 2001 HEL's total receivable from 519 was $2,646,191.

**74**  In 1997, Mr. MacKenzie reminded Surjeet, Herman Jr. and Erwin of their duty, as Estate executors and trustees, to maintain the New York Property. In a letter dated December 29, 1997 he wrote:

There is a concern that the bills concerning the New York property are not being paid. Apparently, insurance comes up in early January and concerns have been expressed about other bills for taxes, caretaker, alarm system, and general maintenance.

The New York property has to be looked at as if it were an Estate asset and it is the Executors' duty to maintain it and I cannot stress too strongly how important it is that the insurance, etc. be kept current.

Mrs. Braich has indicated there are not sufficient funds on hand to pay the bills for the New York property because the funds on hand must be kept for the Mission property.

I would ask that this position be reconsidered and stress again you must pay the bills to keep properly maintained the New York property.

**75**  As noted, HEL, Braich family members and their companies borrowed money from and loaned money to one another regularly. In 1999 and 2000, Bobby and Surjeet loaned funds to HEL which were, in turn, loaned to 519. These funds were used to pay expenses associated with the New York Property and avoid its loss through foreclosure.

**76**  Bobby described the New York Property as a financial albatross. Surjeet and Herman Jr. testified to similar effect. In contrast, Erwin characterized the property as a good investment and denied knowing, after 1998, of problems associated with the cost of its upkeep. I accept the evidence of Bobby, Surjeet and Herman Jr. and reject the evidence of Erwin on this point.

**77**  The New York Property was, in fact, listed for sale by 519 within a few months of its acquisition in 1996. No viable offers were received. In the fall of 2000 Herman Jr. travelled to New York, where he met with realtors and lenders in an effort to sell or refinance the property. These efforts did not meet with success.

**78**  In August, 2000, the three Estate trustees, Surjeet, Herman Jr. and Erwin, met in Vancouver to determine a selling price for the New York Property. They agreed that any offer of at least US$1,500,000 should be accepted and the property should be sold.

**79**  The August, 2000 meeting was necessary because the Estate was the sole shareholder of 519. The New York Property was its only asset and the whole of its undertaking. In these circumstances, s. 126 of the ***Company Act*** required approval of the sale by shareholders resolution. To vote the Estate's share, the approval of all three trustees was required and obtained.

**80**  The New York Property was finally sold in September, 2002. Overall, HEL suffered a loss in the range of $1,500,000 in connection with its acquisition and ownership over the years.

***Family Contact with Erwin Between 1998 and 2002***

**81**  For many years Erwin led a distinctly itinerant lifestyle. He went through a bitter divorce in the mid-1990s and experienced serious financial troubles in the period leading up to his bankruptcy in 1999. By then, Erwin owed substantial sums to, amongst others, various family members. Between 1998 and 2002 he travelled extensively and lived in hotels in the lower mainland area of British Columbia and Washington State.

**82**  Erwin testified that, despite his itinerancy, he was in regular contact with his family and other known associates. He claimed he could be reached by family members easily, at virtually any time.

**83**  Surjeet and Herman Jr. acknowledged that Erwin contacted them periodically. They testified, however, that they were often unaware of his whereabouts and unable to reach him for months at a time. According to Surjeet and Herman Jr., family contact with Erwin has been sporadic since the mid-1990s. In fact, after the August, 2000 trustees meeting in Vancouver, they did not see Erwin in Canada again until 2007, when they saw him in court.

**84**  I conclude that Erwin was generally inaccessible to family members, including Surjeet and Herman Jr., between 1998 and 2002. It was, therefore, difficult, as a practical matter, for the three trustees to conduct Estate business directly given that unanimity was required.

**85**  As a result of Erwin's inaccessibility, Surjeet and Herman Jr. removed him as a signing officer of HEL and 519 in July 1998. Since then, financial matters pertaining to the Estate have been dealt with indirectly by HEL.

**86**  By October, 1999, pursuant to s. 114(1)(d) of the ***Company Act***, Erwin was not qualified to act as a company director. This was so because he was an undischarged bankrupt.

**87**  Erwin remains an executor and trustee of the Estate. In separate proceedings, Clock has sought the removal of Surjeet and Herman Jr. as executors and trustees.

***Bridgewater***

**88**  Bridgewater was incorporated in July, 2000. It is owned by Herman Jr., Bobby, Kenny, Jimmy and Reita, but not Erwin. Surjeet has no ownership interest.

**89**  According to Bobby, Erwin was excluded from Bridgewater because of his status as an undischarged bankrupt and his estrangement from family members. I accept Bobby's testimony in this regard.

**90**  Bobby also testified that, when Bridgewater was formed, there was no plan in place to use it to purchase the Waterfront Property. Again, I accept Bobby's unchallenged testimony on this point.

***The Waterfront Property Transfer***

**91**  By late 2000, the New York Property was again in foreclosure. On October 16, 2000, the County gave notice that US$50,975 was due and owing and provided for a final payment date of February 16, 2001. Herman Jr. later obtained an extension of time for payment to March 16, 2001.

**92**  HEL had insufficient funds on deposit in February and March, 2001 to pay the outstanding tax obligation. As noted, the New York Property had been a financial albatross for years and, thus far, efforts to sell it had failed. Bobby was not willing to lend HEL further funds to cover the cost of its upkeep, nor was he, or any other beneficiary, obliged to do so.

**93**  Clock challenged the proposition that, in early 2001, HEL could not afford to pay the New York Property tax obligation. In so doing, it pointed to a cheque issued to Herman Jr. on December 31, 2000 for "consulting fees" and argued this demonstrated HEL had ample access to funds. It also argued that outstanding loans to family members were sufficient to satisfy the obligation if those funds were available.

**94**  I accept the consulting fees charged by Herman Jr. were of questionable validity. I am satisfied, however, that the funds available to HEL in 2001 were not significantly reduced as a result. Rather, most of the funds HEL paid out to Herman Jr. for the consulting fees in question were immediately transferred back into its bank account. In consequence, Herman Jr.'s loan account was correspondingly reduced but HEL's cash flow was not.

**95**  I also accept there may be cause for concern regarding the general management of HEL and the Estate over time. That was not, however, the focus of the evidence at trial. In particular, regardless of the reasons HEL advanced loans to family members, it was not apparent the funds were available for them to be repaid in early 2001.

**96**  Family discussions were held in late 2000 and early 2001 concerning the immediate and ongoing financial problems associated with the New York Property. In the course of these discussions the Braich siblings, other than Erwin, agreed that Bridgewater should offer to purchase the Waterfront Property from HEL. By this means, funds would be raised by HEL and applied to the costs of maintaining the New York Property until a suitable buyer could be found. In addition, the Waterfront Property would be retained in family members' control.

**97**  Bridgewater offered to purchase the Waterfront Property and chattels located on the Surjeet Braich Land from HEL for the total sum of $650,000. This price was set without the property being exposed to the open market or an appraisal being obtained.

**98**  On March 1, 2001 Bridgewater passed a director's resolution approving the proposed purchase of the Waterfront Property. Given his conflict as a director of HEL, Herman Jr. abstained.

**99**  Surjeet accepted Bridgewater's offer on behalf of HEL. On March 16, 2001, she approved the sale, by way of director's resolution, as the sole director of HEL. Given his conflict as a member of Bridgewater, again Herman Jr. abstained.

**100**  When HEL approved the sale of the Waterfront Property a special resolution of members, pursuant to s. 126(1) of the ***Company Act***, was not obtained.

**101**  On March 16, 2001, in anticipation of the Waterfront Property transfer, Bobby advanced $100,835.82 to HEL. Thereafter, HEL forwarded the funds to 519 and the outstanding property taxes for the New York Property were paid.

**102**  On March 21, 2001 Bridgewater paid HEL a deposit of $25,000.

**103**  On March 29, 2001 Bobby and Herman Jr. signed a CCRA document entitled "Election Concerning the Acquisition of a Business or Part of a Business" with respect to the Waterfront Property transfer. In it, they represented, for GST purposes, that the sale involved all or substantially all of the business of HEL.

**104**  On March 30, 2001 the Waterfront Property transfer completed. Bridgewater paid HEL $200,000 immediately. The balance of the purchase price was the subject of vendor back financing owed by Bridgewater to HEL and secured against the property. Bridgewater also registered a mortgage against the Waterfront Property for $250,000 in favour of Bobby.

**105**  Bridgewater paid HEL the remaining purchase price in May, August and October, 2001 and January, 2002. Following receipt of these payments, HEL advanced further funds to 519 to pay for insurance and taxes on the New York Property. Surjeet also obtained a partial repayment of her loans to HEL.

**106**  In 2000 the CCRA registered a judgment of approximately $700,000 against the Estate-owned matrimonial home. As a result of the sale of the New York Property in 2002, the judgment was paid.

**107**  As part of the Waterfront Property transfer, Bridgewater received an assignment of HEL's right, title and interest under the West Coast lease. Thereafter, it received the lease payments of approximately $100,000 per annum until West Coast terminated the lease in 2005.

**108**  Surjeet and Herman Jr. did not notify Erwin, Clock or KPMG of HEL's intention to transfer the Waterfront Property, nor did they seek directions or approval from the Court. Both testified that they were acting in their capacity as HEL directors, not Estate trustees, in connection with the transaction. Accordingly, from their perspective, such notice and approval were not required.

***The Purpose of the Waterfront Property Transfer***

**109**  Surjeet, Herman Jr., Bobby and Kenny testified their only purpose in agreeing to transfer the Waterfront Property to Bridgewater was to protect HEL's most valuable asset: the receivable owing from 519. That asset was jeopardised, they said, by the outstanding taxes and ongoing maintenance costs of the New York Property, particularly in light of the impending foreclosure.

**110**  As noted, Surjeet and Bobby had, in the past, loaned money to HEL to meet costs associated with the New York Property. They testified, however, that, by 2001, they were no longer prepared personally to do so. I accept their evidence in this regard.

**111**  I also accept that HEL had insufficient funds to pay the outstanding taxes for the New York Property and thus avoid foreclosure. In the circumstances, Surjeet and Herman Jr. decided to sell HEL's other asset and apply the funds received to maintain the New York Property until it could be sold.

**112**  Clock challenges the validity of this explanation for the Waterfront Property transfer. It characterises HEL's allegedly urgent need to cover costs of the New York Property as an after-the-fact explanation devised in response to the lawsuit. In Clock's submission, the real purpose of the transfer was to "screw" KPMG by reducing the value of Erwin's residual interest in the Estate.

**113**  In support of its submission, Clock relies on statements made by Kenny to Graham MacKenzie between February and August, 2002 in several telephone conversations. In summary, according to Mr. MacKenzie, Kenny made wide-ranging accusations of serious misconduct by his family members in their business and Estate dealings, as well as their personal lives. One of those accusations related to the Waterfront Property transfer.

**114**  According to Mr. MacKenzie, Kenny told him HEL transferred the Waterfront Property to Bridgewater for $700,000 in order to "screw" KPMG. He said Kenny claimed the Waterfront Property was sold for undervalue and he had personally offered to buy it for $3,900,000. He also said Kenny claimed the property was, in fact, worth at least $5,000,000.

**115**  Kenny acknowledged making some, but not all, of the statements Mr. MacKenzie attributed to him. He testified, however, that they were made in extreme anger because he was in conflict with his family and Surjeet was trying to evict him from the family property. He also said Mr. MacKenzie took much of what he said out of context and conflated it in a manner he considered unfair.

**116**  Kenny admitted telling Mr. MacKenzie something to the effect that the Waterfront Property was transferred to Bridgewater to "screw" KPMG, although he could not recall his exact words. He claimed this statement was completely untrue and made to gain Mr. MacKenzie's attention and assistance with his family dispute. Kenny denied participating in any discussion with any family member in which anyone said anything about "screwing" KPMG in connection with the Waterfront Property transfer. He also refused to sign a draft affidavit presented by Mr. MacKenzie in which the allegedly untrue statement was outlined.

**117**  Clock also relies on the fact that Surjeet and Herman Jr. failed to notify Erwin, Clock and KPMG or obtain court directions or approval in advance of the Waterfront Property transfer. In addition, they failed to expose the Waterfront Property to the open market which would have resulted in notice to the public at large.

**118**  In Clock's submission, I should infer from these failures that the defendants' combined purpose in transferring the Waterfront Property was to reduce the value of Erwin's interest in the Estate. According to Clock, that purpose was not, as claimed, to enable HEL to secure funds for payment of the New York Property taxes and ongoing maintenance costs.

**119**  I decline to draw the inferences suggested. In my view, there is no strong, clear link between the failures complained of and the wrongful purpose alleged. Rather, it is equally likely that notice was not given and court directions or approval were not sought because Surjeet and Herman Jr. considered such steps unnecessary. Given their familiarity with the Waterfront Property, the same may be said of their decision not to expose it to the open market prior to sale.

**120**  I do not, however, fully accept Kenny's explanation for his statements to Mr. MacKenzie. Although he was angry, he was rational and spoke against his own interest. In my view, it is unlikely Kenny would have intentionally implicated himself in a complete lie about a land transaction to gain Mr. MacKenzie's attention and help. Taking into account the other topics discussed, he could easily have accomplished that goal by simply stating his perception of the truth.

**121**  Although I do not accept Kenny intentionally lied to Mr. MacKenzie, I am satisfied that he exaggerated. In addition, I am not confident that his statements were particularly reliable or precisely reported by Mr. MacKenzie when he testified. For example, Kenny's claims about the value of the Waterfront Property were plainly inaccurate. In addition, the $3,900,000 purchase offer he mentioned could have related to the entire family property in Mission and not just the Waterfront Property. Unfortunately, absent the detailed notes of the conversations, it is difficult to assess the extent to which Mr. MacKenzie may have conflated, misremembered or misinterpreted what Kenny actually said.

**122**  Further, these unadopted hearsay statements are, at best, admissible against Kenny only. They do not meet the requirements of the co-conspirators' exception to the hearsay rule as they were made after the fact and not in furtherance of a common design: ***Insurance Corporation of British Columbia v. Sun***, [*2003 BCSC 1059*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-22HJ-00000-00&context=); ***R. v. Miller and Cockriell*** (1975), D.L.R. (3d) 193.

**123**  I have found the New York Property was a financial albatross for HEL. I agree with Bridgewater that the transfer would probably have occurred sooner if the need to cover its maintenance costs was nothing more than a concocted excuse. In addition, Surjeet and Bobby would not likely have loaned money to HEL in 1999 and 2000 to help pay those costs and funds received from the transfer would not likely have been applied to meet them.

**124**  I am satisfied Surjeet, Herman Jr., Bobby, Kenny and the other personal defendants wished to retain the Waterfront Property within the family. That does not necessarily mean, however, they intended, in so doing, to injure Erwin or his assignees by reducing the value of Erwin's interest in the Estate.

**125**  Taking into account all of the evidence, I accept Bobby's explanation of the main reason for the Waterfront Property transfer. I find its predominant purpose was to raise funds for HEL to apply immediately to the outstanding tax obligation and to the ongoing costs of maintaining the New York Property. In so doing, they intended to protect HEL's outstanding receivable from 519 and, at the same time, keep the Waterfront Property within family members' control.

**126**  I infer that Surjeet, Herman Jr., Bobby and Kenny realised Erwin, Clock and KPMG would be affected by the Waterfront Property transfer in the sense that an Estate owned company, HEL, would be divested of a valuable asset. They also realised it would be sold to a company that Erwin did not own. When Kenny told Mr. MacKenzie KPMG had been "screwed" this may have been what he meant.

**127**  The admissible evidence does not establish, however, that the effect of the transfer on Erwin, Clock or KPMG was the focus of Surjeet, Herman Jr., Bobby or Kenny's thinking. In addition, and importantly, its effect upon them was indirect.

**128**  Although HEL divested itself of the Waterfront Property by transferring it to Bridgewater I accept that Surjeet, Herman Jr., and Bobby believed it did so for a proper business purpose and adequate consideration. Unless the value of HEL's shares was diminished in consequence, Erwin, Clock and KPMG would not be harmed.

***Was Fair Market Value Paid for the Waterfront Property Transfer?***

**129**  As noted, Surjeet and Herman Jr. did not obtain an appraisal of the Waterfront Property or expose it to the open market prior to its transfer. They were, however, well familiar with appraisals obtained in 1988 and 1990 and with the property itself. In addition, they knew of an assessment that ascribed a land value of $390,000 for 2001.

**130**  Surjeet and Herman Jr. were also aware of several issues that impacted the potential value of the Waterfront Property. For example, it was land-locked and could only be reached by crossing the Surjeet Braich Land. Although Erwin testified to the contrary, I reject his evidence and note it conflicts with that of the appraiser upon whose expert opinion Clock relies.

**131**  Erwin also testified that the Waterfront Property, combined with the Surjeet Braich Land, has extremely valuable development potential. He spoke enthusiastically about the prospect of a dynamic waterfront development and mentioned exploratory meetings with the District of Mission. According to Erwin, the Waterfront Property is an important piece of an intricate jigsaw puzzle worth tens of millions of dollars.

**132**  I do not doubt the sincerity of Erwin's belief. It is, however, unsupported by credible evidence and entirely speculative.

**133**  The Surjeet Braich Land is not an Estate asset. Surjeet granted an easement in favour of Sawmill to allow access to the Waterfront Property, but no other agreements are in place. Although Surjeet may leave her land to some or all of her children, given the family's extraordinarily acrimonious history this prospect is by no means certain. I accept Surjeet's testimony that she does not presently know what she will do with the Surjeet Braich Land, either while she is alive or when she dies.

**134**  Other concerns also exist with respect to the Waterfront Property. They include the fact that approximately 11 acres are submerged under water, there is no dyke protection, flood proofing would be very expensive, environmental issues related to past use could arise and there is unpleasant noise and odour in the area. In addition, as of 2001 the viability of the West Coast lease was in doubt due to West Coast's historically precarious financial position. All of these concerns were well known to the defendants.

**135**  I am satisfied that Surjeet and Herman Jr. took into account the prior appraisals, the assessment and the known concerns with the Waterfront Property in deciding to accept $650,000 from Bridgewater. They did not obtain an appraisal because they did not think it necessary in order to assess the quality of the offer. They did not expose the property to the open market because of time pressures associated with the impending foreclosure and their desire to keep the Waterfront Property within family members' control.

**136**  According to Bobby and Herman Jr., Bridgewater considered most, if not all, of the $650,000 it paid to HEL was for the land, not the chattels, included in the sale. Those chattels consisted of an old workshop, an old fuel shed, and three Britco trailers, none of which were valuable or even located on the property. For tax planning purposes, however, $490,000 of the purchase price was allocated to the land and $160,000 was allocated to the chattels. I accept the evidence of Bobby and Herman Jr. and conclude Bridgewater paid approximately $650,000 for the Waterfront Property itself.

**137**  Although the defendants did not obtain an appraisal prior to the Waterfront Property transfer, HEL did so after the action was commenced. The appraisal was conducted by Donn Bennett of Argent Appraisals Ltd. It was introduced and relied upon by Clock.

**138**  Mr. Bennett's appraisal report is dated August 12, 2002. In it, he expressed the opinion that the market value of the Waterfront Property, as of March 30, 2001, was $750,000. His opinion was qualified, however, by the proviso that no survey was available when the report was written. For this reason, Mr. Bennett was unable to ascertain the extent to which the Waterfront Property included submerged portions. For purposes of his written opinion, he assumed all 30.25 acres were above the water.

**139**  In fact, 11.17 acres of the Waterfront Property were and are under water. In other words, approximately one-third of the property is submerged.

**140**  At his deposition, Mr. Bennett testified that the fact portions of the Waterfront Property are submerged is relevant to a determination of its overall fair market value. Generally speaking, submerged land is appraised at between zero and 40% of the value of the unsubmerged land. There is, however, no hard and fast rule.

**141**  If Mr. Bennett's figures of zero to 40% are applied to the submerged portion of the Waterfront Property its market value is somewhere in the range of $477,000 to $589,000. As he candidly conceded, however, for an accurate assessment to be obtained an appraiser would need to return and re-evaluate the property taking into account the submerged land.

**142**  In Clock's submission, Bridgewater paid less than fair market value for the Waterfront Property transfer. On the evidence presented, I cannot agree. Rather, based on that evidence, I conclude its fair market value in March, 2001 was something in the range of $477,000 to $589,000. Bridgewater paid approximately $650,000: slightly more than that amount.

**DISCUSSION**

***Was the Waterfront Property an Estate asset or a corporate asset of HEL?***

**143**  Clock submits that the Waterfront Property was an Estate asset. The basis for this submission is unclear. No case authority was cited in support.

**144**  HEL is a holding company formerly owned by Herman Braich Sr. and, after his death, by the Estate. In 1994, Surjeet and Sawmill transferred the Waterfront Property into HEL. Thereafter, HEL owned it until it was transferred to Bridgewater on March 30, 2001.

**145**  Corporate entities are separate and distinct from their shareholders: ***Salomon v. Salomon Co.***, [*[1897] A.C. 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HDC-MS71-FFFC-B1D7-00000-00&context=) (H.L.). This distinction applies to corporations owned and controlled by a trust: ***Re Lucking's Will Trusts***, [1967] 3 All E.R. 726.

**146**  In support of its submission that the Waterfront Property was an Estate asset, Clock pointed to an affidavit sworn by Surjeet in other proceedings. In that affidavit, she characterised funds on deposit in HEL's bank account as the property of the Estate.

**147**  With respect, Surjeet's legal assertion in an affidavit is of little moment. Indeed, as Tysoe, J. commented when considering her affidavit, the preponderance of evidence in that case suggested the opposite conclusion: ***Braich v. Herman Enterprises Ltd.*** (September 2, 2003) S.C.B.C. Vancouver Registry No. S033265.

**148**  In this case, the evidence clearly establishes that the Estate owns all of the shares of HEL. It is equally clear, however, that HEL was operated from the outset as a separate and distinct corporate entity. As such, its assets and liabilities were its own.

**149**  Clock, as a remainder beneficiary through Erwin, has an equitable interest in the trust, but no legal interest in trust property. Its equitable interest provides it with a right of action against the trustees in connection with the proper discharge of their duties and obligations. This right is a *chose in action*. It is not an interest in specific trust assets or the assets of a corporate entity owned by the trust.

**150**  Herman Jr. submits the independence of the trustees in exercising their powers and discretions concerning trust property would be compromised if, as Clock asserts, a beneficiary holds equitable title to specific trust assets. Taking into account the terms of the will, I agree.

**151**  In all of the circumstances, I conclude the Waterfront Property was a corporate asset of HEL. It belonged, legally and beneficially, to HEL alone.

***Were Surjeet and Herman Jr. acting as Estate trustees or corporate directors when HEL transferred the Waterfront Property to Bridgewater?***

**152**  The same person may fill the roles of trustee and director of a company in which the trust owns shares: ***Simone v. Cheifetz*** [*(1998), 24 E.T.R. (2d) 74*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD51-JB2B-S0JS-00000-00&context=); ***In the Matter of the Estate of David Montgomery Armstrong, Deceased***, [1986] S.C.B.C. Vancouver Registry No. A861544; ***Butt v. Kelson***, [1952] 1 Ch. 197 (C.A.). Although the potential for conflict between the two roles exists, it does not present a bar: ***Kordyban v. Kordyban***, [*2003 BCCA 216*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X2Y4-00000-00&context=).

**153**  In cases where trustees are majority shareholders of a corporation they may, in fact, be obliged to take an active role in corporate management by serving as its directors. To do otherwise, may amount to a breach of duty to both the company and the trust: ***Kordyban***, paras. 81-87.

**154**  When trustees act as directors, their duty as such is to manage the company's affairs. In so doing, like all corporate directors, they are obliged to act honestly, in good faith and in the best interests of the company: ***In the Matter of the Estate of David Montgomery Armstrong, Deceased***.

**155**  In most instances, what is good for a trust-owned company is also good for the trust. Proper corporate management will be reflected in the company's prosperity and in the value of its shares. Where there is a conflict, however, the trustee director's first duty is to the company. As D.W.M. Waters states in *Law of Trust in Canada (Second Edition)*, 1984:

It is indisputable that a director, whoever he is, must put first the interests of the company in all that he advocates and in his voting on the board, even if he knows that his arguments or his votes are not in the best interests of the trust or some of its beneficiaries. Corporate law requires that he be a director first, and a trustee second.

**156**  In ***Re Lucking's Will Trusts***, a trustee director failed to supervise adequately the drawings of the company's managing director. The managing director went bankrupt and, as a result, the value of the company decreased. Cross J. held there was both a breach of duty and a breach of trust based on the trustee director's failure adequately to supervise. In the circumstances, the decrease in value of the shareholdings was the measure of the loss.

**157**  As in ***Re Lucking's Will Trusts*** and ***In the Matter of the Estate of David Montgomery Armstrong, Deceased***, in this case Surjeet and Herman Jr. were both trustees and corporate directors. In all corporate matters, their first duty was to act honestly, in good faith and in the best interests of HEL.

**158**  HEL owned the Waterfront Property. When Surjeet and Herman Jr. decided to sell it, they acted as corporate directors and not as Estate trustees. In so doing, they fulfilled their first duty: to protect the best interests of HEL.

**159**  Although Surjeet and Herman Jr. acted as corporate directors when the Waterfront Property was transferred to Bridgewater that does not end the inquiry. If their obligations as directors and trustees conflicted, their fiduciary duty to the beneficiaries may, nonetheless, have been breached.

***If Surjeet and Herman Jr. were acting as corporate directors did they act negligently by failing to expose the Waterfront Property to the open market?***

**160**  As HEL's directors, Surjeet and Herman Jr. were governed by s. 118 of the ***Company Act***. It provides:

118 (1) Every director of a company, in exercising the director's powers and performing the director's functions, must

1. act honestly and in good faith and in the best interests of the company, and
2. exercise the care, diligence and skill of a reasonably prudent person.
3. The provisions of this section are in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors of a company.

**161**  In ***Peoples v. Wise***, [*2004 SCC 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B12J-00000-00&context=), the Supreme Court of Canada analyzed the standard of care owed by corporate directors pursuant to similar legislation. In so doing, they considered the "business judgment rule". On behalf of the Court, Major and Deschamps JJ. stated:

In order for a plaintiff to succeed in challenging a business decision he or she has to establish that the directors acted (i) in breach of the duty of care and (ii) in a way that caused injury to the plaintiff: W.T. Allen, J.B. Jacobs, and L.E. Strine, J., "Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law" (2001), 26 Del. J. Corp. L. 859, at p. 892.

Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(b) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

**162**  According to Clock, Surjeet and Herman Jr. failed to exercise the care, diligence and skill of reasonably prudent businesspeople when they failed to expose the Waterfront Property to the open market prior to its transfer. It emphasizes their lack of expertise in property valuation and argues they should have done so. In the circumstances, in Clock's submission, the best means of ascertaining its fair market value was to offer it for open sale.

**163**  I agree. This does not necessarily mean, however, that Surjeet and Herman Jr. were negligent. Perfection is not what was required.

**164**  In February, 2001 HEL was in a difficult financial position due, in part, to the high costs of maintaining the New York Property. Foreclosure was imminent. As a result, the value of the 519 receivable was jeopardised.

**165**  As HEL's directors, Surjeet and Herman Jr. were obliged to act promptly, with reasonable prudence, to protect its most valuable asset. In all of the circumstances, I am satisfied that they did.

**166**  The decision to sell the Waterfront Property was a reasonable business alternative for addressing the immediate and ongoing problem of the New York Property costs. Ideally, the Waterfront Property would have been exposed to the open market or an updated appraisal obtained. Given their familiarity with prior appraisals, the recent assessment and ongoing concerns regarding the property, however, Surjeet and Herman Jr. were reasonably informed of its value. Given the time pressures they faced with the foreclosure and Bridgewater's willingness to pay apparently fair consideration, an open sale was not required.

**167**  Although I find Surjeet and Herman Jr. were not negligent, I note that, in fact, Bridgewater paid more than fair market value for the Waterfront Property. In these circumstances, quite apart from the question of ***negligence***, there is no proof that Clock, or anyone else, has suffered a loss.

***If Surjeet and Herman Jr. were acting as corporate directors did they breach s. 126(1) of the Company Act? If so, can Clock apply to set the sale aside?***

**168**  When corporate directors dispose of substantially the whole of a company's undertaking they must obtain the approval of its members by special resolution. Sections 126(1) and (2) of the ***Company Act*** provide:

126(1) The directors must not sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company unless they have the approval of the members given by a special resolution.

1. If the approval required by subsection (1) has not been obtained, the court, subject to subsection (3), on application by any member, director or creditor of a company, may do one or more of the following:
2. enjoin a proposed sale, lease or other disposition of the whole, or substantially the whole, of the undertaking of the company;
3. set aside a sale, lease or other disposition;
4. make any further order the court considers appropriate.

**169**  Definitions of "member" and "special resolution" are set out in s. 1 of the ***Company Act***. A "member" is defined as:

... a subscriber of the memorandum of a company, and includes every other person who agrees to become a member of a company and whose name is entered in its register of members or a branch register of members ...

A "special resolution" is defined as:

... a resolution passed by a majority of not less than 3/4 of the votes cast by those members of a company who, being entitled to do so, vote in person or by proxy at a general meeting of the company ...

**170**  Despite the requirements of s. 126(1), the sale of substantially all of a company's undertaking may be binding even where a special resolution of members has not been obtained. Section 126(3) of the ***Company Act*** provides:

126(3) A sale, lease or other disposition of the whole, or substantially the whole, of the undertaking of a company to a person with whom the directors are dealing for valuable consideration and in good faith, is valid, despite the failure of the directors to comply with subsection (1).

**171**  The undertaking of a company includes all branches or aspects of the business it is authorised to carry on. In ***Can Work (Brampton) Corp. v. Spray-Pak Industries Inc.***, [*[1996] O.J. No. 1985*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCY1-JTNR-M39K-00000-00&context=) Wilson J. adopted the *Dictionary of Canadian Law (Third Edition)* definition of "undertaking". That definition reads, in part:

... An enterprise or activity, or a proposal, plan or program in respect of an enterprise or activity ...

**172**  In ***Lindzon v. International Sterling Holdings Inc.***, [*[1989] B.C.J. No. 1773*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B0DR-00000-00&context=) Gow J. considered the meaning of "substantially the whole of the undertaking of a company" in the context of an oppression action. The applicant sought an order preventing the sale of an office building on the basis that a special resolution of members was required. In dismissing the application Gow J. stated:

... The meaning of "the whole or substantially the whole of the undertaking of a company" was carefully considered by the Saskatchewan Court of Appeal 85956 Holdings Ltd. v. Fayerman Brothers Ltd. [*(1986) 32 B.L.R. 204*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6W1-JNJT-B4X5-00000-00&context=) in which Vancise J.A. giving the judgment of that Court, held that the test to be applied is not the amount or value of the asset being disposed of, but rather its nature. The test is qualitative and not quantitative. The question is whether the consequence of the sale would be the effective destruction of the company's business (at pp. 210-212). This test seems to be indistinguishable from the test applied by Legg, J. (as he then was) in The Matter of Vanalta Resources Ltd., Vancouver Registry No. A760559, December 17, 1976 in which that learned judge refused an application under the then s. 149 on the ground that the impugned disposition "was not such an unusual transaction that it could be said to have struck at the heart of the corporate existence and purpose" of the company (at. P. 25).

**173**  The Quebec Court of Appeal referred to ***Lindzon*** in ***Cogeco Cable Inc. v. CFCF Inc.*** [*(1996), 136 D.L.R. (4th) 243*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JG61-F956-S49F-00000-00&context=). In so doing, it challenged the proposition that ***Fayerman*** establishes a test of general application and noted both quantitative and qualitative criteria are considered by Canadian courts in deciding what constitutes substantially the whole of a corporate undertaking: ***Re. Vanalta Resources Ltd.*** (December 17, 1976), S.C.B.C. Vancouver Registry No. A760559 (B.C.S.C.); ***Martin v. F.P. Bourgault Industries Air Seeder Division Ltd.*** [*(1987), 45 D.L.R. (4th) 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6X1-JP4G-626B-00000-00&context=); ***Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd.*** [*(1986), 37 D.L.R. (4th) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-JF75-M1F2-00000-00&context=).

**174**  After reviewing the cases, Biron J. stated:

I will now describe, in light of the case law and the doctrine, the principles which we should follow in interpreting s. 189(3) of the Act when, as in the case at bar, there is no dispute about the fact that the proposed sale does not come within the framework of the normal course of a company's activities:

1. in the interpretation of s. 189(3) of the Act, it is appropriate to take into account both quantitative and qualitative criteria;
2. the concept of "substantially all of the property" has acquired a special meaning in this particular area of the law;
3. it is difficult to fix a percentage, but in my view, when the sale involves 75% of the value of the property, it ought to be submitted for shareholders' approval;
4. if the case cannot be decided by using the quantitative test, then we must proceed with a qualitative analysis of the transaction;
5. in such a case, it must be determined whether the proposed transaction constitutes a fundamental reorientation which strikes at the heart of the company's activities, in other words, whether this is a transaction which is out of the ordinary and which substantially affects the company's purpose and existence; and [page261] (6) application of the qualitative test must take quantitative criteria into account, the greater the proportion of property sold in relation to all of the company's property, the more likely we would be to conclude that the transaction strikes at the heart of the company and necessitates the shareholders' approval.

**175**  In Clock's submission, the key question for determination is whether the consequence of a sale would be the effective destruction of the company's business. I agree. I also agree with Biron J. in ***Cogeco Cable Inc.*** that, in approaching this question, both qualitative and quantitative criteria should be taken into account.

**176**  According to Clock, by 2001 HEL's only business was maintaining the West Coast lease. When the West Coast Property was transferred to Bridgewater, therefore, substantially the whole of its undertaking was sold. In support of this submission, Clock points to the CCRA election in which Bobby and Herman Jr. characterised the transfer in this way.

**177**  I do not accept that HEL's business was restricted to maintaining the West Coast lease. Although not particularly active, HEL was a holding company. As such, it acquired, maintained and disposed of assets and investments from time to time. In March 2001, one of the assets it held was the Waterfront Property. The other was the receivable from 519.

**178**  From a quantitative perspective, the Waterfront Property represented less than 20% of HEL's overall enterprise value. From a qualitative perspective, its conversion into cash did not substantially alter HEL's corporate purpose or existence as a holding company.

**179**  It is unfortunate Bobby and Herman Jr. mischaracterised the nature of the Waterfront Property transfer in the CCRA election. Nevertheless, I conclude that HEL did not dispose of substantially the whole of its undertaking when it sold the Waterfront Property to Bridgewater. Accordingly, a special resolution of members was not required.

**180**  Given this conclusion it is unnecessary to analyse whether Clock has standing as a "member" to apply to set aside the sale pursuant to s. 126(1) of the ***Company Act***. According to the defendants, it does not.

**181**  There is conflicting authority on whether beneficial shareholders are "members" for purposes of the ***Company Act***. Although the question need not be decided, I think it unlikely that Clock, as a remainder beneficiary of a trust which owns shares in HEL, is a "member" pursuant to s. 126(1): ***Lindholm v. Lindholm***, [*2000 BCSC 269*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X25G-00000-00&context=).

**182**  It is also unnecessary to analyse whether the sale would be saved by s. 126(3) of the ***Company Act***. I have found, however, that it was concluded for a proper business purpose and good consideration was paid. In these circumstances, s. 126(3) would likely apply.

***Did Surjeet and Herman Jr. breach their trust and fiduciary duties when HEL transferred the Waterfront Property?***

**183**  Trustees owe a duty of utmost good faith and loyalty to trust beneficiaries. Their primary obligation is to preserve the property of the trust. In discharging these duties and obligations, trustees must strictly avoid self-interest wherever their interest could conflict with the interests of those they are bound to protect: ***Davis v. Kerr*** [*(1890), 17 S.C.R. 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3N1-FCYK-23MD-00000-00&context=).

**184**  Trustees must also act impartially and treat all beneficiaries with an even hand: ***Re Fleming*** [*(1973), 37 D.L.R. (3d) 512*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JSC5-M163-00000-00&context=); ***Kordyban***. If a trustee acts with partiality toward one beneficiary to the detriment of another, the latter may have a right of recourse against both: ***Roblin v. Jackson*** (1901), 13 Man.R. 328 (C.A.).

**185**  Trustees cannot personally make a profit out of a trust without the full knowledge and consent of the beneficiaries: ***Campbell Bros. v. Keast & Roe*** (1922), 67 D.L.R. 315. Where a trustee makes a secret profit the transaction is voidable at the instance of the beneficiary regardless of whether it was reasonable or fair: ***Gray v. New Augarita Porcupine Mines Ltd.***, [*[1952] 3 D.L.R. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-WC31-F5KY-B4V6-00000-00&context=) (P.C.).

**186**  As a general rule, trustees are not entitled to purchase trust property. If such a purchase is necessary, however, a court application may be brought and court approval obtained: ***Weagle v. Weagle***, [*[1955] 3 D.L.R. 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPY1-DY33-B2D0-00000-00&context=) (N.S.C.A.); ***Trustee Act***, *R.S.B.C. 1996, c. 464*.

**187**  When a trust owns shares in a company, its beneficiaries are entitled to be treated as shareholders. They cannot, however, call on the trustees to use their powers as directors as though those powers were held in trust: ***Butt***; ***Lindholm***.

**188**  Shareholders do not participate in the day-to-day operations of a company. Rather, corporate directors are charged with the duty of managing the company's affairs. For this reason, shareholders are not generally consulted regarding decisions made in the ordinary course of business operations.

**189**  In the case of a trust-owned company, beneficiaries are entitled to disclosure of communications between the corporation and trustees. Disclosure of corporate information will, however, be limited to ensure that interference with business operations does not occur: ***Lindholm***.

**190**  In Clock's submission, Surjeet and Herman Jr. were obliged to notify Erwin and his assignees prior to transferring the Waterfront Property to Bridgewater. In addition, or alternatively, they were obliged to obtain court approval in advance of the sale. According to Clock, their failure to do so amounted to a fiduciary breach.

**191**  In support of its submission, Clock characterised the Waterfront Property as an Estate asset. It argued that Herman Jr. purchased trust property through Bridgewater despite his status as an Estate trustee. In addition, Clock submitted that, given Erwin's exclusion from Bridgewater, all beneficiaries were not treated with an even hand.

**192**  I have found the Waterfront Property was not an Estate asset. Accordingly, the first branch of Clock's submission must fail. I conclude the same is also true of the second.

**193**  In this case, as in most, what was good for HEL was also good for the Estate and its beneficiaries. All benefited equally from the fact that the 519 receivable was protected and the value of HEL's shares thus preserved. Bridgewater's ownership by some, but not all, family members was not a relevant factor in this regard.

**194**  The Waterfront Property transfer was conducted in the ordinary course of HEL's business. Accordingly, Surjeet and Herman Jr. were not obliged to consult the Estate's beneficiaries when they concluded the sale. Although they assumed a risk the transaction might later be successfully challenged when they did not obtain prior court approval, their assumption of that risk did not amount to a fiduciary breach.

***Did the defendants commit the tort of conspiracy in agreeing to the Waterfront Property transfer?***

**195**  The Supreme Court of Canada described the test for civil conspiracy in ***Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.***, [*[1983] 1 S.C.R. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M27Y-00000-00&context=) as follows:

Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

1. whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or
2. where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

**196**  In Clock's submission, when HEL transferred the Waterfront Property to Bridgewater the defendants' predominant purpose was to reduce the value of Erwin's residual interest in the Estate and thus to cause injury. I have found otherwise. Accordingly, the claim for civil conspiracy fails on the first branch of the test.

**197**  In the alternative, Clock submits that, regardless of their predominant purpose, the defendants combined to transfer the Waterfront Property unlawfully and did so with Erwin and his assignees in mind. According to Clock, in so doing, the defendants should have known that injury to Erwin and his assignees was likely to result, and it did.

**198**  At the trial's conclusion Clock abandoned its claims of fraud with respect to the Waterfront Property transfer. Although the conspiracy claim was maintained, the alleged unlawfulness at issue was unexplained.

**199**  In any event, I am satisfied the defendants did not act unlawfully when HEL transferred the Waterfront Property to Bridgewater. Rather, they concluded a *bona fide* commercial transaction in which Bridgewater paid HEL more than fair market value for one of its corporate assets in order to protect the value of the other.

**200**  In addition, there is no evidence that the value of HEL's shares was diminished as a result of the Waterfront Property transfer. On the contrary, the New York Property was preserved until a suitable buyer was found and the value of the 519 was protected. In these circumstances, it cannot be said that Erwin or his assignees suffered any loss or damage.

**CONCLUSION**

**201**  In summary, Clock's claims against the defendants are dismissed. The parties may apply to make submissions on costs, in person or in writing, within 90 days.

G. DICKSON J.

\* \* \* \* \*

Corrigendum

Released: March 19, 2009

Please be advised that the attached Reasons for Judgment of Madam Justice G. Dickson dated December 8, 2008 have been edited.

1. *"On the front page, Co-Counsel for Bridgewater Properties Inc. should read:*

*Yong-Jae Kim*

**End of Document**

[***Cummings v. 565204 B.C. Ltd. (c.o.b. Auto Couture), [2009] B.C.J. No. 1498***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0M6-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.B. Gerow J.

Heard: May 4-7, 2009.

Judgment: July 27, 2009.

Docket: M070738

Registry: Vancouver

**[2009] B.C.J. No. 1498** | 2009 BCSC 1009 | 85 M.V.R. (5th) 274 | 1 B.C.L.R. (5th) 151 | 2009 CarswellBC 2027 | 179 A.C.W.S. (3d) 1093

Between Joelle Christine Cummings, Plaintiff, and 565204 B.C. Ltd. doing business as Auto Couture, Daewoo Richmond and Daewoo Richmond Financial Services, and John Doe, Defendants

(77 paras.)

**Case Summary**

**Commercial law — Unfair trade practices — False, misleading or deceptive representation — Statutory remedies — Damages — Action against automobile dealership for damages caused by unsafe vehicle allowed — The plaintiff lost control of her vehicle and suffered soft tissue injuries — She alleged that the defendant had misrepresented the safety of the vehicle's tires at the time of purchase — The court found that the tires were unsafe and had caused the accident — The defendant negligently misrepresented the state of the tires, thus engaging in a deceptive business act — The plaintiff was awarded general damages of $25,000, special damages of $2,600, future care costs of $3,500 and accelerated depreciation of $7,600 — Business Practices and Consumer Act, s. 4(1).**

**Tort law — Fraud and misrepresentation — Negligent misrepresentation (Hedley Byrne principle) — Action against automobile dealership for damages caused by unsafe vehicle allowed — The plaintiff lost control of her vehicle and suffered soft tissue injuries — She alleged that the defendant had misrepresented the safety of the vehicle's tires at the time of purchase — The court found that the tires were unsafe and had caused the accident — The defendant negligently misrepresented the state of the tires, thus engaging in a deceptive business act — The plaintiff was awarded general damages of $25,000, special damages of $2,600, future care costs of $3,500 and accelerated depreciation of $7,600 — Business Practices and Consumer Act, s. 4(1).**

**Damages — Types of damages — General damages — For personal injuries — Special damages — Non-pecuniary loss — Pain and suffering — Action against automobile dealership for damages caused by unsafe vehicle allowed — The plaintiff lost control of her vehicle and suffered soft tissue injuries — She alleged that the defendant had misrepresented the safety of the vehicle's tires at the time of purchase — The court found that the tires were unsafe and had caused the accident — The defendant negligently misrepresented the state of the tires, thus engaging in a deceptive business act — The plaintiff was awarded general damages of $25,000, special damages of $2,600, future care costs of $3,500 and accelerated depreciation of $7,600 — Business Practices and Consumer Act, s. 4(1).**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Action against automobile dealership for damages caused by unsafe vehicle allowed — The plaintiff lost control of her vehicle and suffered soft tissue injuries — She alleged that the defendant had misrepresented the safety of the vehicle's tires at the time of purchase — The court found that the tires were unsafe and had caused the accident — The defendant negligently misrepresented the state of the tires, thus engaging in a deceptive business act — The plaintiff was awarded general damages of $25,000, special damages of $2,600, future care costs of $3,500 and accelerated depreciation of $7,600 — Business Practices and Consumer Act, s. 4(1).**

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| Action by the plaintiff, Cummings, against the defendant automobile dealership, Daewoo Richmond and related companies, for damages under the Business Practices and Consumer Act and for ***negligence*** and negligent misrepresentation. The plaintiff was injured in a single vehicle accident. She drove a vehicle that she had purchased from the defendant seven days earlier. The plaintiff alleged that the accident occurred because the rear tires of the vehicle lacked sufficient tread, causing her to lose control of the car. The plaintiff suffered soft tissue neck and back injuries in the accident that remained unresolved. The plaintiff alleged that the defendant engaged in a deceptive act or practice in selling a vehicle with unsafe tires contrary to s. 4 of the Act. She further alleged that the defendant made negligent misrepresentations regarding the tires. She claimed that the defendant was negligent in failing to inspect the tires prior to sale of the vehicle. The defendant submitted that the accident was caused by the plaintiff's negligent operation of the vehicle. Photographic evidence showed that the tires were significantly worn and contained missing tread. The parties gave contradictory evidence as to whether the defendant represented the safety of the tires following an inquiry by the plaintiff. The defendant stated that the vehicle had passed safety inspections upon its import and that no further inspections were conducted. The defendant denied that it acted negligently or engaged in any deceptive acts or practices.  HELD: Action allowed.  The plaintiff's contention that the defendant represented the safety of the rear tires without checking the vehicle was accepted. The plaintiff was entitled to rely on such representation given that she was purchasing a nearly new vehicle from a dealership. The evidence established that the tires were worn beyond a safe level of use. The tires were defective at the time the vehicle was sold to the plaintiff. Therefore, the defendant's representation was negligent, and the defendant had engaged in a deceptive act entitling the plaintiff to damages. The unsafe tires were the sole cause of the accident, as the defendant failed to establish that the plaintiff negligently contributed to the accident. The plaintiff was entitled to general damages of $25,000, special damages of $2,600 and costs of future care of $3,500. The defendant was further liable for the accelerated depreciation of the vehicle in the amount of $7,600. |

**Statutes, Regulations and Rules Cited:**

Business Practices and Consumer Act, [*SBC 2004, CHAPTER 2, s. 1(1)*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5KY-B22P-00000-00&context=), s. 1(1), s. 4, s. 4(1), s. 4(2), s. 4(3)(a)(ii), s. 4(3) (a)(iii), s. 4(3)(b)(vi)*, s. 5, s. 5(1), s. 5(2)*, s. 171, s. 171(1), s. 171(1)(a)

Trade Practices Act, RSBC 1996, CHAPTER 457, s. 3(1)

**Counsel**

Counsel for the Plaintiff: A.C.R. Parsons.

Counsel for the Defendants: K. Herr.

**Reasons for Judgment**

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| **L.B. GEROW J.** |

**1**   Joelle Christine Cummings claims damages for injuries she suffered in a single car accident on June 8, 2008. The accident occurred when Ms. Cummings was driving a 2005 Nissan 350Z she had purchased from the defendant, 565204 B.C. Ltd. doing business as Daewoo Richmond (collectively "Daewoo"). Ms. Cummings alleges that the accident occurred because the rear tires of the Nissan lacked sufficient tread to be operated safely, and caused her to lose control of the car. She alleges that Daewoo engaged in a deceptive act or practice in selling a vehicle which had unsafe tires on it, and claims damages against Daewoo pursuant to s. 4 of the *Business Practices and Consumer Act*, *S.B.C. 2004, c. 2* (the "*BCPC Act*"). As well, Ms. Cummings claims against Daewoo on the basis that Daewoo made negligent misrepresentations about the tires, and was negligent in failing to inspect the tires prior to selling the vehicle. Daewoo denies that it engaged in any deceptive acts or practices, or was negligent as alleged. Daewoo further denies that the rear tires on the Nissan were unsafe when the vehicle was sold to Ms. Cummings. Daewoo alleges that the accident was caused by Ms. Cummings' ***negligence*** in operating the vehicle.

**2**  The issues are:

1. Is Daewoo liable to Ms. Cummings for selling a vehicle fitted with unsafe rear tires?
2. Did the tires cause or contribute to the motor vehicle accident and, if so, was Ms. Cummings contributorily negligent?
3. What, if any, damages is Ms. Cummings entitled to?

**BACKGROUND**

**3**  Ms. Cummings was referred to Daewoo by a friend, John Markakis, who owns an OK Tire franchise in Calgary, Alberta. Mr. Markakis knew Diven (David) Nair, the Sales Manager at Daewoo.

**4**  Daewoo is in the business of selling late model pre-owned cars. 565204 B.C. Ltd. is now doing business as Auto-Couture rather than Daewoo. Mr. Nair has been with 565204 B.C. Ltd. since 2001. His wife is a director and officer of 565204 B.C. Ltd. Mr. Nair currently works as a buyer for the company and looks after customer relations. In the summer of 2006, Mr. Nair was acting as the manager of Daewoo.

**5**  When Ms. Cummings initially went to Daewoo's lot, she dealt with Jason Rawlins, a sales representative. She testified that she advised Mr. Rawlins that she wanted to trade in her Volkswagen Jetta and purchase a fun, sporty vehicle. On her first visit to Daewoo there were no vehicles on the lot that interested her. However, a few days later Ms. Cummings went back to Daewoo and Mr. Rawlins showed her the Nissan. She test drove the Nissan on city streets and Highway 99. The roads were dry on the day of the test drive.

**6**  After thinking about the car, Ms. Cummings decided to purchase it and arranged to come to Daewoo on June 1, 2008, to complete the transaction. Ms. Cummings was told to deal with Mr. Nair to negotiate the price of the Nissan and the value of her trade-in.

**7**  While waiting for Mr. Nair, Ms. Cummings walked around the car in the showroom in order to see if there were any small dings or marks on the car. Ms. Cummings says that she noticed that the rear tires were more worn than the front tires. When she went into Mr. Nair's office, Ms. Cummings asked him about the rear tires. Ms. Cummings' evidence is that Mr. Nair replied that the car was only a year old and the tires were fine. Her evidence is that Mr. Nair did not go out to look at the tires before telling Ms. Cummings that they were fine.

**8**  Mr. Nair's evidence is that Ms. Cummings never mentioned the tires to him. He testified that there is no way to look at the car and see whether the rear tires are worn because it is a low slung car, and the tires are covered for the most part by the body.

**9**  Mr. Nair's evidence is that Mr. Markakis telephoned him and told him that Ms. Cummings wanted to purchase a car. When Ms. Cummings came to Daewoo, she wanted a sports car. Mr. Nair's evidence is that he did not have a suitable car on the lot so he contacted a broker and arranged for the Nissan to be brought to the lot. The Nissan had been imported from the United States.

**10**  According to Mr. Nair, safety is the number one issue for Daewoo and if they are aware that there is something wrong with a vehicle they do not sell it. In order to be imported into Canada, the vehicle had to pass a series of safety inspections. Mr. Nair's evidence is that Daewoo relied on the inspections done when the vehicle was imported, and did not perform its own inspection of the vehicle. Mr. Nair testified that he told Ms. Cummings that the vehicle had a factory warranty and that she should take it to Nissan. If the car needed anything under warranty, it would be done free of charge.

**11**  Mr. Rawlins testified that Ms. Cummings advised him that she wanted a sporty, fun car. Daewoo did not have a vehicle for her on the lot, but the Nissan was located and he contacted her the next day. According to Mr. Rawlins, Ms. Cummings test drove the vehicle for about 15 to 20 minutes. She was excited about the car so he had her speak to Mr. Nair. Ms. Cummings did not buy the car the day of the test drive. He does not recall any conversation with Ms. Cummings about the tires.

**12**  Mr. Rawlins was shown a picture of the tires that were on the Nissan at the time of the accident, and agreed that he would not sell a vehicle that had tires that looked like that. The tires that are depicted are worn significantly and have parts where the tread is missing.

**13**  Ms. Cummings owned the Nissan for seven days prior to the accident. The day of the accident was the first day it rained heavily after she purchased the Nissan. Ms. Cummings testified that she may have driven the Nissan in drizzling rain conditions in the days prior to the accident, but she had not driven it in heavy rain conditions. The accident occurred when she was travelling eastbound on Nordel Way in Delta. Ms. Cummings lost control of the vehicle as she drove through a curve when the back end of the vehicle fishtailed to the right. Ms. Cummings' evidence is that she tried to steer into the turn, as she had learned in driver's training, but nothing worked. The back end of the Nissan spun into the roadside barrier and the vehicle spun again and the front of the Nissan struck the roadside barrier.

**14**  Ms. Cummings testified that she was travelling at around 60 kph over a highway overpass just before the corner, and had geared down to go into the corner to about 50 kph when the accident occurred.

**15**  Following the collision, Ms. Cummings sat in her vehicle and a young man, who was later identified as Rajesh Sewak, came up to her car and asked if she was all right.

**16**  Mr. Sewak's evidence is that he was following the Nissan as it was going through the corner on Nordel Way. Mr. Sewak confirmed that it was raining heavily at the time of the accident and there was water on the road surface. He observed the rear end of the Nissan spin out and the back of the car hit the barrier. At the time of the accident, he estimated the Nissan's speed at 50 - 60 kph based on the speed he was driving. He was about 10 or 12 car lengths behind the Nissan, travelling at around 50 - 60 kph, and the Nissan was not pulling away from his vehicle.

**17**  Ms. Cummings' evidence is that the collision with the barrier was violent and that she was thrown to the side and then the front. After the accident she had a mark on her shoulder from the seat belt. Ms. Cummings testified that she suffered an injury to her neck and down her spine onto the right side and into the shoulder. Her evidence is that the injuries she suffered in the accident have not fully resolved. The Nissan was not driveable following the accident. The cost of repairs to the Nissan was in excess of $13,000.

**ANALYSIS**

***Liability***

*Business Practices Act claim*

**18**  Ms. Cummings alleges that the defendants are in breach of the *BCPC Act.* The relevant portions of the *BCPC Act* provide:

1. In this Act:

"consumer" means an individual, whether in British Columbia or not, who participates in a consumer transaction, but does not include a guarantor;

"supplier" means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by

1. supplying goods or services or real property to a consumer, or
2. soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",

...

1. In this Division:

"deceptive act or practice" means, in relation to a consumer transaction,

1. an oral, written, visual, descriptive or other representation by a supplier, or
2. any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

"representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.

1. A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.
2. Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:
3. a representation by a supplier that goods or services

...

1. are of a particular standard, quality, grade, style or model if they are not,
2. have a particular prior history or usage that they do not have, including a representation that they are new if they are not,

...

1. a representation by a supplier

...

1. that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,

5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

1. If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

171 (1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a

1. supplier,

...

who engaged in or acquiesced in the contravention that caused the damage or loss.

**19**  The *Trade Practices Act*, [*R.S.B.C. 1996, c. 457*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-DY33-B0JT-00000-00&context=), was the predecessor of the *BCPC Act* and contained s. 3(1) entitled "Deceptive Acts or Practices", which is virtually identical to the current s. 4(1) of the *BCPC Act*. Section 3(1) of the *Trade Practices Act,* and its predecessor, have been considered by the courts.

**20**  In *Rushak v. Henneken* [*(1991), 59 B.C.L.R. (2d) 250*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X30K-00000-00&context=) (C.A.), the similar section in the *Trade Practices Act* was considered. After considering the authorities, Taylor J.A. stated at paras. 23-28:

While it used to be said that what is described in general terms as "puffery" on the part of a salesman does not give rise to legal consequences, I am not satisfied that the same can necessarily be said today in light of the provisions of the Trade Practice Act. "Puffery" cannot, in my view, excuse the giving of an unqualified opinion as to quality when the supplier has factual knowledge indicating that the opinion may in an important respect very well be wrong. Exaggeration or embellishment of qualities which a seller knows to exist may, perhaps, be excused as puffery, and particularly where the potential buyer is in as good a position as the supplier to form an opinion on the matter. That expression cannot, however, so far as the Act is concerned, be used to excuse a laudatory description given with specific factual knowledge not shared by the potential buyer which suggests the goods may, in fact, be in an important respect defective, and not therefore of the quality described at all.

I am of the view that the section must be taken to require that suppliers involved in the defined transactions refrain from any sort of potentially misleading statement, and that this must include an honestly-held opinion given in circumstances in which the supplier knows that giving the opinion without appropriate qualification may mislead. It was not, in my view, open to the defendant to describe the car as "a good vehicle", "one of the best of its kind" and "very nice", without appropriate qualification, when he had reason to suspect that there might be extensive rust, and that the rust had been coated over with brushed-on undercoating so as to render it incapable of discovery by ordinary examination.

...

In suggesting that the respondent have the vehicle looked at by others, without saying what sort of examination was needed and when he knew that ordinary visual examination would not be helpful, Mr. Henneken did not, in my view, render the giving of his unqualified opinion no longer misleading.

It seems to me that where a seller has factual evidence gained from inspection suggesting that the thing offered may have a latent defect of great importance to the potential buyer, then to express a commendatory opinion without qualification must be "conduct having the capability of misleading", within the meaning of the section, because to adopt the words of Mr. Justice Hutcheon, cited above, such a statement must tend to lead the potential purchaser "astray into making an error of judgment". That the purchaser had the vehicle inspected by others, who could not see the latent defect, and that she failed to have it inspected by the dealer, as suggested by the defendant, cannot, in my view, change the character of the statement made. It was a statement which necessarily 'downplayed' the need for such examination, and tended to lead to an error of judgment.

**21**  The deception may be inadvertent. A supplier cannot escape liability if the misleading act or statement leads to the purchaser's injuries, even if he honestly believes the representations: *Mikulas v. Milo European Cars Specialist Ltd.* [*(1993), 52 C.P.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F956-S1B4-00000-00&context=) (B.C.S.C.).

**22**  In my view, a supplier should not be able to escape liability on the basis that he honestly believed the representations, or that he relied on an inspection done by others, when he is advised of a concern about the vehicle by a purchaser and takes no steps to discover whether the representation is true, and the purchaser is misled by the representation.

**23**  Section 171 allows a plaintiff to recover from the supplier damages resulting from a deceptive act: *Findlay v. Couldwell* [*[1976], 69 D.L.R. (3d) 320*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F1H1-20W6-00000-00&context=) (B.C.S.C.).

**24**  In this case, it is alleged that Daewoo engaged in a deceptive act or practice when Mr. Nair made a representation at the time the Nissan was sold to Ms. Cummings that the rear tires were fine when, in fact, they were not.

**25**  Given the allegation, s. 5 of the *BCPC Act* shifts the burden to Daewoo, as the supplier, to show either that it did not make the representation alleged, or that the representation that was made was true, i.e. the rear tires were fine at the time the Nissan was sold.

**26**  There is contradictory evidence as to whether Ms. Cummings asked Mr. Nair about the tires. I accept Ms. Cummings' version of events. I do not accept Mr. Nair's evidence that he did not discuss the tires with Ms. Cummings. It is much more likely that Ms. Cummings would have a better recollection of a conversation she had about purchasing the car than Mr. Nair, whose memory of the details of any conversations he had with Ms. Cummings were vague at best. I accept that Mr. Nair represented that the rear tires were fine as the Nissan was only a year old, without checking to see if that representation was correct.

**27**  Daewoo takes the position that it was under no obligation to take any steps to inspect the tires after Ms. Cummings expressed her concern about them to Mr. Nair. Daewoo argues that Ms. Cummings should have done her own inspection of the vehicle. However, Ms. Cummings was relatively naive about automobiles and was relying on the fact that she was purchasing a nearly new automobile from a dealership. In my view, Ms. Cummings was entitled to rely on the representations made by Mr. Nair about the tires.

**28**  Having found that Daewoo made the representation alleged, the next issue to be considered is whether or not the representation was true. Daewoo did not lead any evidence to prove that the condition of the rear tires was fine at the time the car was sold to Ms. Cummings. The plaintiff's evidence is that the tires were worn past the wear bars, and had to be replaced before the body shop that repaired the car would release it. Mr. Rawlins, who was examined for discovery as an authorized representative for Daewoo, admitted that he would not sell a Nissan 350Z that had tires that were as worn as the rear tires of the Nissan he sold to Ms. Cummings.

**29**  Ross Chonn, the mechanic who conducted the inspection of the Nissan prior to its sale to Ms. Cummings, testified that he completed a government designated inspection report for the vehicle on May 31, 2007. He checked the pass box beside tires. His evidence is that he checks the tires to ensure that they have 1/32nd of an inch of tread prior to passing the tires. Mr. Chonn's evidence is that the tires shown in the pictures of the rear tires of the Nissan would pass his safety inspection, and he does not look at wear bars but only the depth of the tread. Mr. Chonn testified that if the tread of a tire does not meet the minimum requirement, i.e. 1/32nd of an inch, it is acceptable to cut the tire with a knife to deepen the tread in order to obtain the correct measurement. He testified that he did not cut the Nissan's rear tires in order to obtain the minimum measurements required to check the pass box on the inspection report.

**30**  Mr. Chonn's opinion about whether the tires should have been passed is contradicted by the evidence of other witnesses who testified that the tires were worn and should have been replaced.

**31**  George Estachio, the manager of Craftsman Collision where the Nissan was repaired after the accident, testified. Mr. Estachio's evidence is that he advised Ms. Cummings that the rear tires were worn and that he would not put them back on the car. He told Ms. Cummings that the tires were unsafe, and that before he would release the Nissan she would have to purchase new tires for him to install. Mr. Estachio testified that the rear tires were well past the wear bars that indicate when a tire has to be replaced. The inside of the tire was more worn than the outside. Ms. Cummings purchased new tires and Craftsman Collision installed them.

**32**  Donald Rempel, an engineer with expertise in accident reconstruction, testified that in his opinion the rear tires were worn out. He measured the tread depth and concluded that rear tires should have been replaced as the wear bars on the tires were showing. The wear bars are intended to give someone a quick visual indication that the tires need to be replaced. In his opinion, the tires fitted to the rear of the Nissan constituted a dangerous mechanical condition rendering the vehicle unsuitable for use on wet roads.

**33**  Len Haffenden, an expert in appraisal of used vehicles and accelerated depreciation, testified that in his opinion the rear tires of the Nissan were worn beyond a safe level of use.

**34**  Although Daewoo asserts that Ms. Cummings has failed to establish the condition of the tires at the time she purchased the vehicle, the onus is on Daewoo to establish that the tires were not in the same worn condition at the date the Nissan was sold that they were in at the time of the accident, one week later. Daewoo argues that the wear may have occurred in the week prior to the accident.

**35**  Daewoo's evidence is that the tires that were on the Nissan would have satisfied the inspection conducted by Mr. Chonn. However, Daewoo admits that they would not have sold a vehicle with tires in that condition. As stated above, Mr. Rawlins agreed that he would not sell a vehicle that had tires on it with the amount of wear shown on the tires in the picture.

**36**  Daewoo did not adduce any evidence that rear tires of the Nissan could become worn in a week. The plaintiff relies on the evidence of Mr. Haffenden who testified that the tires on the Nissan were good quality tires which should last 40,000 to 50,000 kilometres. The Nissan had just over 15,000 kilometres at the time of the accident. Mr. Haffenden noted a significant difference between the tires on the rear and front of the car. In his opinion, the rear tires would not become that worn in a week.

**37**  Having reviewed the evidence, I accept that the tires were defective at the time the Nissan was sold to Ms. Cummings. As a result, I have concluded that Daewoo engaged in a deceptive act within the meaning of the *BCPC Act*, and that Ms. Cummings is entitled to damages pursuant to s. 171 of that *Act.*

*Tort Claim - Negligent Misrepresentation*

**38**  A vendor of a vehicle owes a duty of care to a purchaser. If the vendor makes a negligent misrepresentation that is relied upon by a purchaser, the vendor is bound to compensate the purchaser based on the relationship: *Robillard v. Comox Valley Ford Sales (1964) Ltd.* [*(1995), 3 B.C.L.R. (3d) 374*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M27R-00000-00&context=) (C.A.).

**39**  In my view, Ms. Cummings was entitled to rely on the representations made by Mr. Nair regarding the condition of the tires. I accept Ms. Cummings' evidence that she relied on Mr. Nair's representation. Daewoo should have anticipated reasonable reliance on statements made by its manager, Mr. Nair. Both Daewoo and Mr. Nair owed Ms. Cummings a duty of care in making statements regarding the condition of the vehicle. Ms. Cummings' reliance was clearly to her detriment, given the losses she suffered as a result of the accident.

**40**  In the circumstances, I am of the view that Mr. Nair was negligent in representing the tires as fine, when they were excessively worn and needed to be replaced. Accordingly, Daewoo is liable to Ms. Cummings for negligent misrepresentation in regard to the rear tires.

*Contributory* ***Negligence***

**41**  Daewoo takes the position that Ms. Cummings has not established that the condition of the rear tires caused the accident. Daewoo relies on the opinion of Mr. Toor, an expert in accident reconstruction, in asserting that the accident was caused by Ms. Cummings driving at an excessive speed.

**42**  Mr. Toor's opinion is that Ms. Cummings was travelling at 75 kph or more at the time of the accident based on the calculations he performed. One of the factors which he acknowledged was difficult to determine was the amount of water on the road at the time of the accident. Mr. Toor's opinion is based, in part, on his assumption that even though it was raining hard it was unlikely there was any standing water on the roadway. Mr. Toor concedes that the tire tread on the rear tires was considerably worn. Mr. Toor acknowledged that if Ms. Cummings was travelling at 60 kph or less and the back end of her vehicle swung to the right, then the loss of control was due to a loss of friction of the rear tires due to the reduced tread on the tires and water on the road.

**43**  Mr. Rempel's opinion is that the condition of the rear tires caused the accident. The longitudinal grooves were no longer in existence on the rear tires that were on the Nissan at the time of the accident. The longitudinal grooves provide channels for water to move from beneath the tire in order for the tire to maintain contact with the road. On a tire with good tread there are lots of channels to get water out so that the flat areas of the tire maintain contact with the road. In Mr. Rempel's opinion the rear tires of the Nissan lost traction and the rear end started to spin out as a result of insufficient tread.

**44**  Mr. Rempel's opinion is consistent with the evidence of the independent witness, Mr. Sewak. Mr. Sewak testified that he observed the rear end of the Nissan spin out and the back of the vehicle hit the barrier. As well, Mr. Sewak testified that Ms. Cummings' speed at the time the rear end of the vehicle spun out was approximately 50 to 60 kph. Mr. Sewak's evidence is that it was raining extremely hard at the time of the accident. Mr. Sewak's evidence in that regard is consistent with Ms. Cummings' evidence that it was raining extremely hard and that she was travelling at approximately 50 kph at the time the accident occurred.

**45**  Having considered all of the evidence, I have concluded that Mr. Rempel's opinion should be preferred over Mr. Toor's opinion as it is consistent with the evidence of the independent witness. I have concluded that the accident was caused by a loss of friction due to the wear on the rear tires of the vehicle, and that Daewoo has failed to establish that Ms. Cummings' operation of the vehicle either caused or contributed to the accident.

***Damages***

*Non-pecuniary Damages*

**46**  Ms. Cummings was diagnosed with soft tissue injuries to her neck and shoulder girdle following the accident. Her neck area had been injured in two motor vehicle accidents prior to the accident of June 2006. According to Ms. Cummings she had not been having ongoing problems, apart from occasional tightness in her neck area, prior to the June 2005 accident. As well, the injury she sustained in the June 2006 accident was different than the injury she sustained in the earlier motor vehicle accident. Ms. Cummings' evidence in that regard was confirmed by Dr. Atkinson, her family doctor.

**47**  While Ms. Cummings was recovering from the injuries she sustained in the accident, she was involved in another motor vehicle accident on January 15, 2007. Following the January 2007 accident, Ms. Cummings was advised to continue with physiotherapy.

**48**  As stated earlier, Ms. Cummings had a history of prior soft tissue injuries to her neck. However, she had not been seen by her doctor, Dr. Atkinson, for more than a year prior to the June 8, 2006 motor vehicle accident. In Dr. Atkinson's opinion, Ms. Cummings had not recovered from the injuries sustained in the June 2006 accident when she was re-injured in the accident of January 15, 2007.

**49**  Dr. Atkinson's opinion is that Ms. Cummings has experienced significant partial disability as she has persisting pain and discomfort. Dr. Atkinson is of the view that Ms. Cummings requires a structured exercise rehabilitation program tailored to her needs in order to recover. The program should be of several months' duration and thereafter, she requires a gym membership with access to a kinesiologist or personal trainer in order to modify her progress and make adjustments. Dr. Atkinson's opinion is that the prognosis for full recovery is good if Ms. Cummings has access to the program she outlines in her report. Otherwise, Ms. Cummings' prognosis is less sure as her symptoms have persisted, and she has had a number of neck injuries in the past.

**50**  Ms. Cummings' evidence is that prior to the accident she had no ongoing symptoms from her neck. Immediately following the June 2006 accident, she had trouble getting out of bed and tying her shoes. She still suffers from some ongoing stiffness, pain and discomfort in her neck. She continues to be plagued with "flare ups" or severe pain in her neck from time to time. As time has progressed, Ms. Cummings was able to go for longer periods of time without having a flare up.

**51**  Prior to the June 2006 accident, Ms. Cummings was very physically active. She has not been able to return to some of her pre-accident activities such as kick boxing, though she has been able to return to a modified form of cardio boot camp. Although Daewoo took the position that the physical exercise in which Ms. Cummings is participating may be exacerbating her condition, Dr. Atkinson is aware of Ms. Cummings' physical regime and is of the opinion that staying as active as possible is the best thing for Ms. Cummings' neck and shoulder.

**52**  Terry Cochrane, Ms. Cummings' boyfriend, testified regarding the difference in Ms. Cummings' activity level before and after the June 2006 accident, and confirmed that Ms. Cummings has not been able to return to the activities she was doing prior to the June 2006 accident.

**53**  It is apparent from the evidence that Ms. Cummings suffered a mild to moderate soft tissue injury to her neck, back and shoulder girdle. Her injuries had not completely resolved by January 2007, approximately six months after the accident, when she was re-injured in a second motor vehicle accident. She complains that she is still suffering from flare ups, although the time period between flare ups is increasing.

**54**  According to Ms. Cummings, the second accident was a very minor rear end collision which caused approximately $1,200 damage to the Nissan. However, it did flare up the neck symptoms she had been suffering since the June 2006 motor vehicle accident.

**55**  Although Daewoo argues that Ms. Cummings was suffering from ongoing neck problems at the time of the June 2006 accident, the evidence does not support that contention. The uncontradicted evidence of both Ms. Cummings and Dr. Atkinson is that Ms. Cummings had recovered from the earlier neck injuries she had suffered by the time of the June 2006 motor vehicle accident. As well, the evidence is that injury she sustained in the June 2006 accident affected an area of her neck and her shoulder girdle which had not been previously injured.

**56**  Ms. Cummings and Daewoo have provided me with a number of cases to assist in determining the appropriate award for pain and suffering.

**57**  Ms. Cummings submits that an award of general damages of $45,000 to $55,000 is appropriate based on the evidence and the case law. Daewoo submits that the authorities support a global award for general damages of $9,000, and that $2,500 is the appropriate award for the injuries Ms. Cummings sustained in the June 2006 accident. I have considered the authorities presented by the parties. As with most cases, there are aspects of other decisions which are helpful, but they also have features which distinguish them from this case.

**58**  Having considered the nature and extent of the injuries, the fact that her symptoms have not completely resolved and she still has flare ups three years post accident, and the cases presented by counsel, I am of the view that the appropriate award for non-pecuniary damages is $25,000.

*Special Damages*

**59**  Ms. Cummings is claiming $2,600 for special damages. Although Daewoo takes issue with the fact that she bought four tires when the front tires were still in good condition, Ms. Cummings' evidence is that she was advised that all the tires had to be replaced.

**60**  As a result, I have concluded that Ms. Cummings is entitled to the amount of $2,600 for special damages.

*Cost of Future Care*

**61**  Ms. Cummings is claiming for the cost of the kinesiologist recommended by Dr. Atkinson. The cost of future care award is not a precise accounting exercise to determine the strict minimum required by the plaintiff: *Strachan (Guardian ad litem of) v. Reynolds*, [*2006 BCSC 362*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23RN-00000-00&context=), [*39 C.C.L.T. (3d) 79*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23RN-00000-00&context=).

**62**  I accept Dr. Atkinson's opinion that the exercise program would increase Ms. Cummings' chance of fully recovering from the injuries sustained in the accident. Accordingly, I am awarding $3,500 under this head of damages.

*Apportionment Between the Two Accidents*

**63**  Daewoo takes the position that the ongoing problems that Ms. Cummings is suffering are as a result of the second accident, and that any damage award for the June 2006 motor vehicle accident should be restricted to the time up to the second motor vehicle accident. Ms. Cummings settled her claim arising out of the second motor vehicle accident a week before the trial of this action. As well, Daewoo argues that Ms. Cummings should not be entitled to the costs of any treatments after the motor vehicle accident in January 2007.

**64**  However, as noted earlier, the second motor vehicle accident was a low velocity rear-end collision. The uncontradicted evidence is that Ms. Cummings had not fully recovered at the time of the second accident. Dr. Atkinson's evidence is that at the time of January 2007 accident, Ms. Cummings was susceptible to injury due to her injuries from the June 2006 accident, that the January 2007 accident aggravated and exacerbated her injuries from that accident, and that the June 2006 accident is the major cause of the symptoms for which the ongoing treatment is required.

**65**  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=), [*71 B.C.L.R. (4th) 234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-246D-00000-00&context=), Shaw J. discussed the two approaches to apportioning damages between two accidents. One approach, taken from *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=), considers the situation where multiple ortuous causes result in an indivisible injury. The other approach, taken from *Long v. Theissen* (1968), 65 W.W.R. 577 (B.C.C.A.), considers the situation where a plaintiff has overlapping divisible injuries resulting from multiple ortuous causes.

**66**  I have concluded that in this case the injuries and consequences resulting from the two accidents are indivisible based on the evidence that Ms. Cummings had not recovered from the injuries sustained in the June 2006 accident at the time of the 2007 accident, that the injuries of the June 2006 accident made her more vulnerable to injury in the second accident, and that the accident exacerbated and aggravated her pre-existing injuries.

**67**  Having concluded that Daewoo is liable, and that on the facts of this case the second accident is not a basis for limiting Daewoo's liability, the issue of double recovery is raised because Ms. Cummings already received a settlement for the second accident.

**68**  It is a fundamental principle of tort law that a plaintiff should be compensated for the full of amount of her loss but no more, and is not entitled to turn her injury into a windfall: *Ratych v. Bloomer*, [*[1990] 1 S.C.R. 940*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6549-00000-00&context=). In order to prevent double recovery, the amount the plaintiff received for damages in the settlement of the second accident must be deducted: *Ashcroft.*

**69**  Accordingly, any amount Ms. Cummings received for damages in the settlement of the second action should be deducted from the damage award for personal injury.

*Accelerated depreciation*

**70**  Ms. Cummings is claiming the amount of $7,600 for accelerated depreciation of the Nissan due to the damage it sustained in the accident. For the following reasons, I have concluded that an award in that amount for accelerated depreciation is appropriate.

**71**  The cost to repair the Nissan following the June 2006 motor vehicle accident was in excess of $13,000. Ms. Cummings tried to trade the Nissan in following the accident but was told by Dean Dodd, the lease manager at the Richmond Honda dealership, that the dealership is not interested in a vehicle that had sustained more than $5,000 in damage in an accident. Mr. Dodd confirmed that the dealership does not accept cars for trade that have in excess of $4,000 damage.

**72**  Mr. Haffenden testified that the owner of a vehicle that has been involved in an accident where the damages exceed $2,000 must declare the damages, whether selling privately or to a dealer. In his opinion, the Nissan would have suffered a depreciation of approximately 20% or $7,600 on the date of the accident as a result of the damage it sustained.

**73**  It is not necessary for a plaintiff to sell a vehicle in order to make out a claim for accelerated depreciation. The assessment of a claim for accelerated depreciation should be made on the day of the accident: *Reinders v. Wilkinson* [*(1994), 51 B.C.A.C. 230*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63H4-00000-00&context=).

**CONCLUSION**

**74**  Daewoo is liable to Ms. Cummings for the injuries she sustained as a result of the June 2006 accident in the following amounts:

|  |  |  |  |
| --- | --- | --- | --- |
|  | General Damages | $25,000 |  |
|  | Special Damages | $ 2,600 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of Future Care | $ 3,500 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $31,100 |  |

**75**  As set about above, the amount Ms. Cummings received in damages in the settlement of January 2007 accident should be deducted from the award for her injuries.

**76**  As well, Daewoo is liable to Ms. Cummings for the loss she sustained in accelerated depreciation of the Nissan in the amount of $7,600.

**77**  Ms. Cummings is entitled to her costs of this action at Scale B.

L.B. GEROW J.

**End of Document**

[***Dhillon v. Song, [2016] B.C.J. No. 564***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JFT-GTR1-JKPJ-G342-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

C.J. Bruce J.

Heard: February 9-12, 15-19, and 22-25, 2016.

Judgment: March 21, 2016.

Docket: M128776

Registry: New Westminster

**[2016] B.C.J. No. 564** | [*2016 BCSC 486*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-623W-00000-00&context=)

Between Jaswant Singh Dhillon, Rajwant Kaur Dhillon, Parwinder Kaur Gill and Gurkaran Singh Dhillon a Minor by his Litigation Guardian Gursewak Singh Gill, Plaintiffs, and Jun Song, Jun Ling Zhao, Yu Zuo Song and Harpreet Kaur Dhillon, Defendants

(205 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Head injuries — Headaches — Considerations impacting on award — Degree of impairment — Credibility — Action by 35-year-old plaintiff passenger for damages for personal injuries arising from motor vehicle accident in 2008 allowed in part — Plaintiff required immediate craniotomy and emergency caesarean delivery — Sustained closed head injury and permanent scarring — Suffered mild intermittent post-traumatic headaches — No permanent cognitive deficits — No compensable wage loss as any impediment to her return to work was due to low back pain unrelated to accident — Earning capacity not impaired by continuing symptoms — Awarded $115,000 in non-pecuniary damages, $155 in special damages and $3,770 for costs of future care.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Special damages — Expenses and expenditures — Non-pecuniary loss — Pain and suffering — Action by 35-year-old plaintiff passenger for damages for personal injuries arising from motor vehicle accident in 2008 allowed in part — Plaintiff required immediate craniotomy and emergency caesarean delivery — Sustained closed head injury and permanent scarring — Suffered mild intermittent post-traumatic headaches — No permanent cognitive deficits — No compensable wage loss as any impediment to her return to work was due to low back pain unrelated to accident — Earning capacity not impaired by continuing symptoms — Awarded $115,000 in non-pecuniary damages, $155 in special damages and $3,770 for costs of future care.**

**Tort law — *Negligence* — Causation — Causal connection — Action by 35-year-old plaintiff passenger for damages for personal injuries arising from motor vehicle accident in 2008 allowed in part — Plaintiff required immediate craniotomy and emergency caesarean delivery — Sustained closed head injury and permanent scarring — Suffered mild intermittent post-traumatic headaches — No permanent cognitive deficits — No compensable wage loss as any impediment to her return to work was due to low back pain unrelated to accident — Earning capacity not impaired by continuing symptoms — Awarded $115,000 in non-pecuniary damages, $155 in special damages and $3,770 for costs of future care.**

|  |
| --- |
| Action by the 35-year-old plaintiff passenger for damages for personal injuries arising from a motor vehicle accident in 2008. Liability for the T-bone collision was admitted. At the time of the accident, the plaintiff was eight months pregnant and was on maternity leave from her job as a dietary aide. The plaintiff suffered a blood clot in her brain, requiring an immediate craniotomy. She remained unconscious for several days. An emergency caesarean delivery was performed. The baby was born healthy. At trial, the plaintiff claimed she continued to suffer headaches, confusion, memory loss, soft tissue injuries to her neck, shoulders and low back, and right leg swelling and discomfort. She had scarring from the craniotomy and the caesarean delivery. The plaintiff did not fill her pain prescriptions and misled her family doctor. Her evidence regarding how long she was bedridden and her pain symptoms was inconsistent. In 2011, a functional capacity evaluation determined the plaintiff was able to return to work on a graduated basis. The plaintiff gave birth to her second child in 2011. She returned to part-time work in 2012. She stopped working in July 2013, claiming she was terminated when she refused to work full-time. Her employer testified that the plaintiff was terminated for continually calling in at the last minute to say she could not come in for her shift.  HELD: Action allowed in part.  The intermittent mild post-traumatic headaches the plaintiff continued to experience did not disable her from working. Some of her headaches were unrelated to the accident but were caused by her chronic sinusitis. The plaintiff had not suffered permanent cognitive deficits due to the brain injury. She had not established her low back pain or leg issues were caused by the accident. The plaintiff was awarded $115,000 in non-pecuniary damages. She had not suffered any past wage loss as she chose not to work due to her second pregnancy and thereafter any impediment to her return to work was due to low back pain unrelated to the accident. The plaintiff's earning capacity had not been impaired by her continuing symptoms. She was awarded $3,770 for future prescription costs. Her physiotherapy and chiropractic expenses were not compensable as they related to her low back pain. She was awarded $155 in special damages. |

**Counsel**

Counsel for the Plaintiffs: Kevin D. Cowan, Gulbahar S. Kang.

Counsel for the Defendants: Ewen C. Carruthers.

**Reasons for Judgment**

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| **C.J. BRUCE J.** |

**INTRODUCTION**

**1**  This is an action for damages arising out of a motor vehicle accident that occurred on December 13, 2008. There were four plaintiffs, all of whom were passengers in one of two vehicles involved in the accident. The plaintiffs are all members of a family: Jaswant Dhillon and Rajwant Dhillon are the grandparents of the infant Gurkaran Dhillon, and Parwinder Gill is the infant's aunt and the daughter of Mr. and Mrs. Dhillon. The driver of the family's vehicle is the defendant Harpreet Dhillon, who is the infant plaintiff's mother and Ms. Gill's sister-in-law. The driver of the other vehicle involved in the accident is the defendant, Jun Song. The two remaining defendants are the owners of the vehicle (Jun Zhao and Yu Song). By agreement of counsel, the claim of Gurkaran Dhillon, the infant plaintiff, is adjourned generally and I am not seized of this matter.

**2**  The defendants have admitted liability, jointly and severally, and Mr. and Mrs. Dhillon (Ms. Gill's parents) have settled their claims against the defendants. As a consequence, only the damage claim of Ms. Gill is in dispute.

**3**  There is no dispute about the circumstances of the collision. Ms. Dhillon was driving a Dodge Neon sedan on the evening of December 13, 2008. The collision occurred when Mr. Song, who was operating a Toyota minivan, turned left in front of the Neon and the two vehicles collided.

**4**  Ms. Gill was eight months pregnant at the time of the collision and she was seated in the rear seat of the Neon. At the time, Ms. Gill was on a maternity leave from her job as a dietary aide and a cook's helper at the Willingdon Care Centre in Burnaby. Although Ms. Gill was conscious immediately after the collision, shortly after arriving at Surrey Memorial Hospital she lost consciousness and was diagnosed with a subdural hematoma on the right side of her brain. This blood clot required an immediate craniotomy to relieve the pressure on her brain. Further, the hospital staff determined that the unborn child was in distress and immediately performed a caesarean delivery prior to the craniotomy. The child was born in a healthy state and remained at Surrey Memorial Hospital while Ms. Gill was transferred to Royal Columbian Hospital in New Westminster where she remained unconscious for several days after the craniotomy. The craniotomy successfully removed the blood clot and Ms. Gill was discharged from hospital on December 23, 2008.

**5**  Ms. Gill claims that she continues to suffer from the injuries occasioned by the accident including post-traumatic headaches, confusion, memory loss, difficulty with busy environments, soft tissue injuries to the neck, shoulders and low back, and right lower leg swelling and discomfort. Ms. Gill also has scarring from the craniotomy and from the caesarean delivery.

**6**  As a result of the injuries caused by the accident, Ms. Gill claims damages for pain and suffering; past wage loss and past diminished capacity to earn income; future loss of income earning capacity; the cost of future care; and special damages. The defendants agree that Ms. Gill is entitled to compensation for pain and suffering; however, they argue that she is not entitled to any compensation under the other heads of damage. Further, the defendants argue that the injuries Ms. Gill may have suffered to her low back and right knee and leg are unrelated to the accident.

**CREDIBILITY**

**7**  During the trial, it became apparent that Ms. Gill was not a reliable historian about events in her life. She repeatedly responded that she did not recall the dates, details and timing of events in direct and cross-examination. Moreover, Ms. Gill had almost no recollection of statements that she had made to any of the medical professionals that she met with or was treated by in the years since the accident. Even recent statements, including those made under oath in the trial, were beyond her ability to recall. Commonly Ms. Gill either adopted the notes made by the medical professionals or agreed that she "might have said" a particular statement noted. In addition, Ms. Gill has given inconsistent medical histories to the various medical professionals with whom she has had contact since the accident and, further, has given obviously incorrect information about her life to them. As a consequence, little of the history of Ms. Gill's complaints since the accident can be relied upon unless there is some corroboration of her evidence from other sources.

**8**  In addition, Ms. Gill's evidence has to be viewed with caution because it is apparent that she misled her family physician (Dr. Jawanda), as well as other medical professionals, about her use of prescribed medications for her headaches and her back pain and in regard to the treatment she received or sought. She also misled the court about the reason she left her employment at the Willingdon Care Centre in July 2013. It is of further concern that Ms. Gill's reports of pain in her low back and with respect to her headaches have been quite inconsistent over time. The pain symptoms appear to worsen as the years go by without any apparent explanation. For example, in February 2015, she reported to Dr. Singh that her headaches were mild and intermittent and in March 2015, she reported worsening headaches and an increased use of prescription medication to Dr. Teal. Her reports of back pain have also been inconsistent in the same time frame; she reported being unable to stand or walk for more than two or three minutes to the occupational therapist (Ms. Sebastian) on April 20, 2011, while on April 16, 2011, she reported to her physiotherapist (Mr. Grewal) that she had low back pain with long periods of sitting and standing with forward neck flexion.

**9**  Ms. Gill's sister, Kulwinder Gill and her sister-in-law, Gurjot Gill, corroborated her evidence in some respects. I found Gurjot tended to exaggerate her observations of Ms. Gill's symptoms, and her recollection of the events, particularly when describing the sessions with Ms. Sebastian, was vague. I found Kulwinder's evidence to be vague and overgeneralized and thus mostly unhelpful. Kulwinder also appeared to have memory deficits when giving her evidence, particularly in cross-examination.

**10**  I did not find any credibility issues arising from the testimony of the experts called by both parties.

**11**  Ms. Sebastian, the occupational therapist assigned to Ms. Gill's case by ICBC, was also a credible witness; she provided her evidence in a straightforward, forthright manner. Ms. Sebastian did not testify as an expert; however, she was clearly not an advocate for either party. It was apparent that she disagreed with the views of the ICBC rehabilitation officer who retained her to act as Ms. Gill's occupational therapist and she advocated for her client with regard to insurance benefits. Ms. Sebastian also readily qualified her notes of the events in a manner favourable to Ms. Gill based on her independent recollection of Ms. Gill's state of health after the accident.

**12**  I also found Ms. Riar, who was Ms. Gill's supervisor at the Willingdon Care Centre, to be a credible witness. She was called as a witness for the plaintiff, and as such, any inconsistencies between her evidence and that of Ms. Gill must be resolved in her favour. The plaintiff cannot seek to discredit her own witness.

**MATERIAL FACTS**

**A. Early History**

**13**  Ms. Gill is 35 years old; she was born in India on September 17, 1980. Growing up she lived with her parents who owned a large farm. Ms. Gill was a hardworking daughter; she was energetic and helped her mother with household chores both before she left for school and after she returned home each day. She was a happy and healthy teen.

**14**  Ms. Gill was also a competent student. She graduated from high school and attended university, earning a Bachelor of Arts Degree in 2002 and Master's Degrees in History and Punjabi in 2004 and 2006. Her grades were in the 45 to 50% range but nevertheless passing marks. Ms. Gill's long-term goal was to become a teacher.

**15**  Ms. Gill's older sister, Kulwinder Gill, who trained as a registered nurse in India, immigrated to Canada in 1998. She trained as a care aide and obtained work at the Willingdon Care Centre. Kulwinder also learned English and testified at the trial without the assistance of an interpreter. Her husband, Gursewak Gill, has a construction business. In May 2006, Kulwinder sponsored her parents and Ms. Gill and they were all permitted to immigrate to Canada.

**16**  The entire family lived in a house in Surrey. Ms. Gill resided in the basement suite with her parents and Kulwinder and her family lived upstairs. Ms. Gill did not speak English, but Kulwinder obtained work for her at the Willingdon Care Centre as a cook's helper and a dietary aide. Although Ms. Gill still had plans to further her education and become a teacher in Canada, Kulwinder expected her to work and support herself before engaging in additional studies. Kulwinder testified that she counselled Ms. Gill to change her plans and consider becoming a care aide because she believed her sister was physically able to manage this type of heavy work. Ms. Gill testified that if she could not pursue a career teaching, she would have completed the care aide program.

**17**  Ms. Gill did not take ESL courses to improve her English or take any steps to further her education, either in the teaching field or as a care aide, prior to the accident in December 2008. There is also no evidence that she did any research regarding the qualifications and education required for a teacher or a care aide. Gurjot testified that she knew nothing of any employment or education plans Ms. Gill might have had.

**18**  Ms. Gill began working at the Willingdon Care Centre in July 2006. She worked full time between the positions of dietary aide and cook's helper. The cook's helper prepared the food for the cook and ensured the dishes and pots were cleaned and put away. The dietary aide prepared food trays, stacked them in large trollies and delivered them to the care aides who served the food to the residents.

**19**  Ms. Riar supervised Ms. Gill's work. Ms. Gill and Ms. Riar worked for M & K Food Services, which contracted with the Willingdon Care Centre to provide the meals for residents. Ms. Riar was the supervisor for three facilities. She testified that cook's helpers and dietary aides are in great demand in her business; they are hard to find.

**20**  In regard to the dietary aide and cook's helper positions, Ms. Riar testified that Willingdon has a relatively large kitchen with two food preparation stations at just below waist level. On each shift there is a cook and two helpers in the kitchen. She believed the work environment was not overly noisy or hectic except when meals were being served. There was also time for breaks between meals. The dietary aide is responsible for loading a large trolley with meal trays and two aides wheel it out to the care aides who serve the food to residents. A smaller trolley is used in the dining room for transporting food from the kitchen. There is an industrial dishwasher for plates and other items, but the pots are washed by hand in a deep sink. The lifting requirements, according to Ms. Riar's testimony, were limited for the cook's helper. The cook normally put away all her supplies and only occasionally asked the helpers to put away smaller items. The helpers were not required to lift full pots of soup or porridge but may have to slide them on the stove occasionally.

**21**  The job description for dietary aide was identified by Ms. Riar. She confirmed that the job required significant amounts of lifting, bending, stooping and stretching. However, she said the description contained every duty that could conceivably be performed and in practice some of the duties are rarely, if ever, required. She also testified that the dietary aides and cook's helpers are instructed to fill the bus pans and to carry only as much weight as they can manage safely, but acknowledged that the employees have to be efficient and during meal times it is very busy. As a consequence, the employees cannot make endless trips with lightly loaded bus pans back to the kitchen.

**22**  In addition to Ms. Riar's evidence concerning Ms. Gill's employment, there were two other reports describing the work duties. Ms. Sebastian prepared a worksite visit report on January 27, 2011, and described the two positions based on her observations, and after discussions with Ms. Gill and Ms. Riar, as follows:

***Cook's Helper*** *-* The main job duties of the cook's helper position include preparing and portioning out a variety of the day's menu items as determined by the Cook (eg salads, desserts, juices etc.). These tasks may involve lifting and transferring or carrying (up to 10 lbs) from all levels as ingredients are selected from the pantry and/or cooler shelves and taken to the food prep counter areas (approximately waist high) as well as constant bilateral hand tasking as the food is prepared. The cook's helper also must push the "Suzy Q" cart (which holds the hot food) out to the dining room and stand there for approximately 15 minutes to dish out the hot food on to plates which are then served to the residents (cook's helper does not serve the plates to residents, only prepares them). The cook's helper then clears the dishes from the tables using bus pans and takes them via the cart back to the kitchen where the dietary aide is responsible for washing them. ... The cook's helper must also wash the large pots and pans that are used for preparing meals in the large industrial sinks in the kitchen (some forward bending involved to reach into the sinks). The cook's helper is also responsible for cleaning out and wiping down the "Suzy Q" cart after serving the hot food.

***Dietary Aide*** - The position of dietary aide initially involves loading food trays with appropriate food items (approximately waist height) according to the dietary card on the trays for each resident, placing the trays on a "delivery cart" (floor to overhead positions) and then pushing the cart into the designated dining room. Once the carts are delivered, the dietary aide will serve coffee and tea for a short time period. It is then the dietary aide's responsibility to load the dishes (from the bus pans that the cook's helper has returned to the kitchen) into the automatic dishwasher for washing. He/she then unloads the clean dishes and puts them away.

**23**  Ms. Noel, a functional capacity evaluator with OrionHealth Rehabilitation & Assessment Centres, also prepared a job description for cook's helper and dietary aide with reference to Ms. Sebastian's description in the worksite report, the NOC job categories, and her own experience. Her report dated February 23, 2011, says as follows:

The NOC (#6641) identifies the physical activity factors for Cook's Helper and Dietary Aide to include the following: working in multiple body postures (i.e. standing, crouching, stooping); upper limb coordination, and Medium strength demands. Ms. Gill's description of her work and findings from the work site visit report on file (dated January 27, 2011) are consistent with the NOC requirements with the exception of strength demands, where it is reported that the job demands are at a Light strength level.

...

Although it was not identified in the work site visit report, based on my previous experience with assisting food service workers to return to work, Ms. Gill's position will likely require extensive amounts of neck flexion. Depending on the height of the work surface, there will be at least moderate neck flexion required during tasks such as food preparation, plating food, and hand washing dishes (as the industrial sink is likely below waist level).

**24**  On February 10, 2008, Ms. Riar authored a progress report commenting on Ms. Gill's performance. In all areas Ms. Gill more than met her employer's expectations. She was described as requiring minimal supervision and working accurately and thoughtfully. Ms. Gill always made time for extra duties and worked consistently and independently. She was conscientious in maintaining a clean, orderly and safe work area and remained calm under pressure. Ms. Riar testified that once the job duties were clear to Ms. Gill, she was very good at her work.

**25**  Ms. Gill described her work as very fast paced. The kitchen staff had to consistently meet the needs of all the patients at the centre during mealtimes. Thus the ability to work efficiently under pressure and to focus on one's tasks was essential. The work performed by Ms. Gill also required lifting and bending, as well as carrying heavy pots and utensils. Both the cook's helper and the dietary aide were described as physically demanding jobs. Although Ms. Gill picked up a little English while she worked outside her home, she testified that she was not proficient in the language and primarily spoke Punjabi within the family.

**26**  Ms. Gill enjoyed her work at the Willingdon Care Centre and easily managed the heavy work and relatively long hours. Even when she was pregnant, the work was manageable. Ms. Gill testified that she did not feel exhausted at the end of the day and she did not feel pain or stiffness in her back or shoulders after working each day or at the end of the week. Ms. Riar confirmed that she noticed no problems in her work while Ms. Gill was pregnant.

**27**  Ms. Gill earned $18,028 from her work at the Willingdon Care Centre in 2007. In 2008, she earned $22,349 and approximately $2,000 working for her brother-in-law's construction company. She performed bookkeeping services in the company's home office. Kulwinder testified that her sister was good at this type of work; she was efficient and organized.

**28**  In 2007, Ms. Gill became involved with Hira Gill, who is a cousin of Gursewak Gill. They married in March 2007 in India. After spending two or three months with her new husband, Ms. Gill returned to Canada intending to sponsor Hira as a new immigrant. Hira came to Canada as a visitor in early 2008 and Ms. Gill became pregnant with her first child. At this time, Ms. Gill was residing with her parents in the Surrey basement suite and her mother had agreed to provide childcare when she returned to work after her maternity leave. While on maternity leave, Ms. Gill planned to take an ESL course to upgrade her English proficiency and possibly take a training course to become a care aide. Due to the injuries sustained by her mother in the accident on December 13, 2008, she was unable to care for the new baby. In addition, Ms. Gill's injuries prevented her from engaging in any educational programs. There is no evidence that Ms. Gill investigated the cost, duration or requirements for ESL and care aide training prior to the accident.

**29**  Ms. Gill commenced her maternity leave at the end of November 2008. She was eligible for a one-year maternity leave and EI benefits. In total her maternity EI benefits were $15,550. Before the accident intervened, it was Ms. Gill's plan to return to work full time at the Willingdon Care Centre after the one-year maternity leave.

**30**  At the time of the accident, Hira Gill was in India awaiting permission to immigrate to Canada. Because of the accident, he obtained permission to re-enter Canada on a temporary compassionate visa.

**B. December 13, 2008 to January 2010**

**31**  When Ms. Gill woke up in the hospital she felt empty and lifeless. She had no memory of the accident and was told that her daughter had been delivered by caesarean. At first she felt nothing because she was heavily sedated with pain medications; however, soon she felt pain all over her body and particularly in the area of the stitches on her head. When Ms. Gill learned that she had missed the birth of her daughter, she felt dry and empty inside and was extremely unhappy. Ms. Gill remained at Royal Columbian Hospital for ten days and her daughter stayed at Surrey Memorial. She expressed breast milk to feed the baby, but she did not see her or feed her.

**32**  Kulwinder testified that when Ms. Gill regained consciousness, she did not recognize her and had no memory of the accident. When Kulwinder told Ms. Gill about the baby, she appeared to be in shock and became extremely upset and then depressed. The entire family was very concerned about the possible complications arising out of the subdural hematoma and subsequent craniotomy. Because both her parents had been seriously injured in the collision, they were unable to care for Ms. Gill. As a consequence, Kulwinder took Ms. Gill to her home to convalesce after she was released from the hospital.

**33**  By this time, Kulwinder and her husband had moved to a different residence in Surrey. Ms. Gill stayed at her sister's home for several months until she travelled to India in July 2009. Both Kulwinder and Gurjot took time off work to care for Ms. Gill and the baby. In addition, a professional care aide retained by ICBC came to help Ms. Gill until April 2009. She came in the morning for four hours each day. Ms. Sebastian had to advocate for the continuation of the care aide services because she was primarily looking after Ms. Gill's baby so that Ms. Gill could rest. The ICBC rehabilitation officer in charge of the file was not inclined to continue these services because the care did not benefit Ms. Gill directly. He ultimately agreed to continue the services until mid-April 2009.

**34**  It is difficult to discern for how long Ms. Gill was bedridden after the accident. Kulwinder and Gurjot gave rather inconsistent time estimates and Ms. Gill's evidence was vague and her memory suspect. For some period of time she confined herself to the bedroom and required help walking to the bathroom. She breastfed her baby but was not able to change diapers or bathe the child. She experienced severe headaches and felt dizzy when standing. Her neck, shoulders and back were stiff and sore. Kulwinder assisted her sister by cooking her meals and helping her to the bathroom. Her sisters also cared for the baby. When Ms. Gill complained of sore muscles, Kulwinder massaged her back and shoulders. Kulwinder slept with her sister at night to keep her safe and help her to the bathroom. During this period, Ms. Gill was very sensitive to noise and would cry if Kulwinder's children or her own baby were too noisy. She continued to take pain medications and gradually increased the time spent out of bed. By the end of January 2009, Ms. Gill could spend two to three hours out of bed but she was not comfortable talking to anyone. Carrying on a conversation was difficult for Ms. Gill because she continued to have problems with her memory. Gurjot testified that Ms. Gill was a friendly, happy person before the accident, but during this early recovery period she was weak and did not want to talk to anyone.

**35**  Gurjot also testified about the cultural embarrassment Ms. Gill experienced due to the shaving of her head. Sikh women do not cut their hair and the shock of her shaved head was a significant embarrassment to Ms. Gill. Gurjot also testified that by January 2009, Ms. Gill could get to the bathroom on her own but did not do household activities such as cooking until about June 2009. For the first few months she did not read or watch television due to the headaches. Gurjot provided Ms. Gill with a heating pad to relax her back and shoulder muscles because she was stiff all over her body.

**36**  On January 9, 2009, Ms. Gill saw her general practitioner, Dr. Jawanda, for an assessment of her C-section and the stitches from the craniotomy. Dr. Jawanda noted that she was healing quite well from the C-section and the right-sided hematoma surgery. Ms. Gill did not discuss her headaches or back pain on this visit. There was a follow-up pending with Dr. Lee who had performed the craniotomy.

**37**  On January 28, 2009, Ms. Gill saw Dr. Lee and he noted that overall she was doing well but continued to have headache pain and her family advised that she was forgetful. Her personality was described by the family members as normal.

**38**  Ms. Gill's first meeting with Ms. Sebastian was on January 14, 2009. Although Ms. Sebastian was able to communicate directly with Ms. Gill for the most part, she also had the assistance of Gurjot Gill if there was anything that needed to be clarified with Ms. Gill in Punjabi. Most of the other health professionals who met with Ms. Gill also said they were able to communicate with her directly in English. As a consequence, I prefer Ms. Sebastian's evidence on this point over Ms. Gill's testimony that suggested she did not speak to the occupational therapist directly. Kulwinder's evidence about Ms. Sebastian's visits is also suspect because it is apparent that Gurjot was the interpreter for most of the sessions rather than Kulwinder.

**39**  During the first meeting with Ms. Sebastian, Ms. Gill reported that she continued to have fairly significant throbbing pain at the surgical site and into her right eye and generally did not feel well. She was dizzy getting out of bed. However, Ms. Sebastian recorded that Ms. Gill could perform the activities of daily living independently and was not bedridden. Ms. Sebastian observed Ms. Gill walking in the home, and during their session she was seated in the living room. She could not care for the baby due to the constant headaches and the homemaking chores and meal preparation were done by her sisters. She also reported pain in her lower calves but Gurjot noted no cognitive changes or emotional problems. Ms. Gill continued to be very tired even after long periods of sleep. For pain Ms. Gill was taking Tylenol rather than a prescription medication. Ms. Sebastian counselled Ms. Gill to try walking more around the house to ease the muscle pain in her calves. Overall, given the serious nature of the injuries suffered by Ms. Gill in the accident, she was recovering well in Ms. Sebastian's view.

**40**  On February 2, 2009, Ms. Sebastian visited Ms. Gill again and Gurjot was present to help with translation. According to Ms. Sebastian, Ms. Gill reported continuing headache pain but it was reduced in severity. When asked to rate her headache pain Ms. Gill said they were now a 3.5 out of 10. Dizziness when getting out of bed had resolved and there was no mention of back pain. There was also no report of cognitive deficits or emotional difficulties by Gurjot or Ms. Gill. The pain in her lower legs had decreased since the last visit and she was getting up more. Fatigue was still a problem with the headaches and Ms. Gill said she continued to require the care aide's services for childcare.

**41**  On February 4, 2009, Ms. Sebastian provided ICBC with a progress report on Ms. Gill's case and itemized the following symptoms:

1. Headaches: Ms. Gill reports on-going headaches which originate from the surgery site and go anteriorly into her right eye. She states she feels throbbing and pressure in her head. Initially Ms. Gill reported that her headaches were constant and extremely intense (about 8/10 on a pain scale), however, at my follow-up session she reported the intensity of the headaches to have diminished substantially (now approximately 3.5/10 on a pain scale).
2. Right and Left Lower Extremities: Initially Ms. Gill reported pain in both her left and right calf muscles. However, this is also decreased significantly since my first visit.
3. Dizziness: Ms. Gill initially reported occasional dizziness particularly when getting up out of bed. This symptom reportedly seems to have resolved itself at this point in time.
4. Fatigue: Ms. Gill reports no problems with sleeping but that she feels extremely fatigued even after getting significant sleep.

**42**  In regard to functional capacity, Ms. Sebastian reported the following as of February 4, 2009:

Ms. Gill reports she is independent in all aspects of self-care [washing, dressing and eating] and child care [with the aid of the care worker] at this point in time though continues to struggle in her ADL's due to her fatigue. She is currently receiving 4 hours of attendant care daily to assist her in this regard. She is able to sit and stand without difficulty and walks slowly for short distances only (mostly within the house) at this point in time. With respect to homemaking tasks she states her family is available to assist in this regard. She is not driving at this point in time.

**43**  On February 24, 2009, Ms. Sebastian met with Ms. Gill again. Ms. Gill was experiencing significant improvement in her fatigue levels and the headaches, which still were not resolved. She also reported to Ms. Sebastian pain in her lower legs that came intermittently. They talked about the care aide and Ms. Gill said it would probably be fine to end her services at the end of February 2009 because her husband was in Canada for another three months. She was also attempting more activity around the home including cooking and some childcare. There were still no cognitive issues reported by Ms. Gill or her sister-in-law.

**44**  By March 2009, Kulwinder testified that Ms. Gill had begun to walk independently but did not go outside and was not able to care for the baby beyond breastfeeding. She did not do any chores around the home and Kulwinder and her sister-in-law continued to help her with daily living activities. On March 25, 2009, Ms. Gill attended at Dr. Basra's chiropractic clinic for treatment relating to her cervical spine. Ms. Gill reported pain in her neck and shoulders and headaches. All movements were painful which she rated at 6 to 8 on a pain scale. Dr. Basra testified that on examination her cervical spine was in spasm on palpation and she had significant restriction in her range of motion. He treated Ms. Gill with muscle manipulation and she did not return for additional treatments until August 7, 2012.

**45**  On April 17, 2009, there was another follow-up visit with Dr. Lee who reported that while Ms. Gill was doing well, she still had some pain in her head and was still a bit forgetful. Her balance was satisfactory and there was no pronator drift. All of the CT scan reports showed full recovery without evidence of continuing injury to the brain.

**46**  On April 14, 2009, Ms. Sebastian met with Ms. Gill for the last time (until mid-2010) with the assistance of Gurjot. At this time, Ms. Gill reported that she still had the occasional headache once per week or once every two weeks. There was also occasional pain at the incision site. While she had no further leg pain and was independently doing personal care, she was still receiving help from her sisters for homemaking chores and childcare. The care aide was also coming two hours per day. Gurjot agreed that by this time Ms. Gill was managing all her activities of daily living related to personal care but she and Kulwinder still did all the housework and helped with childcare. Ms. Gill was quite content to give up the care aide because the family was there to help. I found Gurjot's evidence that Ms. Gill had daily headaches at this time to be quite suspect given the information provided to Ms. Sebastian that the headaches were now only intermittent.

**47**  On April 21, 2009, Ms. Sebastian reported to ICBC that there was significant improvement in Ms. Gill's functional abilities and symptoms as of her visit on April 14, 2009. Ms. Gill was currently managing independently in self care, childcare and homemaking tasks. (During testimony Ms. Sebastian agreed that this was not entirely accurate in light of her sisters' help and the services of the care aide). Ms. Sebastian reported that Ms. Gill's headaches reoccurred approximately every two weeks and there was minor pain in the incision sites occasionally. (Again not entirely accurate). There was also no pain in her lower legs as earlier reported. At this time Ms. Gill was not on any medications and Ms. Sebastian concluded that her services were no longer necessary.

**48**  Ms. Sebastian agreed that at this time Ms. Gill was not fully recovered from her injuries and was clearly not ready to return to work. She had not yet resumed her pre-accident activities at home and continued to require the assistance of her family members to care for her baby and for household tasks. She was, however, improving and the services of an occupational therapist were not required at that time. The file was not closed but simply put on hold awaiting further instructions from ICBC.

**49**  Ms. Gill continued to receive maternity benefits throughout this period but not partial disability benefits from ICBC. Ms. Gill's husband was in Canada on a visitor's visa and there is some evidence he was working part time as a roofer. Thus I accept that at this time Ms. Gill was not well off financially.

**50**  On June 3, 2009, Ms. Gill reported reoccurring headaches to Dr. Jawanda and she prescribed Naproxen for pain at bedtime. Ms. Gill filled this prescription on the same day. On June 8, 2009, Ms. Gill consulted with Dr. Jawanda about her husband's positive HIV status and was advised to use condoms. Dr. Jawanda testified that Ms. Gill was dealing with this issue well and did not appear to be anxious about the matter. In a subsequent visit, Ms. Gill learned that she was not HIV-positive. Although the defendants argued the HIV situation was causing Ms. Gill's ongoing headaches or at least contributing to the headaches, I find there is no evidence to support such an inference.

**51**  On June 11, 2009, Ms. Gill had another follow-up visit with Dr. Lee and she reported headaches "at times". Although she also reported forgetfulness, Dr. Lee did not have concerns about any reoccurrence of the hematoma and anticipated that there would be further improvement. On June 30, 2009, Ms. Gill again reported persistent headaches to Dr. Jawanda. Later visits in July 2009 were unrelated to the accident.

**52**  On July 24, 2009, Ms. Gill travelled to India with her husband to spend time with his family and to introduce them to the new baby. She remained in India until November 23, 2009. She came back with her husband who now had permanent residency status and he began working full time. On their return, Ms. Gill and her husband lived with Kulwinder for a short time before moving to their own basement suite. Ms. Gill testified that the flights were very difficult for her because sitting for long periods brought on lower back pain. To relieve the pain she stood in the aisles for portions of the flight. She did not refer to any headache pain during the flight or during the visit in India. Nor did she complain of low back pain while in India.

**53**  On December 2, 2009, shortly after returning to Canada, Ms. Gill complained to Dr. Jawanda that she was still having quite a few headaches and had been experiencing these since the accident. She described a feeling of heaviness. Dr. Jawanda diagnosed muscle tension headaches and prescribed Elavil 10 mgs per day. Ms. Gill filled this prescription the same day and received 30 tablets in a 10 mg dosage. Dr. Jawanda also provided Ms. Gill with a note concerning her headaches to enable her to apply for EI sickness benefits, which were subsequently denied because she had already received the maximum amount in maternity benefits.

**54**  On December 24, 2009, Ms. Gill returned to Dr. Jawanda's office complaining of continuing headaches of the same type. She prescribed an increase in the Elavil to 20 mgs. Ms. Gill did not fill this prescription. Ms. Gill testified that she likely still had some Elavil from early December 2009.

**55**  Ms. Gill and Kulwinder testified that there had been stiffness and pain in the lower back since the early days after the accident. Gurjot could not confirm this evidence as she was only aware of stiffness throughout Ms. Gill's body. There is no evidence that a specific complaint of low back pain was mentioned to any health professional up to the end of 2009. While pain in both calves was reported to Ms. Sebastian, it does not appear that Gurjot, Kulwinder or Ms. Gill mentioned back pain to Ms. Sebastian between January and April 2009.

**C. January 2010 to December 31, 2011**

**56**  The first complaint of back pain recorded in clinical records is Dr. Jawanda's note from a visit on January 25, 2010. At that time Ms. Gill complained of upper and lower back pain. This complaint occurred shortly after Ms. Gill moved into her own basement suite and began doing housework and taking care of the baby without assistance from members of her family. Although this fact logically supports Dr. Caillier's conclusion that Ms. Gill's deconditioned state, brought on by inactivity due to the accident injuries, gave rise to mechanical low back pain once she returned to household tasks, Ms. Gill and Kulwinder testified that the low back pain was a specific complaint in the early days following the accident. Ms. Gill advised Dr. Caillier that the low back pain began 15 to 20 days after the accident when she tried to get out of bed. On the other hand, Ms. Gill was not able to identify when the low back pain began when she was examined by Dr. Teal. As outlined earlier, Ms. Gill's recollection of events is quite suspect and cannot be relied upon without corroboration and there is little independent evidence to confirm either the onset of the pain in early January 2010 coincident with a return to household chores or the existence of low back pain shortly after the accident. I note that Dr. Jawanda's clinical notes do not identify an incident leading to the low back pain and Ms. Gill did not testify that the low back pain came on while she attempted household chores or childcare.

**57**  When she examined Ms. Gill on January 25, 2010, Dr. Jawanda found no abnormalities or reduced range of motion and diagnosed musculoskeletal injuries due to muscle tenderness on palpation. Dr. Jawanda recommended that Ms. Gill continue with her physiotherapy because she was under the impression that physiotherapy was ongoing at this time. However, Ms. Gill was not involved in any type of treatment at that time. Ms. Gill again complained of pain in her lower and upper back on March 9, 2010, and was told to continue with physiotherapy. Ms. Gill failed to advise Dr. Jawanda that she was not engaging in any physiotherapy at that time.

**58**  Ms. Gill had stopped taking Elavil, and she returned to Dr. Jawanda's office complaining of headaches on April 29, 2010. She was told to restart Elavil at 10 mgs. However, Ms. Gill did not fill any prescription for Elavil at this time and the last Elavil she purchased was on December 2, 2009.

**59**  In late May 2010, ICBC was considering whether to pay disability benefits to Ms. Gill. Ms. Gill's legal counsel had requested disability benefits be considered for her, and Dr. Jawanda had provided a medical note from December 2009 that indicated she could not work for another six to eight weeks due to headaches (notably not for low back pain). Some benefits were paid out but ICBC wanted Ms. Sebastian to re-assess whether Ms. Gill was still disabled and unable to work, and whether she required any further rehabilitation before deciding whether such benefits could be paid to her. On June 7, 2010, Ms. Sebastian telephoned Gurjot and advised her that the file was being re-opened and set up a meeting for June 14, 2010.

**60**  On the same day, June 7, 2010, Ms. Gill returned to Dr. Jawanda complaining of back pain and on examination she was found to be tender in the paralumbar area with a slightly decreased range of motion. She prescribed Flexeril and Naproxen and recommended physiotherapy. On the same day Ms. Gill filled both prescriptions. She also had her first physiotherapy session with Mr. Grewal at Singh Physiotherapy on June 7, 2010. His office is adjacent to Dr. Jawanda's in the same building. Ms. Gill's primary complaint was low back pain. Mr. Grewal was unable to do a complete examination for nerve damage and range of motion because Ms. Gill reported the pain was not bearable. However, range of motion as tested was substantially restricted and there was no detectable nerve involvement. She reported pain on palpation and he observed her bent posture and abnormal gait when she walked. Mr. Grewal diagnosed a lumbar muscle spasm. Ms. Gill continued to attend for physiotherapy sessions on a weekly basis until July 7, 2010. At the conclusion of these sessions Ms. Gill appeared to be managing better and saw some improvement in her back pain and flexibility. Mr. Grewal noted on July 7, 2010, that she was lumbar pain free. Home exercise was recommended along with massage therapy. By July 5, 2010, Ms. Gill was able to lift ten pounds from floor to waist five times and to carry ten pounds for ten metres, having lifted floor to waist. Ms. Gill testified that she would have liked to have continued with the physiotherapy; however, she could not afford to pay for the sessions.

**61**  On June 14, 2010, Ms. Gill met with Ms. Sebastian, and Kulwinder was present to help interpret. Ms. Gill reported intermittent headaches that could last up to a week. The headaches were characterized by pain behind the eyes and across the forehead and the temples. It felt like "heaviness in her head." The back pain was in the lumbar region and radiated into the upper back and shoulders. This is the first occasion that Ms. Gill reported memory problems when she was experiencing a headache. She also reported slower processing of information for the first time. Ms. Gill reported that Dr. Jawanda had prescribed muscle relaxants and painkillers. As she testified, Ms. Gill told Ms. Sebastian that she managed the cooking and cleaning and childcare by taking breaks; however, bathing the child was difficult due to low back pain. Her husband helped with the heavy tasks and with childcare when he was not at work. Her mother-in-law was also now available to help out with the child as she was visiting from India for several months. Ms. Gill advised Ms. Sebastian that she was not ready to go back to work.

**62**  On July 17, 2010, Ms. Gill again reported headaches and Dr. Jawanda increased the dosage of Elavil to 20 mgs and Naproxen twice daily. Ms. Gill did not fill these prescriptions. She testified that she was not taking Naproxen every day. It is unlikely that Ms. Gill had Elavil left from December 2, 2009 unless she was not taking it contrary to Dr. Jawanda's advice. Ms. Gill testified that in these early days her husband was not working full time and the family could not afford to pay for her prescriptions. ICBC would sometimes reimburse her for prescriptions but payment was very slow. This is inconsistent with her evidence that her husband had full-time work when they returned from India in late November 2009. She had also received some disability benefits from ICBC and was purchasing other types of medication at this time quite consistently. There was no reference to low back pain during this visit, which supports a conclusion that the physiotherapy sessions had been successful.

**63**  In early July 2010, Ms. Sebastian contacted the Willingdon Care Centre to inquire about a job for Ms. Gill and they agreed she could come back as a supernumerary working as a dietary aide if she was able to do so. However, she had to be capable of all the required duties and they would support a graduated return to work. In a report dated July 8, 2010, Ms. Sebastian advised ICBC of her recommendations as follows:

1. ... It is recommended that Ms. Gill begin participation in an active rehabilitation program (or continue if this is the nature of her program at Singh Physiotherapy) in an effort to address her current complaints of back pain and condition herself toward increased functioning in her ADL's as well as a successful return to work. A 1:1 exercise therapy program supervised by a registered kinesiologist 3 times per week for the next 8-12 weeks which would include strengthening, range of motion and conditioning exercises as well as the incorporation of work simulation tasks when appropriate would certainly assist her in achieving this goal. ...
2. ... Given Ms. Gill's on-going complaints of significant and sometimes long lasting headaches, a follow-up with the neurosurgeon may be warranted. ...
3. ... OT services are recommended to monitor Ms. Gill's progress and facilitate the progression of the gradual return to work trial when deemed appropriate to do so by her family physician. ...

**64**  Between July 2010 and late March 2011, Ms. Gill participated in a variety of exercises in a supervised program designed to recondition her body and hopefully reduce her back pain. The exercise program included workouts at the gym under the supervision of a kinesiologist at the Newton Wave Pool. During the exercise program, Ms. Gill reported that her back pain was significantly reduced and less frequent. She continued to suffer from headaches but the exercises made her feel stronger and she noticed improvement in the back pain. The kinesiologist reported that Ms. Gill was compliant with the exercises and showed good effort.

**65**  On September 27, 2010, Ms. Gill reported to Dr. Jawanda that her back was better now that she was involved in the supervised exercise program and she did not report low back pain again to Dr. Jawanda until April 18, 2011.

**66**  It was in this time period that Dr. Jawanda referred Ms. Gill to Dr. Singh, who is a neurologist, for her reoccurring headaches. Dr. Singh saw Ms. Gill on November 15, 2010 and diagnosed her with a closed head injury and continuing post-traumatic headaches. However, because she reported mostly mild headache pain at that time Dr. Singh did not believe a prophylaxis was necessary to inhibit the headaches. She was advised to take Tylenol or Advil for pain relief and he suggested physiotherapy. At this time Ms. Gill advised Dr. Singh that she took Tylenol or Advil for headaches and had not tried any other medication except Elavil for about a month and did not find it helpful. Ms. Gill testified that this was true and acknowledged that she had not filled the prescriptions for other headache pain medication that Dr. Jawanda provided her, such as Naproxen.

**67**  Ms. Gill also continued to see Dr. Jawanda for ongoing headaches on September 27 and 30, 2010 and on November 22, 2010. She advised Dr. Jawanda that Tylenol was not helpful and Naproxen was mildly helpful. However, Ms. Gill had not filled a prescription for Naproxen since June 7, 2010. Dr. Jawanda prescribed Zoloft 25 mgs in early January 2011. Ms. Gill did not fill the Zoloft prescription until March 2, 2011.

**68**  When Ms. Gill returned to Dr. Jawanda's office in early February 2011, she reported that the Zoloft was helping reduce the headache pain and the dosage was increased to 50 mgs. This was obviously untrue because Ms. Gill had not yet filled the prescription. There were visits with Dr. Jawanda in February, March and early April 2011 that appeared to be about unrelated medical issues.

**69**  Throughout this period (Fall 2010 to February 2011), Ms. Gill was also meeting with Ms. Sebastian who recorded that the headaches continued to be problematic, particularly after gym workouts, but the back pain was continuously improving with exercise. Sometimes she would miss gym workouts due to headaches. By March 2011, Ms. Gill reported to Ms. Sebastian readiness to begin a graduated return to work program at the Willingdon Care Centre.

**70**  On January 17, 2011, Ms. Sebastian had visited the worksite with Ms. Gill and prepared a review of the job demands of the cook's helper and dietary aide. She concluded, based on Ms. Gill's self-report and with input from the kinesiologist, that Ms. Gill could meet the job demands at a light strength level with an increased ability for dynamic and static standing and postural tolerances including bending and forward reaching. Ms. Sebastian recommended a gradual return to work, keeping in mind that headaches may continue to be a limiting factor even if she could perform the physical aspects of the job. The employer still took the position that only during the graduated return to work would Ms. Gill have modified duties. Thereafter she would have to be fit for all of the required duties.

**71**  As of early February 2011, Ms. Gill was lifting 20 pounds from floor to waist at the gym under the supervision of the kinesiologist, Mr. Bhambra. She reported to Mr. Bhambra that she was also going to the gym twice per week in addition to the weekly supervised session. It was determined that a functional capacity evaluation should be obtained before the return to work. At this time Ms. Gill told Ms. Sebastian that she was open to the graduated return to work even though her headaches continued to be problematic.

**72**  At the request of ICBC, Ms. Noel, who is an occupational therapist with OrionHealth, conducted a functional capacity evaluation of Ms. Gill on February 14, 2011. She noted good effort on the part of Ms. Gill. Despite finding Ms. Gill did not meet some aspects of the two jobs evaluated, Ms. Noel concluded that she was currently able to work part time (one-half to three-quarters) in the cook's helper and dietary aide positions with the potential to progress to full-time work. Ms. Noel also noted the difficulties presented by ongoing headaches and recommended adjustments to the return to work plan to address these problems:

Although Ms. Gill demonstrated endurance for part time work, due to her on-going headache complaints and some observable signs of fatigue, I recommend that she start her GRTW at reduced hours (i.e. 2 hour shifts) and alternating days to start, with weekly progressions in hours and days worked. As Ms. Gill's overall performance speed was slow, it is recommended that she start her GRTW with job tasks that do not require time pressures. As indicated in the work site visit report, the employer requires her to be an extra worker during the GRTW; therefore she can start the GRTW with assisting with job tasks such as food preparation, serving coffee and tea to the residents and clearing the dishes from the tables which would be less time pressured.

It is also recommended that the job tasks requiring moderate neck flexion are slowly introduced during her GRTW (for example, if dishwashing is regularly a 20-30 minute job task, she would start with 5 minute periods and progressively increase by 5-10 minutes per week). In addition, Ms. Gill would benefit from a work site assessment as to whether there are any possible ergonomic modifications that can be implemented to improve her neck positioning and postural tolerances (i.e. raising table surface used for food preparation, use of long handled scrubber for washing pots, use of a sit stand stool to reduce standing demands).

**73**  Ms. Noel also concluded that Ms. Gill had not demonstrated in her functional capacity assessment, any symptom management strategies. Further education on this topic was recommended, which would include training about such strategies as micro-breaks, pacing, and stretching.

**74**  A graduated return to work program ("GRTW") was arranged for April 12 to May 20, 2011. Ms. Gill attended for her first shift on April 12, 2011 as a cook's helper. Ms. Sebastian noted that Ms. Gill did not have a headache that morning but she commented that her back felt sore and "locked up" when she woke up that morning. Ms. Gill was to shadow another employee assigned to the job. Ms. Sebastian was present for the first one-and-a-half hours of the shift and did not observe any pain behaviours by Ms. Gill. On April 14, 2011, Ms. Gill telephoned Ms. Sebastian and reported that she had such pain in her lower back that she could not walk or stand for more than two to three minutes. Ms. Gill did not attend for work that day and thereafter Ms. Sebastian's attempts to contact her were unsuccessful. On April 18, 2011, Ms. Gill went to work and advised her employer that she was not well. That afternoon she telephoned Ms. Sebastian and advised that her increased back pain led her to attend for physiotherapy on April 16 and 18, 2011. She also attended Dr. Jawanda's office on April 18, 2011 complaining of back pain. Dr. Jawanda testified that Ms. Gill attended her office that day with complaints of lumbar pain and it was tender upon examination. There were no complaints of headache pain.

**75**  The clinical records from Singh Physiotherapy indicate that Ms. Gill attended on April 16, 2011 complaining of lower back pain with sitting and standing for long periods and with bending forward activities. This appears to be a different history from that provided to Ms. Sebastian. Her range of motion was full apart from pain at the very end of backward and forward flexion. Mr. Grewal noted that Ms. Gill had weak abdominal muscles but there was no nerve involvement in the hips and spine. He diagnosed low back pain secondary to decreased abdominal strength. In cross-examination, Mr. Grewal agreed that Ms. Gill's back pain was minimal and consisted of a dull ache and some stiffness. Ms. Gill advised Mr. Grewal that she was not taking any medication for back pain. He also agreed that Ms. Gill's posture and gait were normal and that the sensory tests were normal. It appears irreconcilable that Ms. Gill had weak abdominal muscles a short time after her supervised exercise program ended. She may have continued to exercise at the gym on her own but there is no evidence to support this assumption and Dr. Caillier noted in her report dated March 10, 2014, that Ms. Gill did not feel comfortable in the gym environment and was only doing stretching exercises at home.

**76**  Ms. Gill returned for treatment on April 18, 2011. However, after advising the physiotherapist that she was pregnant, he counselled against further treatment and recommended that she undergo massage therapy through a specialist therapist. This was a recommendation from Dr. Jawanda. There is no evidence that Ms. Gill subsequently attended for massage therapy.

**77**  Ms. Gill attended for work on April 20, 2011, but experienced increased back pain at the end of the shift and did not return to work thereafter. On April 27, 2011, Ms. Gill reported lower back pain radiating into the hip region to Dr. Jawanda. Although this suggests sciatic nerve involvement, Mr. Grewal's tests indicated there was no sensory impingement. Dr. Jawanda prescribed extra strength Tylenol and further physiotherapy, which is inconsistent with Mr. Grewal's evidence that massage therapy was recommended. I note that there were several visits to Dr. Jawanda's office between September 2010 and April 2011, with no complaints of lower back pain.

**78**  On May 3, 2011, Ms. Sebastian contacted Dr. Jawanda who continued to support Ms. Gill's return to work provided she did not do any heavy lifting. Dr. Jawanda indicated that Ms. Gill was coming in soon and they would discuss the return to work. Dr. Jawanda did not recall this conversation and has no record of it.

**79**  Although Ms. Gill attended Dr. Jawanda's office on May 11, 2011, there is no indication in her clinical records that they discussed a return to work or back pain. Instead, Ms. Gill reported increased headaches and was prescribed Zoloft. However, Ms. Gill did not fill the prescription for Zoloft at that time or at any time before the end of 2011. Her last Zoloft prescription was filled on March 2, 2011. On May 18, 2011, Ms. Sebastian spoke to Ms. Gill and was advised that her headaches and low back pain continued to prevent her return to work. Although she advised Ms. Sebastian that she was now taking a new medication, this was obviously a misrepresentation of the facts.

**80**  Dr. Jawanda saw Ms. Gill on May 24, June 13, July 25, August 10, August 31, September 17, and October 18, 2011, but there were no complaints of low back pain during these visits. The primary complaint remained headaches. On October 4, 2011, Ms. Sebastian closed her file because she had not heard from Ms. Gill since May 18, 2011.

**81**  Ms. Gill gave birth to her second child on or about December 23, 2011. It was a normal birth without complications.

**D. January 2012 to present**

**82**  In the early months of 2012, Ms. Gill attended Dr. Jawanda's office with complaints of ongoing headaches. She was prescribed Naproxen and Elavil; however, Ms. Gill did not fill the prescription for Elavil. She purchased the Naproxen sometime after her appointment on February 8, 2012.

**83**  Notwithstanding some attendances for headaches, Ms. Gill's primary complaint commencing in early 2012 was tibia and fibula pain and swelling in her right leg. An X-ray taken on March 16, 2012 showed a slight thinning of the lateral main knee joint, but otherwise there were no abnormalities of the tibia or fibula or ankle. On June 26, 2012, a bone scan revealed soft tissue inflammation and active osseous remodelling within the right mid tibia medially. Although the X-ray evidenced bone healing after a recent trauma, Dr. Caillier and Dr. Jawanda agreed that "recent" meant within the past six to eight months and thus not likely related to the accident. The remodelling could also be due to an infection and, as a consequence, Dr. Jawanda ordered a CT scan.

**84**  The CT scan dated July 24, 2012 was inconclusive as to the cause of the new bone formation but there was a suggestion of either infection or neoplasm. A chest radiograph and an abdominal ultra sound were recommended. A follow-up CT scan on December 19, 2012 revealed a healed stress fracture in the medial tibial cortex, leaving chronic mature periosteal reaction over the surface of the tibia. There was no evidence of infection, tumour or osteoid osteoma.

**85**  Dr. Jawanda was unable to diagnose the cause of the stress fracture and referred Ms. Gill to Dr. Matthew, who is an orthopaedic surgeon. Dr. Matthew ordered an MRI and, in a consultation report dated January 9, 2013, he diagnosed an old stress fracture but was otherwise unhelpful in isolating the cause. Because the right leg was no longer giving Ms. Gill too much pain, and there were no mechanical symptoms, Dr. Matthew recommended some physiotherapy to strengthen the area and prescribed Diclofenac topical gel. It does not appear that Ms. Gill filled this prescription in Canada and she left for India a short time later. Dr. Jawanda testified that currently she is still unsure of the cause or precise nature of the tibia injury.

**86**  Throughout the summer and fall of 2012, Ms. Gill regularly saw Dr. Jawanda with complaints of pain in her right leg. There were also periodic visits due to headaches and low back pain. Dr. Jawanda continued to prescribe Naproxen and Elavil for the headaches but Ms. Gill did not fill these prescriptions. Although Ms. Gill testified that she did not use Elavil continuously and may have had some left from the last prescription she filled, there was no Elavil prescription filled after December 2, 2009. In cross-examination, Ms. Gill acknowledged that she misled Dr. Jawanda in regard to her use of these prescription medications for headache pain. She also testified that at this time the family could not afford to fill all of her prescriptions; however, in January 2013, Ms. Gill had sufficient funds for a trip to India. Her husband was also working full time and she began working part time at the Willingdon Care Centre in May 2012.

**87**  Later in 2012, Ms. Gill experienced flu symptoms, sore throat and sinusitis. Dr. Jawanda agreed that at times Ms. Gill's headaches are related to sinus infections but these headaches are located more in the sinus areas and are different from the "hat band" headaches that Ms. Gill has reported since the accident.

**88**  On March 21, 2012, ICBC asked Ms. Sebastian to re-open her file on Ms. Gill to attempt another graduated return to work program at the Willingdon Care Centre. Ms. Gill advised Ms. Sebastian that it was her intention to return to work, but her mother-in-law was arriving from India in late April 2012 and thus she felt a May start date would be better for her family because of childcare concerns. In her assessment visit on April 5, 2012, Ms. Gill said that her back pain was the same but increased with activity. Headaches were described as returning every few days and she took Tylenol for pain and a prescription drug in the evening. Ms. Gill had not kept up with her exercises at the gym and was not otherwise regularly active.

**89**  When Ms. Sebastian contacted the Willingdon Care Centre, she was advised that only a part-time position was available for Ms. Gill in May 2012. Ms. Gill felt that part-time work was manageable if scheduled on alternate days. She wanted to work weekends on the early shift from 6:30 a.m. to 2:00 p.m. Ultimately it was Ms. Gill who negotiated her own return to work without any accommodations apart from shorter shifts to begin.

**90**  Ms. Gill went back to work on May 13, 2012, working four shifts of four hours' duration in a two-week period. Occasionally she worked five shifts in a two-week period. This schedule continued until November 24, 2012. Thereafter she consistently worked five shifts in a two-week period until January 2013 when Ms. Gill travelled to India. Ms. Gill reported back pain to Ms. Sebastian at the end of May 2012, but said she was managing at work. In August 2012, Ms. Gill saw Dr. Basra for chiropractic treatments on three occasions. Her complaints were cervical, mid-back and lumbar pain that was aggravated by prolonged sitting and forward flexion. At the end of the treatments there was not much improvement in the low back but the cervical pain had decreased.

**91**  Ms. Gill took a trip to India in early January 2013 and returned to work on April 16, 2013; she worked six shifts in a two-week period. Thereafter Ms. Gill worked ten shifts in some two-week periods to cover people off sick, but at other times she worked six to seven shifts in a two-week period. July 20, 2013 was Ms. Gill's last day at work. She testified that her employer required a full-time cook's helper and dietary aide and could no longer use her services part time. When she refused to accept full-time work, Ms. Gill was forced to resign. The record of employment indicates termination due to a refusal to work shifts. Ms. Gill testified that due to her headaches and her low back pain she was not able to work full time. However, Ms. Riar testified that Ms. Gill was performing her work without any signs of difficulty even when she worked close to full-time hours. Contrary to Ms. Gill's evidence, Ms. Riar testified that she was forced to terminate Ms. Gill's employment because she continually called in at the last minute to say she could not take a shift. The schedule was set about ten days in advance and the staff had an opportunity to choose the shifts they wanted to work. Ms. Gill would choose her shifts and then change her mind when it was too late to replace her. Ms. Riar denied that she had demanded Ms. Gill work full time.

**92**  There were a number of visits with Dr. Jawanda in the spring and fall of 2013; however, most of the complaints related to headaches and sinusitis. It was only in mid-September 2013, that Ms. Gill raised lumbar pain with Dr. Jawanda. She prescribed Elavil and Naproxen for headaches. Ms. Gill filled a prescription for Naproxen on September 10, 2013 and Elavil on August 1, 2013, which must have been prescribed in early July 2013.

**93**  In September 2013, Ms. Gill attended for chiropractic treatments on four occasions, complaining of right-sided SI joint pain rather than acute low back pain. In October 2013, she had three physiotherapy sessions with Mr. Grewal and her complaints were lumbar back pain and stiffness. He found a restricted range of motion and tenderness in the lumbar region with passive leg raising. The treatments improved her pain and she was given some exercises to do at home. In October 2013, Dr. Jawanda recommended exercise and stretching for the back pain and ordered an X-ray that showed no disc narrowing or other abnormalities.

**94**  Ms. Gill did not return to work after July 2013 even on a part-time basis. She continued to report headaches to Dr. Jawanda into the early months of 2014 and was prescribed Elavil again at bedtime. Although Elavil was prescribed on May 9, 2014, Ms. Gill did not fill this prescription until October 7, 2014. Thereafter she regularly filled prescriptions for Elavil (called Amitriptyline) throughout the balance of 2014 in 25 mg doses and this continued until June 2015. Toradol was also prescribed for headache pain in March 2015, but this prescription was not filled. In April 2015, Flexeril was prescribed for headache pain and Ms. Gill filled this prescription in May 2015. On June 22, 2015, Ms. Gill reported lumbar pain and was advised by Dr. Jawanda to take Naproxen and Flexeril. Ms. Gill reported to Dr. Jawanda, recurring headache pain on September 16, 2015 and required additional Elavil as she had run out. This prescription was not filled. It was not until January 11, 2016 that Ms. Gill filled a prescription for Elavil. Thus it appears Ms. Gill attended Dr. Jawanda's office throughout the fall of 2015 with complaints of headache pain but did not fill the Elavil prescription until the New Year.

**95**  Ms. Gill did not attend for any further chiropractic or physiotherapy treatments and it does not appear that after she left work in July 2013 she engaged in a regular exercise program. However, Dr. Jawanda referred her to Dr. Singh again in November 2014 due to the ongoing headaches. Dr. Jawanda testified that headaches were always Ms. Gill's primary complaint and the low back pain did not stand out for her as a significant ongoing problem.

**96**  Dr. Singh's consultation report dated November 25, 2014, indicates that Ms. Gill continued to suffer from headache pain that was made worse by a sensation of dizziness that was not previously reported. She also related a feeling of numbness in her head associated with frontal pain, which she later reported to Dr. Caillier. On this occasion, Ms. Gill associated the headaches with anxiety rather than with exertion and sensitivity to sound and light as she had previously reported to Dr. Jawanda. Although Ms. Gill advised Dr. Singh that she was taking Elavil to prevent headaches, she also took 20 mg of Elavil at night for insomnia, which may explain why her Elavil prescriptions were regularly filled in 2014 unlike in previous years. Rather than post-traumatic headaches as diagnosed by Dr. Singh in November 2010, his impression was that the headaches were from stress, which was suggested by the description of forehead pain and tingling. Because he also felt there was a migraine component to the headaches, Dr. Singh prescribed magnesium and riboflavin.

**97**  Ms. Gill again attended for a consult with Dr. Singh on December 23, 2014, and she advised that the headache intensity and frequency had improved by 10%. Dr. Singh increased her dose of Elavil to 37.5 mgs. Her last consultation with Dr. Singh was on February 3, 2015, and at that time she reported that her headaches were now mild, if they reoccurred, and she had not needed to increase her Elavil consumption beyond 25 mgs.

**EXPERT REPORTS**

**A. The Plaintiff's Experts**

**98**  Dr. Jawanda is Ms. Gill's treating physician and has been so since September 2008. In her expert report dated January 20, 2011, Dr. Jawanda provided a diagnosis of chronic muscle tension headaches and a musculoskeletal injury to her low back arising from the accident. By January 2011, Dr. Jawanda concluded there was no longer evidence of any upper or lower back problems; however, her prognosis regarding the ongoing headaches was guarded:

My impression is that Ms. Gill suffered from extensive injuries and has done remarkably well. Most importantly, she delivered a healthy baby via an emergency C-section. Also her head injury was dealt with in a timely fashion. The right-sided subdural hematoma was drained and evacuated so that she does not have any neurological deficits. Her residual problem from this motor vehicle accident is the fact that she does have these ongoing headaches. We have tried a variety of medications such as Elavil, most recently Zoloft, and the p.r.n. use of naproxen. That seems to work the best as a p.r.n. use of naproxen. My impression is that she has done remarkably well. She will probably continue to have these headaches and my prognosis for the headaches is guarded at this time. Only time will tell over the next couple of years how she will fare.

**99**  In cross-examination, Dr. Jawanda testified that she was unaware that Ms. Gill was not regularly filling the prescriptions she provided for the headaches and thus Ms. Gill was likely misleading her in regard to the consumption and effectiveness of these medications. However, Dr. Jawanda's report indicates that she was aware Ms. Gill was not always taking the prescribed Elavil. Dr. Jawanda agreed that her opinion about the severity and ongoing nature of the headaches may have to be rethought in light of Ms. Gill's sporadic use of prescribed medications. She continued to opine that the headaches reported to her by Ms. Gill were a post-traumatic symptom of the head injury she received in the accident.

**100**  Dr. Singh provided an expert report dated April 5, 2015, based on his four consultations with Ms. Gill since November 2010. As a neurologist, he opined as to the cause of her headaches:

Based on the information we have, that is my evaluation reports, Ms. Gill, prior to the motor vehicle accident of December 13, 2008, was in good health, fully functional. She was not known to have any medical conditions, was not on any regular medications. [She was taking prescription medications for a thyroid condition but this had no bearing on the injuries claimed to be caused by the accident.] December 13, 2008, she was involved in a motor vehicle accident and is amnesic as to what happened over the next three days and came to her senses at Royal Columbian Hospital. She did have a subdural hematoma, which was drained by Dr. Lee. We do not have those records, though.

Based on available information, the motor vehicle accident is the direct cause of head injury, which led to subdural hematoma and the ongoing headaches.

**101**  It was Dr. Singh's opinion that Ms. Gill suffered a severe traumatic brain injury and likely has underlying cognitive deficits, which would have to be tested by a Neuropsychiatric evaluation. He recommended cognitive and physical rehabilitation. Dr. Singh did not believe any subsequent bleed was likely given Ms. Gill's young age, but he had a guarded prognosis for her ongoing headaches:

Ms. Gill, to this date, continues to have headaches, which are posttraumatic. The headache prognosis is usually variable but I do believe she very likely has overlapping depression contributing to the headaches and, therefore, a Psychiatry evaluation would be of value. ...

...

... Specifically, there is a real possibility that the injuries will limit the patient's opportunities with respect to employment.

... The cognitive impairment is likely subtle and it can affect her future employability; however, I would suggest that Ms. Gill be evaluated by a vocational and physical rehabilitation to assess her employability.

**102**  Dr. Singh testified that he disputes Dr. Teal's opinion that the headaches are entirely related to sinusitis. While at times Ms. Gill may suffer from a sinus headache, her description of the headaches in the "hat band" area and accompanying symptoms of heaviness and tingling suggest they are post-traumatic headaches. I note that Ms. Gill does not appear to have suffered from sinusitis until late 2012, which is long after the headaches began. Dr. Singh opined that the slight thickening of the mucus in one or two of Ms. Gill's sinus cavities on X-ray is common in the general population and does not indicate ongoing sinusitis. On the other hand, Dr. Singh did not provide an explanation for his later consultation reports from November 2014 and February 2015, wherein he diagnosed tension headaches triggered by stress rather than a continuation of Ms. Gill's post-traumatic headaches.

**103**  Dr. Caillier is a specialist in Physical Medicine and Rehabilitation and she provided two expert reports dated March 10, 2014 and July 29, 2015. When Dr. Caillier first saw Ms. Gill in January 2014, her complaints related to low back pain, right knee and lower leg pain and headaches. There were times when her thinking was not clear and this was associated with headaches and a freezing sensation in her head when she did paperwork or rushed around with activities. She also reported sound sensitivity with headaches. The headaches could be gone for a week but also could last two to three days.

**104**  Dr. Caillier opined that Ms. Gill suffered a traumatic brain injury as a result of the accident that was at least moderate in nature. She also recovered quite well from the injury with her only cognitive deficit being a reduced thinking capacity with headaches. She opined that the cognitive effects in the form of memory and decreased ability to concentrate are likely secondary to the headaches and that it is possible the headaches cause the visual difficulties Ms. Gill has when reading and watching television. The existence of one brain injury makes her susceptible and vulnerable to a subsequent brain injury even if it is mild. Dr. Caillier also opined that the headaches were post-traumatic and secondary to the brain injury and given their chronicity would likely continue into the future. The headaches described by Ms. Gill were likely to cause fatigue and reduce her cognitive functioning, memory and attention. When she has a severe headache, Ms. Gill will have a reduced ability to participate in home, work and recreational activities.

**105**  In regard to the lower back pain, Dr. Caillier found this was related in a secondary way to the accident:

It is my opinion that as a result of the motor vehicle accident of December 13, 2008, Ms. Gill became physically deconditioned. With this, there was a loss of strength, endurance, and flexibility through the low back, core, pelvis and hip regions.

It is my opinion that she remains physically deconditioned. There is weakness of her core and hip musculature. This is likely increasing her susceptibility and vulnerability to worsening of her lower back pain when she is involved in activities of a repetitive nature, such as repetitive bending, heavier lifting and carrying, heavy impact activities, as well as sustained posturing.

**106**  Dr. Caillier noted that the back pain improved while Ms. Gill was involved in the exercise rehabilitation program; however, she no longer went to the gym or otherwise engaged in strength and endurance exercises. The stretching and movement exercise that Ms. Gill did at home each day was not sufficient to improve her physical conditioning for work or daily chores at home. Dr. Caillier supported her opinion with the lack of any history of back complaints prior to the accident and evidence that she was able to work in a physically demanding job without complaints prior to her maternity leave in late 2008. Dr. Caillier testified that the delay in the onset of low back pain coincided with Ms. Gill's resumption of homemaking chores when she moved to her own apartment in early 2010.

**107**  In terms of a prognosis, Dr. Caillier opined that the back pain would continue into the foreseeable future in view of its already chronic nature. Further, Dr. Caillier opined that Ms. Gill was now susceptible to a worsening of her lower back condition if she sustained a subsequent injury.

**108**  It was also Dr. Caillier's opinion that the lower back condition limited Ms. Gill's ability to engage in activities that required sustained posturing, repetitive bending, heavier lifting and carrying, heavier pushing and pulling, as well as heavy impact activities. Further, if Ms. Gill participated in a reconditioning supervised exercise program, Dr. Caillier believed that these limitations would decrease provided she continued on with the strengthening and endurance exercise program. She could also return to part-time work if she became reconditioned through an exercise program. However, due to the lack of success in the last attempt to return to work, and the lengthy time off work entirely, Dr. Caillier's opinion was that a return to full-time work is unlikely.

**109**  In addition, Dr. Caillier opined that the accident caused an injury to Ms. Gill's right leg:

Ms. Gill sustained an injury to her right lower leg region as a result of the accident. There was bruising. There was swelling. The right lower leg is less painful but continues to have right knee pain. The knee pain appears to involve the medial aspect of her knee or the inside of the knee. Her knee examination today is benign.

It is my opinion that the discolouration involving the anterior lower leg region on the right is likely permanent and related to the MVA assuming that this area was injured in the accident.

**110**  Dr. Caillier deferred to an orthopaedic surgeon the question of whether the fracture and remodelling in the right lower leg was related to the accident. In any event, Dr. Caillier did not believe the pain in this region was likely to restrict her activities provided Ms. Gill completed a supervised exercise program and strengthened her quadriceps muscles.

**111**  Lastly, Dr. Caillier referred to the permanent scarring from the C-section and the craniotomy. The deformity of the skull was tender and this would likely be chronic.

**112**  In a report dated July 29, 2015, Dr. Caillier provided an updated opinion on Ms. Gill's ability to return to full-time work. In providing her opinion, Dr. Caillier relied on Mr. Hosking's functional capacity evaluation from May 12, 2015; she did not examine Ms. Gill. Dr. Caillier's opinion is as follows:

If there is significant improvement in her physical conditioning translating to improved management of her symptoms and lessening of the flares of pain when engaged in sustained posturing or heavier-based activities, in my opinion, it is possible that she will be able to return to work within a full-time capacity but at the very least she will be able to return to work within a part-time capacity within her previous occupation.

It remains my opinion that she is capable of working in some capacity and working within a sedentary to light capacity is also an option for her but, again, language barriers would be an issue. I am in agreement with Mr. Hosking that she would have to likely work with an occupational therapist or that of a vocational rehabilitation consultant in order to assist with this.

**113**  Dr. Caillier testified that although Ms. Gill had already participated in a supervised exercise program, she required a program that was specifically designed for back to work conditioning and one that addressed Ms. Gill's particular physical deficits. Dr. Caillier was also concerned that a successful and sustained return to full-time or part-time work for Ms. Gill depended upon the extent to which her headaches could be managed. She also agreed with Mr. Hosking that eye strain may be playing a role in the headaches Ms. Gill experiences when she reads or watches television.

**114**  Dr. Schmidt is a neuropsychologist who evaluated Ms. Gill with respect to her current psychological and neuropsychological status subsequent to the accident. In his report dated November 16, 2015, Dr. Schmidt summarized his interviews and testing process with Ms. Gill. Ms. Gill reported primarily pain symptoms since the accident and denied any change in her psychological functioning. However, she reported developing problems with anxiety typified by shortness of breath around the time she returned to work in 2012 and now this occurred daily. She also reported difficulties focusing and sustaining her attention and this was associated with headache pain which was present two-thirds of the time. Getting to sleep was problematic due to anxiety and I note that Ms. Gill had been taking 20 mgs of Elavil for sleep.

**115**  Based on the tests administered by Dr. Schmidt, which were quite limited due to language and cultural barriers, it appeared that the only cognitive deficit that could be detected related to the ability to process and analyze visuoperceptual information. This area of functioning refers to the person's ability to perceive and interpret information that is visually presented. It includes the ability to recognize objects and faces, to determine their positions and movement in space, to perceive visual patterns and to analyze visual information. Ms. Gill also showed subtle but consistent weaknesses in executive functioning, which was not further described. Notably he did not find any memory deficits based on the tests administered to Ms. Gill.

**116**  While it was Dr. Schmidt's opinion that Ms. Gill suffered a neuropsychologically significant traumatic brain injury in the form of these subtle deficits in executive function and visual perception, he did not believe that these deficits were affecting her daily life or precluding her from returning to the type of work she was doing before the accident. If she decided to retrain in a field that required pattern construction (such as a seamstress) there may be difficulties. However, if she continued in relatively unskilled, low cognitive demand jobs, he did not expect the weaknesses would have any impact on her performance. Lastly, Dr. Schmidt recommended that Ms. Gill seek treatment for her depression and anxiety from a Punjabi-speaking psychologist.

**117**  Mr. Hosking is a physiotherapist who is trained as an expert in functional capacity evaluations. He assessed Ms. Gill's functional capacity as of May 5, 2015 and the report of the results of the assessment is dated May 12, 2015. Mr. Hosking was of the opinion that while Ms. Gill demonstrated the capacity for medium strength occupations based on tests for lifting, carrying and pushing/pulling, she had a tendency to fatigue with the physical activity requiring prolonged standing and stooped standing positions. Because standing is a critical work demand in her jobs as a cook's helper and dietary aide, Mr. Hosking concluded that she did not meet the requirements for these jobs. In addition, he found that Ms. Gill demonstrated reduced capacity for sustained reaching overhead due to reports of bilateral neck pain and exacerbation of headache pain. In regard to low back pain, Ms. Gill advised that this was well controlled with an external support belt.

**118**  Mr. Hosking concluded that a significant underlying cause of Ms. Gill's inability to meet all of the job requirements for cook's helper and dietary aide was her lack of conditioning and, in particular, poor lumbar-pelvic and hip muscle strength. The fact that the belt controlled her low back pain gave support to Mr. Hosking's conclusion that Ms. Gill had weak core muscle strength.

**119**  The lack of conditioning and the unknown factor of possible eye strain (related to the development of headache pain) presented barriers to Ms. Gill's successful return to full-time and part-time work in her previous occupations. At p. 5 of his report, Mr. Hosking says:

Ms. Gill presents with sufficient physical strength to meet the physical load demands of her pre-MVC occupation on an intermittent or occasional basis. She is very deconditioned, however, evidenced by poor posture, poor aerobic capacity and signs of poor lumbo-pelvic muscle stability. These physical deficits are reflected in her poor durability for repeated and prolonged activity. ... From a physical perspective, and based on the observed performance in this FCE, the probability of her returning to gainful employment is high. However, her ongoing reported headaches and associated symptoms such as "eye strain" likely present a barrier to her complete and full participation in full time work. ... The presence of headaches does introduce an element of uncertainty to the extent to which she may expect to function normally in the workplace.

**120**  It is quite troubling that Ms. Gill was unable to provide Mr. Hosking with an accurate history of her treatment since the accident. She overestimated the number of physiotherapy sessions since the accident and did not recall a seven-month exercise rehabilitation program in 2010 and 2011 under the supervision of a kinesiologist. She also misled Mr. Hosking in regard to the reason for leaving her job in 2013, and Ms. Gill demonstrated less than full effort in the grip tests administered by Mr. Hosking. Further, while heart rate data suggested that Ms. Gill could lift greater than 30-pound weights, her core muscle weakness precluded the safe lifting of heavier objects particularly when reaching overhead. There was also demonstrated right knee swelling at the end of the test day.

**121**  From my reading of Mr. Hosking's report and based on his testimony, if Ms. Gill was not in such a deconditioned state of health and wore her lumbar support belt, the only barrier to her full-time return to work as a dietary aide and a cook's helper would be the possibility of headache pain.

**122**  Ms. Craig, who is also a physiotherapist and an expert in the cost of future care, evaluated all of the medical and rehabilitation recommendations to prepare a cost of care report for Ms. Gill. Her report dated September 3, 2015, provided a summary of the costs associated with each recommendation. These included the cost of future evaluations and physical assessments, projected therapeutic modalities, medications, health and strength maintenance, vocational assessment and household assistance. The average one-time costs total $4,550.20 and the average ongoing yearly costs total $1,901.19.

**B. The Defendants' Expert Reports**

**123**  Dr. Sovio was qualified as an expert in orthopaedic surgery. He examined Ms. Gill on August 27, 2013 and provided an opinion regarding her lower back complaints. In his report dated August 28, 2013, Dr. Sovio recorded Ms. Gill's current complaints as recurring headaches, neck tightness and shoulder pain with work and a strain in the right wrist. She complained of low back pain and stiffness and limitation in her flexion and extension. She also had complaints of pain in the right knee and tibia but no limitation in regard to range of motion in the knee. On examination, Dr. Sovio found no abnormalities in neck alignment and no limitation in her range of motion and no pain on palpation of the neck muscles, just some tightness with side bending. There were also no abnormalities associated with her shoulders or her arms. In regard to the spine, the range of motion in the lumbar spine was relatively normal (clarified in cross-examination as within normal limits), but she complained of pain in this region. The right knee examination was normal apart from pain in the tibia on palpation.

**124**  After reviewing Ms. Gill's medical history, Dr. Sovio came to the following conclusions:

On physical examination the patient did not have any abnormality of the cervical spine or the upper extremities. Nothing to suggest disc issues or nerve root problems.

As far as her low back was concerned the patient complained of some pain in the low back but certainly no evidence of nerve root tension signs, no neurologic abnormality was noted in her lower extremities.

I do not feel that there has been any significant injury to the low back. Perhaps some musculoligamentous type discomfort but nothing to suggest any significant abnormality which would be cause for alarm.

...

The patient's knee complaints did not arise until quite some time after the motor vehicle accident and likely are not directly related to the motor vehicle accident.

In 2012 the patient was diagnosed by MRI of having a stress fracture. Certainly periosteal reaction would not last 4 years so I do not feel that this is related to the motor vehicle accident. ...

...

From the physical standpoint I do not feel that this lady requires any further investigation. The patient is working as a dietary aide 2 days a week, I believe. I do not feel that there is any indication from the physical standpoint that she is limited in her ability to function in her work or recreational activities for that matter.

**125**  By a report dated January 15, 2016, Dr. Sovio responded to Dr. Caillier's report regarding the low back complaints:

... Dr. Caillier was given the history that the patient's low back pain started 15 to 20 days post motor vehicle accident. This, however, seems to be a bit contentious since there is no indication in the family physician's records following the motor vehicle accident of any back pain for more than a year.

Similarly in the reports provided by Symmetry Injury Rehabilitation the first mention of back pain is in the July 8, 2010 report and it states that back pain was not an issue when the patient was initially assessed and followed by occupational therapy and during the reassessment the patient was unable to recall when she began to experience these symptoms.

Based on the fact that the patient appears to have developed back pain more than a year after the motor vehicle accident it would certainly not be related to that.

**126**  Dr. Sovio considered that the back pain may be related to the first pregnancy or to her deconditioned state; however, he did not feel the back pain could be related to the accident. He also opined that this type of mechanical back pain normally responds to exercise and core strengthening. Dr. Sovio testified that he found no objective signs of injury to the low back and Ms. Gill's subjective pain symptoms alone rendered it very likely that she should have a full recovery.

**127**  In cross-examination, Dr. Sovio commented that while he did not know Ms. Gill also worked as a cook's helper, it was his opinion that she was not disabled by her back pain from any work as a cook's helper as described by counsel for Ms. Gill. He opined that she was physically able to work five days a week and that her back should not be an issue. Dr. Sovio did not factor into his assessment Ms. Gill's headaches.

**128**  Dr. Sovio agreed that if Ms. Gill spent two months in bed after the accident, it is likely that her muscles would become deconditioned and her recovery process slowed. He did not agree that this fact would render her full recovery from back pain less likely.

**129**  Dr. Levin is a psychiatrist and he provided an opinion dated June 4, 2014, regarding Ms. Gill's psychological and emotional functioning and her cognitive function. He interviewed Ms. Gill with the assistance of an interpreter on May 22, 2014. In cross-examination, he indicated that specifics of the functional difficulties Ms. Gill experienced during times when headaches rendered her somewhat forgetful were difficult to obtain through the interpreter.

**130**  Dr. Levin did not observe any ongoing psychiatric or neuropsychiatric disturbances in Ms. Gill's clinical presentation that would impair her occupational, social or interpersonal functioning. He opined that she did not suffer any type of post-traumatic depression or any other neuropsychiatric disorder. Ms. Gill's clinical presentation did not reveal any personality changes, irritability or disruption of interpersonal skills. Ms. Gill reported that she was able to care for her children and had a good relationship with her husband and other family members. Ms. Gill did not present with any symptoms of depression, anxiety or any other major mental illness that would require therapy. She did not present with any behavioural abnormalities, maladaptive coping strategies or cognitive distortions that required any type of rehabilitation or therapy.

**131**  By a report dated November 30, 2015, Dr. Levin commented on Dr. Schmidt's opinion. In this regard, Dr. Levin opined that the subtle weaknesses identified in cognitive function are also present in the general population and are not clinically relevant. Further, Dr. Levin believed that the subsequent expression of anxiety and intermittent difficulties with focus (during periods of headache) were more likely not the type of cognitive impairments seen in patients who have experienced traumatic brain injuries. It is more likely that such cognitive difficulties would be constant if related to a brain injury. Dr. Levin opined that these transient symptoms had emotional origins and were not organically related to the brain injury.

**132**  Dr. Levin regarded Dr. Schmidt's test results as unreliable due to the language and cultural limitations of the testing that the psychologist acknowledged, and because the test results contradicted the information provided to him by Ms. Gill. In particular, Dr. Levin noted that she described no type of executive dysfunction or inability to make decisions or any visual deficits. While working at her job in 2012 and 2013, she did not have any accidents related to visual perception errors. Lastly, he concluded there was no clinical evidence to support the test findings due to Ms. Gill's unimpaired social, interpersonal, and occupational functioning since the accident.

**133**  In cross-examination, Dr. Levin testified that Ms. Gill's apparent mistakes in the dates of important events were not clinically significant to him. He believed that errors of this nature are made by a large percentage of the population and cannot be correlated with a traumatic brain injury and cognitive deficits. These are also short-term memory issues which are not normally associated with a past injury to the brain. I note that Dr. Schmidt's test results did not indicate any memory deficits. Dr. Levin also testified that the accident did not represent a traumatic event to Ms. Gill, as she could not recall it and what happened was not constantly or even intermittently replayed in her mind. Although it was a sad event, along with waking up to find she had given birth, the aftermath of the accident did not bring back traumatic memories or feelings for Ms. Gill.

**134**  Dr. Teal is a neurologist and he provided an expert opinion regarding Ms. Gill's injuries in a report dated March 20, 2015. Dr. Teal examined and interviewed Ms. Gill through the services of an interpreter on March 20, 2015; however, he commented that she was able to communicate fairly effectively herself. He opined that as a result of the accident, Ms. Gill suffered a head injury in the form of a right-sided subdural hematoma and an immediate post-traumatic seizure (within 24 hours). Further, as a result of the trauma (whether due to the force of the collision that propelled her head forward and back or as a result of striking her head), the hematoma resulting from the disruption of veins between the dura matter and the brain required a craniotomy to relieve the pressure on the brain itself. This is a potentially life-threatening injury.

**135**  Further, it was Dr. Teal's opinion that immediately after the accident Ms. Gill suffered acute post-traumatic headaches, which are a combination of post-surgical headaches related to the scalp incision and the resolving effects of the hematoma. However, he opined that these headaches resolved by April 21, 2009, in large part based on Ms. Gill's report to Ms. Sebastian on April 14, 2009 that the headaches occurred once every two weeks and were not disabling. The current headaches are not accident-related:

It is my opinion Ms. Gill's initial headache pattern was typical of posttraumatic headaches that gradually but progressively improve following a subdural hematoma and surgical management.

It is my opinion that Ms. Gill probably experienced an excellent recovery from her posttraumatic headaches. Over time, however, she developed different patterns of headaches which had mixed features. Her primary headache pattern is consistent with tension-type headaches. She was also assessed by her family physician on October 23, 2012, as having headache reoccurrence triggered by cold weather.

On December 17, 2012, she was evaluated by Dr. Jawanda, her family physician, as having sinus tenderness and sinus symptoms. She was treated with antibiotics and had sinus x-rays. ...

On May 30, 2013, Dr. Jawanda documented headache in the "hatband area" and diagnosed tension headache.

On June 11, 2013, Dr. Jawanda diagnosed chronic sinus infection with symptoms which he [sic] treated with antibiotics.

At the time of my evaluation, it is my opinion the majority of Ms. Gill's headaches were tension-type headaches that are unrelated to the head injury and do not represent posttraumatic headaches. Based on Dr. Jawanda's records, it also appears that some of her headaches in the years following the motor vehicle accident were related to sinus infections and chronic sinus disease.

It is my opinion it would be unusual for posttraumatic headaches to resolve and then later recur. It is most likely the majority of her current headaches are tension-type headaches, unrelated to the motor vehicle accident. It is possible that the head injury made her more vulnerable to recurrent headaches.

**136**  Further, it was Dr. Teal's opinion that Ms. Gill had an excellent recovery from any cognitive effects of the hematoma and had no residual disability:

... Ms. Gill does report some very mild subjective cognitive symptoms of being occasionally forgetful. It is possible there are very mild residual cognitive sequelae arising from her head injury, however, it is my opinion any residual symptoms are unlikely to be limiting or result in significant restrictions on domestic, recreational, or occupational activities.

**137**  While there is a small chance of developing delayed post-traumatic epilepsy, most people develop this within two to five years of the injury and thus Dr. Teal opined that Ms. Gill was beyond the period of highest risk.

**138**  In regard to the low back pain, Dr. Teal opined that at the time of his examination, the low back pain was mechanical in nature and soft tissue in etiology. She had mild tenderness and mild restricted range of motion but there was no nerve root or neurological involvement upon examination. He did not express an opinion on the cause of the low back pain but indicated that Ms. Gill was unable to say when the back pain first arose and the earliest clinical note of low back pain is from January 2010. He disagreed with Dr. Caillier's conclusion that the accident indirectly caused the low back injury due to Ms. Gill's deconditioned state brought about by the accident.

**139**  In regard to treatment recommendations, Dr. Teal opined as follows:

Ms. Gill may benefit from further management of her tension-type headaches. She is currently on amitriptyline, a tricyclic medication that is often used to treat tension-type headaches. I would recommend a gradual progressive increase in the dose of amitriptyline as tolerated. Ms. Gill may also use simple over-the-counter analgesics such as acetaminophen (Tylenol) or ibuprofen (Advil) providing she does not use them on a daily basis.

Treatment of anxiety and stress management would likely also be helpful.

It is my opinion the severity of Ms. Gill's headaches should not prohibit her from daily activities, domestic activities, or returning to work in a previous capacity as a cook's assistant.

With respect to back pain management, Ms. Gill may benefit from a conditioning and exercise program with efforts made to increase her stamina and endurance as well as her core strength. Ms. Gill will not require surgery for her back pain.

**DISCUSSION**

**Causation**

**140**  The plaintiff must prove on a balance of probabilities that the defendants' ***negligence*** caused or materially contributed to an injury. The defendants' ***negligence*** need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. 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.

**141**  The primary test for causation is the "but for" test. But for the defendant's ***negligence***, would the plaintiff have suffered the injury? This test recognizes that compensation for negligent conduct should only occur 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. 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*.

**142**  Turning to the facts of this case, there is no doubt that as a result of the accident Ms. Gill suffered a serious closed head injury that led to her collapse at the hospital, a craniotomy, three or four days in a coma, loss of memory of the accident and events immediately before and after it, as well as the necessity for a caesarean delivery of her first child. It was a truly horrible experience that could have led to her death had the surgeon not been able to remove the subdural hematoma in a timely fashion. Whether or not the movement of the brain due to displacement by the hematoma caused damage to her brain, there is no question that this was a serious injury that required a lengthy recovery period.

**143**  Ms. Gill spent over ten days in the hospital recuperating from the craniotomy and C-section surgeries. She was unable to function beyond bed rest and was continually medicated for pain. The evidence is consistent that she was in substantial pain throughout this time and did almost nothing but sleep. During this period she was also faced with the loss of the birth experience and deprived of the opportunity to bond with her first child until she was discharged. This was a devastating experience for Ms. Gill.

**144**  Ms. Gill was unable to manage on her own when she was discharged from hospital and stayed with her sister, Kulwinder from December 2008 until July 2009 when she travelled to India with her husband and daughter. For the most part up until the end of April 2009, Ms. Gill remained housebound. While there are some inconsistencies in the evidence surrounding her mobility during this period, it is apparent that she was not active apart from walking short distances within the home, and both Kulwinder and Gurjot were helping with childcare and doing all of the household chores, even though Ms. Gill could care for herself (washing, dressing and eating meals) independently. I accept Ms. Gill's testimony that she was stiff and sore all over her body at this time. There can be no doubt that recovering from a craniotomy and a C-section is going to involve pain and stiffness from head to foot.

**145**  I find the evidence establishes continuity in the headaches throughout January to April 2009, primarily based upon Ms. Sebastian's notes and Dr. Lee's consultation reports, albeit reduced in severity and frequency by mid-April 2009. It does not appear that Ms. Gill was taking anything but Advil or Tylenol for her headaches at this time. Further, there is evidence of a continuity of headache symptoms in early June 2009 when Ms. Gill first reported headache pain to Dr. Jawanda. She was prescribed Naproxen and filled this prescription on the same day.

**146**  Thereafter the evidence of increased headache pain is quite suspect because Ms. Gill did not fill subsequent prescriptions for various headache medications and she misled Ms. Sebastian and Dr. Jawanda as to her use of these medications and their effectiveness. In November 2010, she advised Dr. Singh that she had only used over-the-counter pain medications apart from one month of Elavil up until that time. This was not the same as the reports Ms. Gill made to her family doctor and Ms. Sebastian over the same period.

**147**  I also agree with the defendants' submission that Ms. Gill's later reports of headache pain do not match her objective behaviour. Indeed, the headaches were controlled sufficiently to permit her to travel to India in July 2009, and although she testified about low back pain during the flight, Ms. Gill did not refer to headaches during this trip.

**148**  The medical evidence and the continuity of symptoms clearly establish that Ms. Gill suffered from post-traumatic headaches and that these continue to be present in her life. However, I must conclude that these headaches have subsided in frequency and severity to the point where they are mild when they reoccur, which is what Ms. Gill reported to Dr. Singh in February 2015. It is highly unlikely that mild, intermittent post-traumatic headaches continue to be disabling in regard to work, personal care, recreational activities and household chores. There is evidence that since 2014, Ms. Gill has regularly filled prescriptions for Elavil (Amitriptyline); however, she was specifically prescribed 20 mgs per day for insomnia. Thus I cannot conclude that the post-traumatic component of her headaches has worsened to the point where she now requires a prophylaxis to inhibit them.

**149**  There is also cogent evidence that superimposed upon the post-traumatic headaches are sinus headaches and tension-type headaches brought on by stress and anxiety that are also intermittent in nature. These headaches are unrelated to the accident, given the lack of evidence that Ms. Gill suffered any significant emotional or psychological trauma as a result of the head injury that persisted beyond a few months post-accident. Ms. Gill also developed a chronic condition of sinusitis in early 2013. Dr. Singh diagnosed chronic tension headaches in November 2014, which he testified stemmed from a different description of the location of the headaches (bi-frontal vs. bi-temporal) and their underlying trigger (i.e. stress vs. trauma). Dr. Teal's evidence also supports a conclusion that Ms. Gill's headaches are in part (if not wholly) due to tension and sinusitis. As a consequence, even the mild headaches that Ms. Gill continues to suffer from are not entirely accident-related.

**150**  Although I am not satisfied that Ms. Gill suffered any permanent cognitive deficits due to the brain injury, I accept that when she experienced a significant headache, some confusion, dizziness, lack of focus and forgetfulness occurred. These symptoms appear to be consistently documented in the consultation reports of Dr. Lee. Further, Ms. Gill has consistently limited any cognitive deficits to periods in which she is suffering from a headache. As the headaches subsided, these symptoms would naturally also lessen. Further, I accept that Ms. Gill suffered from fatigue due to the severe headaches, but this also subsided as recorded in Ms. Sebastian's notes from April 2009.

**151**  Ms. Gill demonstrated a very poor memory of events during her testimony. She also provided incorrect histories to various medical professionals regarding significant events. However, I am unable to relate these memory lapses to the accident. Dr. Schmidt's test results do not support any deficits in memory and there is no other evidence that would suggest Ms. Gill's poor memory is related to the injuries she suffered in the accident.

**152**  There is no evidence that Ms. Gill claimed to suffer any emotional or psychological injury due to the accident. Dr. Levin's opinion in that regard is not contradicted by any of the plaintiff's expert opinions.

**153**  In regard to ongoing cognitive deficits, Dr. Schmidt's opinion is quite limited in value due to the language and cultural differences in Ms. Gill's background. He acknowledged that the tests were developed with North American subjects in mind and are based on an assumption that the test subject is fluent in English. However limited the results of testing were, Dr. Schmidt found only subtle visual perception deficits that he testified would not have an impact on Ms. Gill's ability to manage daily life activities or her work as a cook's helper and dietary aide. Moreover, without a benchmark standard with regard to Ms. Gill's pre-accident visual acuity, the subtle deficits noted by Dr. Schmidt may pre-date the accident. Dr. Schmidt also noted subtle deficits in executive function; however, he did not elaborate on the nature of these deficits or how, if at all, they would likely affect her daily functioning. It is significant that Ms. Gill, Kulwinder and Gurjot reported no cognitive issues to Ms. Sebastian up to April 14, 2009.

**154**  Gurjot testified that she has noticed a significant change in Ms. Gill's personality since the accident. She is withdrawn and quiet and is no longer the outgoing, communicative person she was before the collision. However, Ms. Riar testified that Ms. Gill was always a very quiet person at work who did not gossip or waste time chatting with her co-workers. Although she noticed a reduced tolerance for noise because of the headaches, Kulwinder's evidence did not support a significant change in her sister's personality after the accident. I accept that in the months following the accident while Ms. Gill convalesced, she likely wanted to be left alone to rest and due to pain she was likely much less communicative with others. However, apart from this early period of recovery, I find Ms. Gill has failed to prove any real changes in her personality since the accident.

**155**  I am satisfied that Ms. Gill has suffered permanent scarring from the craniotomy and C-section surgeries. In addition, she suffered the cultural embarrassment occasioned by the shaving of her head. She also lost the pleasure of a natural childbirth and the joy of bonding with her new baby in the first days of life. Further, Ms. Gill was deprived of the ability to care for her new baby for several months after the accident and during her recovery period.

**156**  Turning to the low back complaints, there is a rather complicated history concerning this injury. As discussed earlier, the deconditioning occasioned by inactivity while recovering from surgery during the early months of 2009 is logically connected to the onset of low back pain when Ms. Gill moved to her own home and resumed the normal activities of daily life in January 2010. However, Dr. Caillier's diagnosis in this regard is inconsistent with the evidence of Ms. Gill and Kulwinder, who both testified that there was low back pain shortly after the accident and during the early days of Ms. Gill's convalescence. Ms. Gill advised Dr. Caillier that she felt low back pain 15 to 20 days after the accident when she tried to get out of bed. Somewhat inconsistently, Ms. Gill was uncertain when the low back pain began when she was interviewed by Dr. Teal about a year later.

**157**  It is also troubling that Ms. Gill testified that she had low back pain during the flight to India in July 2009, which occurred several months before she moved to her own residence. More troubling is that the only treatment Ms. Gill sought before she reported back pain to Dr. Jawanda was chiropractic manipulation due to cervical pain rather than low back pain. On January 25, 2010, when Ms. Gill first reported back pain to Dr. Jawanda, she provided no description of back pain due to household chores or childcare responsibilities. Dr. Jawanda recorded in her clinical notes no incident that triggered the low back pain. When Ms. Gill attended the Singh Physiotherapy Clinic on June 7, 2010, she complained of low back pain stemming from the December 2008 accident, not pain triggered by household chores, childcare responsibilities or recreational activities. Lastly, Ms. Gill testified that when she moved to her new residence in or about January 2010, her husband was doing the heavy household chores and bathing the baby. There is no evidence that Ms. Gill was actually performing any heavy work in her home to trigger a back injury due to deconditioning.

**158**  These contraindications of a relationship between the low back pain and deconditioning caused by the accident-related injuries are compounded by the lack of trustworthiness in Ms. Gill's evidence. It is difficult to attach any credibility to her subjective reports of pain in light of her behaviour. She clearly misled her physician and Ms. Sebastian about the medications she was taking for headaches and the effectiveness of these medications. She also misled her physician about the treatment she was having for back pain and appears to have ignored Dr. Jawanda's recommendation about physiotherapy. In this regard, a report of significant upper and lower back pain on January 25, 2010, did not lead to any treatments until June 7, 2010, when Ms. Gill first attended for physiotherapy. I must assume that the back pain was quite nominal if Ms. Gill chose to delay any treatment for over five months. Moreover, it does not appear that she was taking any prescription medications for pain during this period as the last prescription she filled for Elavil was on December 2, 2009.

**159**  It is suspicious that Ms. Gill reported extreme back pain to Dr. Jawanda on June 7, 2010 and on the same day Gurjot was advised that Ms. Sebastian was re-opening the rehabilitation services file on her sister. However, Mr. Grewal testified that when he examined Ms. Gill on June 7, 2010, he noted objective signs of muscle spasm in the low back, which corroborates Ms. Gill's subjective report of pain. Thereafter Ms. Gill attended several physiotherapy sessions for low back pain.

**160**  Considering the evidence as a whole, I find the first reliable indication of low back pain is the acute injury presented by Ms. Gill to Mr. Grewal on June 7, 2010. This is almost 18 months after the accident and six months after Ms. Gill resumed daily life activities without the assistance of her sisters. Dr. Caillier does not opine that the low back pain experienced by Ms. Gill was caused directly by the collision despite Ms. Gill's report that the pain began shortly after the accident. Her opinion is based on an indirect causal connection and the foundation for this opinion is an assumption that performing activities of daily life in a deconditioned state led to low back pain in or about January 2010, when it was first reported to Dr. Jawanda. I find there is no credible evidence to support this assumption.

**161**  The onus rests with Ms. Gill to establish a causal connection between the low back injury and the accident; she must prove on a balance of probabilities that the accident caused or contributed to the injury: *Athey* at para. 13. She has failed to do so. There is no credible evidence to support Dr. Caillier's hypothesis, particularly due to the inconsistent evidence of Ms. Gill and her sister regarding the onset of low back pain. There is also no reliable evidence of Ms. Gill's state of physical conditioning in January 2010, and some evidence that her husband was performing the heavier household chores at that time. The report of back pain in January 2010 was upper and lower back pain and it was apparently not serious enough to warrant pain medication or physiotherapy.

**162**  Thus for all these reasons, I find there is insufficient evidence to establish a direct or indirect relationship between the accident and any low back injury. The accident neither caused nor contributed to this injury through deconditioning or otherwise.

**163**  Lastly, I find the right knee and tibia injury is unrelated to the accident. Although Ms. Gill had pain in both legs during the first few months after the accident, this was described as pain in her calves, not pain and swelling in the right knee and tibia. This pain subsided in February 2009 and was completely resolved by April 14, 2009. The right knee and tibia pain appears to have first surfaced in February 2012, over three years after the accident. There is no clear diagnosis for the knee and tibia pain; however, all of the medical experts agree that if it was caused by an injury, such as a fracture, it is unrelated to the accident because the timing of that event is too remote. In other words, the injury could only have been caused by a far more recent event (between six and eight months prior to the bone scan and the MRI). Although Dr. Caillier opined that the knee and tibia injury was accident-related, her conclusion is based on an assumption that Ms. Gill struck this portion of her right leg during the collision. There is no evidence of any direct injury to her right leg at the time of the accident.

**164**  Accordingly, I find the plaintiff has failed to establish, on a balance of probabilities, that the injury to her right knee and tibia was caused or contributed to by the accident.

**Damages for Pain and Suffering**

**165**  Having made these findings concerning Ms. Gill's accident-related injuries, I turn to the quantum of damages appropriate in the circumstances. Ms. Gill claims $175,000 in general damages. In support of her position, Ms. Gill 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=); *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=); *Anderson 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.); *Curtis v. MacFarlane*, [*2014 BCSC 1138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B10C-00000-00&context=); and *Bricker v. Danyk*, [*2015 BCSC 2404*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HR4-FPP1-JG02-S2D4-00000-00&context=). The defendants argue that damages for pain and suffering are in the range of $75,000. They rely on *Stapley*; and *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=).

**166**  The purpose of general damages for pain and suffering was recently summarized in *Bricker* at paras. 134-35:

[134] Non-pecuniary damages are awarded to compensate an injured person for pain, suffering, loss of enjoyment of life and loss of amenities. The principles governing the assessment of such damages are well known and have been discussed in numerous cases: see *Stapley v.* [*Hejslet*], [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) at para. 46, leave to appeal ref'd [*[2006] S.C.C.A. No. 100*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-F361-M45M-00000-00&context=).

[135] Awards of non-pecuniary damages in other cases provide a useful guide to the court, however the specific circumstances of each individual plaintiff must be considered as any award of damages is intended to compensate that individual for the pain and suffering experienced by them: see *Trites v. Penner*, [*2010 BCSC 882*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22C1-00000-00&context=) at para. 189. Moreover, the compensation award must be fair and reasonable to both parties: see *Miller v. Lawlor,* [*2012 BCSC 387*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62BF-00000-00&context=) at para. 109 citing *Andrews v. Grand & Toy Alberta Ltd.,* [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=), [*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=).

**167**  A convenient discussion of the factors to be considered when calculating general damages is found in *Stapley* at para. 46:

[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=)).

**168**  Ms. Gill suffered a closed head injury and permanent scarring as a result of the accident. For years after the accident she has suffered from intermittent, post-traumatic headaches. Ms. Gill recovered very well from the closed head injury but there are lingering headaches, albeit mild and intermittent. Further, associated with severe headaches were some minor cognitive deficits. As a result of the surgeries caused by the accident-related injuries, she suffered pain and stiffness in her entire body for several months and was unable to care for herself or her newborn. She was seriously injured and the recovery period was slow and painful. Ms. Gill was deprived of a natural childbirth for her first child and was unable to bond with her daughter in the first critical days of her life. While Ms. Gill suffered a loss of memory due to the head injury, there is no lingering emotional trauma.

**169**  Having regard to the cases cited by both parties and the factors outlined in *Stapley*, I find an award of damages in the amount of $115,000 is appropriate in all of the circumstances.

**Past Wage Loss**

**170**  Ms. Gill claims past wage loss of $171,000 based on her plan to train as a care aide and argues that the accident-related injuries precluded her from performing this type of work. In the alternative, she argues these injuries precluded a return to full-time work as a cook's helper and dietary aide and claims damages in the amount of $121,075. The defendants argue there is no evidence of any past wage loss because Ms. Gill was not disabled from her pre-accident work at the conclusion of her maternity leave.

**171**  Ms. Gill was on maternity leave when the accident occurred and planned to take a one-year leave. She received maternity EI benefits in the amount of $15,550 in 2009. It was not Ms. Gill's intention to return to work before the end of her maternity leave and she does not claim lost wages for this period.

**172**  There is some evidence that during her maternity leave, Ms. Gill planned to improve her English skills and investigate the training required for the position of care aide with a view to completing this training in the future. However, Ms. Gill did not produce any evidence that she had taken positive steps towards these objectives, either before her maternity leave commenced or prior to the accident. She did not testify that she had researched the cost of these courses or that she met the prerequisites for the care aide training. I acknowledge that the plaintiff is not required to prove this loss of opportunity on a balance of probabilities. Instead, the loss of opportunity is given weight according to its relative likelihood and a hypothetical possibility will be taken into account as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27.

**173**  I find it is unlikely that Ms. Gill would have sought training as a care aide. Her background education was in language and history. She had no medical training and her long-term goal was to become a teacher not a hospital worker. Moreover, there is no evidence that the injuries sustained in the accident would preclude Ms. Gill from training as a care aide. As I outlined earlier, the low back injury is not related to the accident and the post-traumatic headaches are minimal and intermittent. Ms. Gill's memory difficulties were limited to the times when she had a severe headache and by February 2015, she reported to Dr. Singh that any reoccurring headache was mild. As a consequence, I find there is no evidence of a loss of opportunity.

**174**  The main impediment to Ms. Gill's return to work as a dietary aide and a cook's helper has been her low back pain. The functional capacity evaluations prepared by Ms. Noel in 2011 and by Mr. Hosking in 2015 indicate that while Ms. Gill would be able to manage these jobs on a part-time basis, provided there were some accommodations in scheduling and workload, a return to full-time work is problematic due to her reports of intermittent low back pain and her generally deconditioned state of physical health. Because I have found no causal relationship between the low back injury and the accident, it cannot be said that Ms. Gill's loss of wages for this reason is compensable.

**175**  The functional capacity evaluations also refer to Ms. Gill's headaches as a possible impediment to part-time or full-time work as a cook's helper and dietary aide. Ms. Noel and Mr. Hosking's comments in this regard are based on Ms. Gill's subjective reports of headache pain. They are not qualified to provide an expert opinion on the cause or severity of the headache pain. The role that headache pain plays in Ms. Gill's inability to return to work is unclear.

**176**  When she returned to work briefly in April 2011, it was clearly low back pain that led Ms. Gill to abandon the graduated return to work plan. There were no complaints of headaches during the first GRTW. She subsequently sought physiotherapy treatments for low back pain. Thereafter Ms. Gill realized she was pregnant with her second child and she made no further attempts to return to work until after the child was born in late December 2011.

**177**  Ms. Gill's second return to work occurred in May 2012. She worked two days per week normally, but gradually there was an increase in the number of shifts until the summer of 2013 when Ms. Gill began working almost full-time hours. Ms. Gill testified that her headaches and low back pain prevented her from working full time. Although Ms. Gill testified that she was forced to leave her job in July 2013 due to Ms. Riar's insistence that she work full time, I am unable to accept this evidence as credible. Ms. Riar testified that she was forced to terminate Ms. Gill's employment because her last minute refusal of shifts made it very difficult to find a replacement for her. Ms. Riar denied that she demanded that Ms. Gill work full time. Moreover, Ms. Riar testified that Ms. Gill was handling the work without any apparent difficulties and she was quite satisfied with her performance. In my view, Ms. Riar's evidence, as a witness called by the plaintiff, cannot be reconciled with Ms. Gill's testimony regarding her departure from work at the Willingdon Care Centre.

**178**  Ms. Gill's complaints of back pain as a reason for leaving the job in July 2013 are not corroborated by any reports of back pain to Dr. Jawanda around this time; however, she attended for chiropractic treatments in August 2013 with complaints of cervical and low back pain. She also attended for physiotherapy treatments in October 2013. Nevertheless, I have concluded that Ms. Gill's complaints of low back pain are not related to the accident.

**179**  Ms. Gill's claim that headaches also precluded full-time work is only partly corroborated by her reports of headache pain during visits with Dr. Jawanda. Ms. Gill's primary complaint in 2012 was fibula and tibia pain in her right leg. I have found this injury to be unrelated to the accident. Further, in the fall of 2012, Ms. Gill was prescribed medications for headache pain that she reported to Dr. Jawanda but she did not fill these prescriptions. In late 2012, and again in the fall of 2013, Dr. Jawanda treated Ms. Gill for sinus headaches due to chronic sinusitis. When Ms. Gill was referred to Dr. Singh for ongoing headaches, he diagnosed headaches that were triggered by stress rather than the post-traumatic headaches he diagnosed in November 2010. Lastly, Ms. Gill reported only back pain to Ms. Sebastian during her return to work in 2012 and 2013.

**180**  In light of the subjective nature of headache pain, the inconsistencies between the evidence of Ms. Riar and Ms. Gill regarding her work performance and the reason for her termination, the failure to fill prescriptions for headache medications during the return to work, and the lack of significant complaints of headache to Ms. Sebastian, I am unable to conclude that Ms. Gill's inability to work full time is causally connected to headache pain related to the accident. It is more probable that, if there was a problem with full-time work, it was caused by periodic low back pain which is unrelated to the accident.

**181**  As a consequence, I find that Ms. Gill is not entitled to any wage loss from the period April 2011 to August 2013. It is apparent that she chose not to work due to her second pregnancy from April 2011 to May 2012. Thereafter if there was an impediment to her return to full-time work, it was due to low back pain which is not related to the accident. While Ms. Gill may have suffered from headaches during this period, I must conclude that they were not severe enough to interfere with work.

**182**  After her maternity leave ended in late November 2009, Ms. Gill did not attempt any type of return to work. There were a number of visits to Dr. Jawanda's office for back pain in early 2010; however, there were no complaints of headaches until April 29, 2010. On this visit she was told to restart Elavil at 10 mgs. However, Ms. Gill did not fill any prescription for Elavil at this time and the last Elavil she purchased was on December 2, 2009. On July 17, 2010, Ms. Gill again reported headaches and Dr. Jawanda increased the dosage of Elavil to 20 mgs and Naproxen twice daily. Ms. Gill did not fill these prescriptions.

**183**  It was in this time period that Dr. Jawanda referred Ms. Gill to Dr. Singh for her reoccurring headaches. Dr. Singh saw Ms. Gill on November 15, 2010 and diagnosed her with a closed head injury and continuing post-traumatic headaches. However, because she reported mostly mild headache pain at that time, Dr. Singh did not believe a prophylaxis was necessary to inhibit the headaches. She was advised to take Tylenol or Advil for pain relief and he suggested physiotherapy.

**184**  Ms. Gill also continued to see Dr. Jawanda for ongoing headaches on September 27 and 30, 2010 and on November 22, 2010. She advised Dr. Jawanda that Tylenol was not helpful and Naproxen was mildly helpful. However, Ms. Gill had not filled a prescription for Naproxen since June 7, 2010. Dr. Jawanda prescribed Zoloft 25 mgs in early January 2011. Ms. Gill did not fill the Zoloft prescription until March 2, 2011.

**185**  When Ms. Gill returned to Dr. Jawanda's office in early February 2011, she reported that the Zoloft was helping reduce the headache pain and the dosage was increased to 50 mgs. This was obviously untrue because Ms. Gill had not yet filled the prescription.

**186**  The medical experts all agree that headache pain is a subjective symptom and they must rely on the patient to accurately describe the duration and severity of pain symptoms. It is difficult to accept Ms. Gill's subjective complaints of headache pain when her actions are inconsistent with her claims. Ms. Gill was not filling the prescriptions for prophylaxis medications given to her by Dr. Jawanda and she misled her doctor and Ms. Sebastian regarding the effectiveness of these medications. She also ignored Dr. Singh's recommendation for physiotherapy. In these circumstances, it is unlikely that the headaches were disabling and it is more probable than not that Ms. Gill was exaggerating the pain to Dr. Jawanda and Ms. Sebastian.

**187**  As a consequence, I find there is no compensable wage loss between the end of November 2009 and the first return to work attempt in April 2011. If Ms. Gill was experiencing post-traumatic headaches during this period, they were not disabling and would not have interfered with a return to work.

**188**  From July 20, 2013 to date, Ms. Gill has not worked part time or full time. There is essentially no evidence to explain her failure to return to work on a part-time basis. Mr. Hosking's functional capacity evaluation suggests Ms. Gill is capable of part-time work as a cook's helper and a dietary aide. Ms. Riar testified that she was prepared to offer a position to Ms. Gill, despite her termination in 2013, due to the scarcity of good workers in this field.

**189**  During 2014 and 2015, Ms. Gill continued to report headache pain to Dr. Jawanda and she was again referred to Dr. Singh for a neurological consultation. In these years Ms. Gill began regularly filling the prescriptions for Elavil that were prescribed for her headaches; however, she was also taking this medication for insomnia. Further, when she saw Dr. Singh in 2014 and 2015, he diagnosed the headaches as stress-related rather than post-traumatic. Moreover, by February 2015 she reported that the headaches were mild and only intermittent. In my view, if any part of the headaches is related to the accident, mild intermittent headaches are unlikely to have an adverse impact on Ms. Gill's ability to return to work.

**190**  For these reasons, I find that Ms. Gill's intermittent headaches, if accident-related, do not preclude a return to full-time work. She is thus not entitled to any past wage loss for the period July 20, 2013 to the date of trial.

**Future Loss of Earning Capacity**

**191**  Ms. Gill argues that the injuries caused by the accident have diminished her capacity to earn income in the future and that damages should be assessed in a global sense. She advocates the test established in *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.), which sets out four considerations at para. 25:

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.

**192**  Regarding the value attributed to a loss of future earning capacity, Ms. Gill argues that a partial disability must be given weight. In this regard, Ms. Gill cites *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.). She argues that the calculation of damages is a matter of judgment rather than mathematics: *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. Ms. Gill says her capacity to earn income as a capital asset has been diminished by the residual symptoms she suffers from the accident. Lastly, she argues that the standard of proof is simple probability because the assessment of damages is based on hypothetical events: *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 amount claimed is between $300,000 and $350,000.

**193**  The defendants argue that Ms. Gill has proven no loss of capacity to earn income in the future. If she is unable to return to work as a cook's helper and a dietary aide, it is for reasons that are unrelated to the accident. In support of their argument, the defendants cite *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=); *MacDonald v. Kemp*, [*2014 BCSC 1079*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B0WF-00000-00&context=); *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=); and *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=).

**194**  I have found that Ms. Gill continues to suffer mild, intermittent headaches that are in part related to the accident. I have also found that her complaints of lower back pain and right leg pain are unrelated to the accident. When assessing whether the mild, intermittent headaches represent a loss of earning capacity to Ms. Gill, I must take into account all substantial possibilities and give them weight according to how likely they are to occur in light of all the evidence. The authorities support an award for future loss of earning capacity even if the plaintiff is able to work at her pre-accident employment because to do so she must work through the pain and suffering of an accident-related injury. If there is a real and substantial possibility of a loss in future, an award should follow for loss of capacity to earn income.

**195**  In this case, I am not satisfied that Ms. Gill left her job in July 2013 due to headache pain. I accept Ms. Riar's evidence that Ms. Gill was performing the job duties without apparent difficulties and it was not a demand that she work full time that led to her termination. Further, I find there is no explanation for Ms. Gill's failure to return to any type of work since July 2013 that is related to injuries suffered in the accident. I have denied any claim for past wage loss. If she is unable to return to her work as a cook's helper and dietary aide, it is for reasons unrelated to the accident. In February 2015, Ms. Gill reported mild intermittent headaches to Dr. Singh. These headaches were diagnosed as stress-related; however, if the accident represents one of the underlying causes of Ms. Gill's headache pain, I find that her earning capacity has not been impaired by these continuing symptoms.

**196**  Ms. Gill has not been rendered less capable overall from earning income from all types of employment by mild, intermittent headaches. She is not less marketable or attractive as an employee to potential employers. Ms. Gill has not lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured, and she is not less valuable to herself as a person capable of earning income in a competitive labour market.

**197**  There is no cogent evidence that headaches caused Ms. Gill to abandon the return to work in April 2011 or that headaches precipitated her termination from the Willingdon Care Centre in July 2013. There is also no credible evidence that mild, intermittent headaches currently preclude Ms. Gill from working at her pre-accident employment. Based on the standard for hypothetical future events, I find it is highly unlikely that headache pain will preclude Ms. Gill from working in the future or render her less competitive in the workforce. It is not a substantial possibility and constitutes mere speculation to say that mild headaches, which are only intermittent, will impact her employment opportunities in the future.

**198**  Further, it is not a substantial possibility that any cognitive deficits related to the accident will diminish Ms. Gill's future capacity to earn income in her pre-accident occupation. Dr. Schmidt's evidence establishes that the subtle visual perception deficits measured in neurological tests will not have any impact on Ms. Gill's ability to perform jobs similar to the cook's helper and dietary aide. The forgetfulness and lack of focus Ms. Gill might experience when she has a severe headache is also unlikely to have an adverse impact on her employability or income earning capacity because the accident-related headaches are now only mild and intermittent.

**199**  The impact of continuing headaches on Ms. Gill's future income earning capacity is entirely based on her subjective report of ongoing pain. Because I have found her evidence to be generally lacking in credibility, I cannot accept her historical reports of pain to be reliable without corroboration. There is also no evidence as to why Ms. Gill has made no attempt to return to part-time work, which is supported by the functional capacity evaluations. These are insurmountable difficulties in the plaintiff's case for loss of future earning capacity.

**200**  I thus find no claim has been established for loss of future earning capacity.

**Cost of Future Care**

**201**  The only future cost related to the accident is prescriptions for Elavil. Ms. Craig calculated the cost of this medication based on one tablet per day. However, Ms. Gill's past reliance on Elavil for headaches is very inconsistent and she currently is prescribed 20 mgs per night for insomnia and the dose she purchases is 25 mgs. While it is possible that at some times her headaches may require a prophylaxis, I do not accept that it is regularly necessary to inhibit headaches related to the accident. Ms. Craig estimates the cost for Elavil to be $240 per year. Attributing one-half of this cost to headache prevention and management, and applying the present value tables at a rate of interest of 2%, I award $3,770 for cost of future care.

**Special Damages**

**202**  Ms. Gill claims $1,485.15 for the cost of chiropractic services, physiotherapy, medications and mileage for attendances at Dr. Jawanda's office from her home. The initial chiropractic treatment on March 29, 2009 for cervical pain is compensable because it appears to be part of her overall stiffness complaint during her initial recovery period ($35). Thereafter the treatments were for low back pain, which I have found are not related to the accident. The physiotherapy treatments from Singh Physiotherapy were all related to low back pain and are not compensable. There is an outstanding account with Mountainview Health and Wellness for $464.94; however, there is no evidence in regard to the purpose of this treatment. There is no evidence that Ms. Gill sought any type of therapy for her headaches. Thus this account is unlikely compensable. Similarly, there is no evidence that the physiotherapy treatments from Apex Physiotherapy in June and July 2015 are related to Ms. Gill's headaches. As a consequence, I find the cost is not recoverable as special damages.

**203**  Lastly, Ms. Gill is entitled to mileage for visits to her family doctor if the visits concerned accident-related injuries. The costs claimed appear reasonable. I thus award $120 for mileage.

**204**  In total, I award $155 for special damages.

**Summary**

**205**  Ms. Gill is awarded $115,000 for non-pecuniary loss, $3,770 for cost of future care, and $155 for special damages, together with prejudgment interest on the award for special damages. In addition, she is entitled to costs at Scale B. I retain jurisdiction to address any dispute regarding costs.

C.J. BRUCE J.

**End of Document**

[***Dobranski v. Jackson, [2009] B.C.J. No. 325***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3NY-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kelowna, British Columbia

W.G. Parrett J.

Heard: August 26 and 27, 2008.

Judgment: February 24, 2009.

Docket: S66763

Registry: Kelowna

**[2009] B.C.J. No. 325** | [*2009 BCSC 226*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2S8-00000-00&context=)

Between Kim Dobranski, Plaintiff, and Ken Jackson, Mike McMichael, Community Auto Sales and Community Auto & Truck Centre Ltd., Defendants

(139 paras.)

**Case Summary**

**Tort law — *Negligence* — Motor vehicles — Snowmobiles — Speed — Action for damages for personal injury allowed — Plaintiff was driving his snowmobile on the right side of a logging road at 50 to 60 kilometres per hour — Defendant driver rounded the corner from the opposite direction at 100 kilometres per hour and collided with plaintiff — Plaintiff's evidence was uncontradicted and corroborated — Defendant failed to control his vehicle by exceeding any reasonable speed — Defendant's *negligence* was the sole cause of the collision.**

**Damages — Physical and psychological injuries — Physical injuries — Arm injuries — Wrist — — Considerations impacting on award — Pre-existing injury — Action for damages for personal injury allowed — 35-year-old plaintiff was involved in an automobile accident, sustaining a wrist injury that resolved within six months — Ongoing symptoms were neck and back discomfort with tingling and numbness in the arms — The tingling resulted from an aggravation of a pre-existing degenerative disease — Plaintiff had a pre-existing hip problem which was not aggravated by the collision — Plaintiff awarded $30,000 in non-pecuniary damages, $18,000 for loss of income, $90,000 for loss of earning capacity and $2,954 in special damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Pre-existing medical conditions — Loss of earning capacity — Retroactive loss of income — Action for damages for personal injury allowed — 35-year-old plaintiff was involved in an automobile accident, sustaining a wrist injury that resolved within six months — Ongoing symptoms were neck and back discomfort with tingling and numbness in the arms — The tingling resulted from an aggravation of a pre-existing degenerative disease — Plaintiff had a pre-existing hip problem which was not aggravated by the collision — Plaintiff awarded $30,000 in non-pecuniary damages, $18,000 for loss of income, $90,000 for loss of earning capacity and $2,954 in special damages.**

|  |
| --- |
| The plaintiff sought damages for injuries sustained on November 19, 2003, when his snowmobile was struck by another snowmobile, driven by the defendant Ken Jackson and owned by the corporate defendant; neither defendant appeared at trial. The defendant Jackson lost control of his snowmobile when he rounded a corner at a speed in excess of 100 kilometres per hour. There were inconsistencies between the plaintiff's evidence and the notes of his orthopaedic surgeon regarding both the circumstances of the accident and the description of the plaintiff's injuries. The plaintiff told the surgeon he saw his family doctor a week or so after the accident, when he in fact did not see any medical professional concerning his injuries for three months. The plaintiff had a hip replacement in his teens, a revision of the total hip replacement in 2001 and had further hip replacement surgery in August of 2004. The plaintiff suffered an injury to his right wrist in the accident, which required a wrist brace for a few weeks but completely resolved in six months. The plaintiff, who suffered from pre-existing degenerative diseases including a moderate disc bulge, continued to experience tingling in his shoulders and fingers which required him to stretch of alter his position from time-to-time. The plaintiff, who owned and operated a software company, sought $45,000 for past loss of income based on a yearly loss of $7,000 since the collision. The plaintiff sought $2,954 in special damages for the cost of repairing his snowmobile and $48,220 in special damages for hiring contractors to complete renovations he claimed he could have completed himself.  HELD: The plaintiff was awarded $30,000 in non-pecuniary damages, $18,000 for past loss of income, $90,000 for loss of earning capacity and $2,954 in special damages.  The defendants were jointly liable for the plaintiff's injuries and loss. The defendant Jackson was negligent in his operation of the snowmobile, which he operated with the knowledge and consent of the corporate owner of the vehicle. The tingling in the plaintiff's shoulders and fingers resulted from an aggravation of his pre-existing degenerative condition but did not represent a significant reduction in his capacity or overall productivity. It was unsafe to conclude the plaintiff's August 2004 hip surgery was caused in any way by the collision. The evidence of the plaintiff's past loss of income was murky at best and his income was also affected by fluctuations in the U.S. dollar and his hip replacement surgery. There no evidence the claims for special damages for the cost of hiring contractors were legitimate and foreseeable claims arising from the injuries the plaintiff suffered in the collision. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5X76-XJ31-JKB3-X2FB-00000-00&context=)

**Counsel**

Counsel for the plaintiff: S.T. Pihl and S. Grewal.

Counsel for the defendants: No Appearances.

**Reasons for Judgment**

|  |
| --- |
| **W.G. PARRETT J.** |

**INTRODUCTION**

**1**  This action arises from a collision between two snowmobiles on a forest service road near Kelowna on November 19, 2003. The plaintiff seeks damage awards arising from personal injuries and property loss. In addition, he seeks both past and prospective loss of income

**2**  The action against Mike McMichael has been discontinued while it has proceeded against the remaining defendants.

**3**  The defendant Ken Jackson ("Jackson") initially retained counsel who entered an appearance and filed a defence on his behalf. Jackson eventually discharged his counsel, attended his examination for discovery on his own and, although duly served with notice of this trial, he has not appeared.

**4**  The corporate defendants have been represented by counsel throughout and, in fact, provided Mr. Jackson's reply to the notice to admit. These defendants, for reasons best known to them, have chosen to neither appear at, nor participate in, this trial.

**BACKGROUND**

**5**  The plaintiff, on November 19, 2003, was enjoying a snowmobile trip with two friends, Milo McDonald and Jordan MacClelland. They had left Kelowna earlier that day and had travelled to the Greystokes Plateau some 40 to 50 kilometres from Kelowna near the Big White Ski Resort.

**6**  After arriving in the parking area they unloaded their snow machines and left the parking area and travelled along a logging road which took them up into the snowmobile area.

**7**  At about 2:00 to 2:30 p.m., the three were returning to the parking area. They were travelling over the 5 kilometre stretch of logging road. Each of the three was on a separate snowmobile and they were travelling single file with the plaintiff leading the way.

**8**  The snowmobiles were approximately 200 feet apart and proceeding at 50 to 60 kilometres per hour on the right hand side of the road, down a slight slope towards a left hand turn.

**9**  As they approached the turn the defendant Jackson came around the corner in the other direction on a snowmobile owned by Community Auto & Truck Centre Ltd.

**10**  As Jackson rounded the corner he was travelling in excess of 100 kilometres per hour. At his speed he was unable to maintain control and slid sideways, striking the plaintiff's snowmobile despite the fact that the plaintiff had slowed and moved as far onto the shoulder as he could.

**11**  After impact Jackson and his snowmobile continued down the road, nearly striking the McDonald snow machine before coming to rest near the MacClelland machine.

**12**  It is possible, in this case, to be brief and to the point on the issue of liability.

**13**  The plaintiff's evidence is not contradicted and is corroborated and expanded upon by the evidence of Milo McDonald. McDonald is a corporal and a 12 year member of the Royal Canadian Mounted Police. I accept his evidence as to the accident itself.

**14**  The logging road in question I find to be a public highway as that is defined in s. 1 of the ***Motor Vehicle Act***, R.S.B.C. 1996; c. 318. A snowmobile is also defined within s. 1 and the Regulations as a motor vehicle.

**15**  Quite apart from the evidence as to the use of the road in the area where the collision occurred, there were also signs posted, both in the parking area and on the roadway, warning motorists to be cautious because of active logging use.

**16**  Mr. Jackson was riding the particular snowmobile and was travelling in a group of 3 riders, one of whom was the president of Community Auto & Truck Centre Ltd.

**17**  I am satisfied on the whole of the evidence that Jackson was operating the snowmobile with the knowledge and consent of the owner, Community Auto & Truck Centre Ltd. I am equally satisfied that Mr. Jackson was negligent in his operation of the snowmobile in that he was considerably exceeding any reasonable speed limit given the conditions and that he failed to control his vehicle as he approached the plaintiff. I specifically find that the defendant Jackson's ***negligence*** was the sole cause of the collision in question.

**18**  Aside from Jackson's admission as to para. 4 of the plaintiff's notice to admit, which reads:

1. The Defendant, Community Auto Sales and Community Auto & Truck Centre Ltd. (hereafter "Community Auto"), was at all material times the owners of the snowmobile operated by the Defendant Jackson.

there is no evidence as to who or what Community Auto Sales is. Neither of the other defendants responded to the notice to admit, nor was there evidence it was served on them.

**19**  The letter from Marvin Geekie returning Mr. Jackson's reply to the notice to admit makes it clear that he did not act for Jackson but it did not make it clear who he was acting for, or for what purpose.

**20**  Mr. McMichael, on his examination for discovery read in by the plaintiff, admitted that Community Auto & Truck Centre Ltd. owned the snowmobile. No such admission was made with respect to Community Auto Sales.

**21**  I find the defendants Jackson and Community Auto & Truck Centre Ltd. jointly liable for the plaintiff's injuries and loss.

**QUANTUM OF DAMAGES**

1. **Personal Injuries**

**22**  The impact of the collision knocked both the plaintiff and his snowmobile off the road surface and into a ravine to Mr. Dobranski's right. Mr. Dobranski described flying through the air and landing on the ground in bushes and trees.

**23**  The plaintiff is 40 years of age. He was born in Regina, Saskatchewan, on January 11, 1968 and has been heavily involved in snowmobiling for many years.

**24**  The plaintiff submits that as a result of injuries he suffered in the collision, he has suffered:

1. a significant series of restrictions on his physical activity that affects his employment, his recreational activity and his ability to carry out home renovations and improvements of the kind he was able to do before the accident;
2. a loss of income both past and prospective;
3. contractor costs to complete work he would otherwise have completed himself;
4. emotional injury as well as the physical manifestations.

**25**  Mr. Dobranski submits that his limitations and his pain has been constant and chronic having plateaued approximately 3 years after the collision.

**THE PLAINTIFF'S EVIDENCE**

**26**  During the course of his evidence, the plaintiff testified that:

1. I sort of didn't feel I had any crippling injuries;
2. My entire body was in pain ("numbing pain") but most significant was my wrist;
3. I had pain in my back which got worse between the shoulder blades with tingling in my arms;
4. I had a problem with my hip but it didn't show up for a couple of weeks or a month;
5. I had some pain in the lower back but it was manageable;
6. My wrist became more and more severe, more immobile, and it was difficult to grasp things;
7. I had no significant problems with my wrist after six months or so;
8. The numbness and pain between my shoulder blades and the tingling into my arms affected me particularly when I was sitting in one position or when I was reaching over my head. I tried to relieve by altering positions;
9. I was having neck pain I had never had before. Within a day or two I got concerned and went to see my physician who ordered x-rays and an MRI. This peaked within months then slowly improved. The improvement then stopped and it wasn't getting any better;
10. I continue to suffer from sporadic and unexpected pain with some days being good and some when I am completely useless;
11. Today I feel pretty good. I adapt to my limitations and can work around the ongoing problems with my back and my hands;
12. I have lost the enjoyment I had with snowmobiling and lost interest in it;
13. My hands are dead and my back is numb, the wrist and hip are no longer problems, but I am not as efficient and productive as I was.

**27**  I have set out the plaintiff's evidence in some detail, though not exhaustively, because of the absence of a defence and any cross-examination.

**28**  Two medical reports were placed in evidence. The first from Dr. James Ketch, the plaintiff's family doctor, dated November 27, 2006; and the second from Dr. Keith Christian, an orthopaedic surgeon, dated August 7, 2007.

**29**  Dealing initially with the report of Dr. Ketch, he indicates that he has been Mr. Dobranski's family doctor since September 1998 and that over the five years preceding this collision on November 19, 2003, he had not "presented with any concerns regarding his neck and back".

**30**  Dr. Ketch records Mr. Dobranski's description of the collision, its aftermath and his first attendance on his family doctor in these passages:

He was involved in a snowmobile accident on November 19, 2003. According to Mr. Dobranski, he was standing on his snowmobile at the time of the impact with all his weight on his right leg. He stated that he was thrown from the snowmobile and landed head first into the snow. He was stiff and sore all over, as expected after an accident, and took Tylenol and anti-inflammatories to manage his pain.

Mr. Dobranski presented to the office on February 18, 2004 to be assessed as he was not getting better from the injuries sustained in the accident in November. He expressed concern that his right wrist was still sore and made a grinding noise with movement. He also stated that he "got numbness and tingling in his upper back if he sits for a while". On my examination of his right wrist, he had crepitus and pain over the extensor muscle group which was indicative of a tendonitis. This was managed with ice, stretches and anti-inflammatories. His back was sore to the touch due to muscle spasm and inflammation. He was encouraged to continue with stretches and medications.

**31**  On the evidence Mr. Dobranski next attended on his family doctor on April 6, 2004 when he was assessed by Dr. Mckee:

Mr. Dobranski presented to the clinic on April 6, 2004 and was assessed by Dr. Mckee. Mr. Dobranski complained of right hip pain since the snowmobile accident which was progressively getting worse. He felt his hip click with movement and it was painful. Mr. Dobranski was investigated for this and had to get his right hip replaced earlier than expected due to the excessive wear of the artificial hip which he had replaced in 2001. This premature wear and tear of his artificial hip could possibly be due to trauma as a result of his accident on November 19, 2003.

**32**  He next attended on July 18, 2006. This was his third visit noted in the report and was some 32 months since the collision on November 19, 2003:

Mr. Dobranski was seen in the clinic for various medical concerns and presented on July 18, 2006 with his persistent upper back pain and numbness down his arms when he sits too long. He has learnt to compensate for this numbness by altering his positions in order to alleviate it. I thought that he probably had a cervical disc [sic] at C6-7 level. He was further investigated with a CAT scan of his neck which confirmed a moderate disc bulge at C6-7. Mr. Dobranski has been referred to Dr. Goplen, a neurosurgeon for definitive care and assessment.

**33**  Dr. Ketch concludes this report with the following:

It is of my medical opinion that Mr. Dobranski probably sustained a cervical disc injury at the level of C6-7 at the time of the accident on November 19, 2003. He is a stoic man who denied his discomfort and was able to modify his posture or change his position to compensate for the impingement caused by his disc bulge at C6-7. It is also my medical opinion that the trauma to his right hip in the accident, possibly contributed to the premature wear and tear of his right hip prosthesis.

**34**  Before turning to the report of Dr. Christian I note that if Mr. Dobranski was seen and assessed by Dr. Goplen no such evidence was placed before the court.

**35**  Dr. Christian saw Mr. Dobranski on August 7, 2007 at the request of the plaintiff's counsel for the purpose of conducting an independent medical examination.

**36**  Dr. Christian is a licensed orthopaedic surgeon in British Columbia, who obtained his degree in medicine and surgery from the University of Manchester in 1971. He became a fellow of the Royal College of Surgeons of Canada in 1978. Dr. Christian has been in private orthopaedic practice in Vernon since January of 1979 and has served as a consulting orthopaedic surgeon at the Vernon Jubilee Hospital through most of the time since then. He has an interest in disability evaluation and has pursued training in this field as well as being board certified in the United States.

**37**  Dr. Christian's report was based on the history provided to him, his physical examination of the plaintiff and on his review of the documentation provided to him, which he quite properly lists as follows:

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| --- | --- | --- | --- | --- |
| 1. |  | Kelowna General Hospital Records | April 7, 2004 to |  |
|  |  |  | October 13, 2005 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 2. |  | Dr. Ketch - Clinical Records | December 15, 2003 to |  |
|  |  |  | June 12, 2005 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 3. |  | Dr. Ketch - updated Clinical | July 18, 2006 to |  |
|  |  | Records September 13, 2006 |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 4. |  | Dr. Ketch - x-ray and CT | September 7, 2006 |  |
|  |  | results of C Spine |  |  |

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| --- | --- | --- | --- | --- |
| 5. |  | Dr. Ketch - Report | November 27, 2006 |  |

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| --- | --- | --- | --- | --- |
| 6. |  | Dr. Govender Consult Report | January 16, 2007 |  |
|  |  | to Dr. Ketch |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 7. |  | Dr. Gary O'Connor - Clinical | November 19, 2003 to |  |
|  |  | Records | October 11,2005 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 8. |  | Dr. Govender - Clinical Records | November 6, 2006 to |  |
|  |  |  | January 16, 2007 |  |

**38**  I note that of the eight items listed that were provided to and considered by Dr. Christian, only one, item 5, was placed in evidence during this trial.

**39**  Dr. Christian notes that this documentation is primarily concerned with hip surgery the plaintiff had in August of 2004 and then notes that:

There is very little documentation concerning his snowmobiling accident.

**40**  There are some surprising inconsistencies between the version of the collision given in the plaintiff's evidence and that recorded in Dr. Christian's comprehensive 11 page report:

This gentleman explained to me that in November of 2003 he was involved in a snowmobile accident. He and some companions were snowmobiling on a logging road and another vehicle came around the corner and collided with his vehicle. He recalls that there was a fairly steep embankment and the vehicle struck his vehicle and he was knocked off the trail and down the embankment. He thinks he probably fell about twenty to twenty-five feet. He recalls that the speed involved was probably 30 to 40 kmph. He was naturally dazed and somewhat shocked and he was able to get off his vehicle and looked up above him where one of his companions was looking down and expressing concern about his condition. . . . The person who collided with him apparently did not stop but one of his companions did stop to help and it was through the encounter with this person that the identity of the person that hit him was discovered. He was able to crawl out of the ditch. . . .

**41**  If Dr. Christian has captured the history given to him accurately, and I accept it as accurate, it differs in both detail and tone from what his evidence was at this trial. The key discrepancies in these passages include his speed estimate, the apparent steepness of the embankment and the allegation that the defendant Jackson failed to stop.

**42**  The inconsistencies continue into the description of his injuries, the extent to which they affected him immediately after the accident and the sequence of events that followed:

. . . He initially was quite in shock and felt numb. His first thought was whether he was still alive. He was able to feel his arms and his legs and he did not really have any pain at that time particularly. Fairly soon after the impact however he was aware of some pain in his neck and interscapular area of his back. He also had some pain and swelling in his right wrist. He describes the pain as being a feeling of tightness in the interscapular region and he was able to clamber up the slope for help.

. . . Mr. Dobranski was not feeling very well at the time naturally and he stayed with the vehicle while his friends went to obtain his truck and drove it back and loaded the snowmobile onto his truck. He was well enough to drive the vehicle home. On the way home he stopped at the snowmobile shop and dropped it off for repairs. He recalls that there was probably about $3500 damage done to the vehicle at that time and the vehicle at that time he thinks was probably worth about $10000 to $11000.

He subsequently drove home and went to bed. The next day he woke up feeling "very achy". He had pain in his neck and his right wrist was very swollen and sore. He did not seek medical attention initially. He had a friend who had a wrist brace, which he applied, and noted that it felt much better with the brace on. It was a week or so later apparently when he saw his family doctor. At that time it was his neck and his wrist that were the main areas of concern. He is not sure whether an x-ray was taken.

Following the impact, he was off work for a week to ten days or so he recalls. He works in the computer programming area and his job is mainly sitting and because of persisting pain in the neck and interscapular area he was unable to work for that period of time.

[Emphasis added]

**43**  In this case it is clear that the plaintiff did not see his family doctor ". . . a week or so later . . ." as he told Dr. Christian. He, in fact, did not see any medical professional concerning his injuries until February 18, 2004, three months after the collision.

**44**  The significance of this inaccuracy, in my view, is that it compresses the actual time frame considerably and misrepresents the temporal link between the symptoms he describes and the collision. By relating it to his seeking medical assistance it impliedly establishes a direct connection between the collision and the complaints he supposedly took to his family doctor ". . . a week or so later . . ."

**45**  The history recorded by Dr. Christian also notes that Dobranski was apparently aware of ". . . some pain in his neck and interscapular area of his back" fairly soon after the impact.

**46**  Mr. Dobranski's evidence at this trial highlights the difficulty created by this evidence. The plaintiff testified that when his neck pain developed he "got concerned" and "within a day or two" he went to see his family doctor who ordered an x-ray and an MRI.

**47**  This evidence is demonstrably inaccurate in that either the neck pain did not develop for three months and he then, as he suggests, saw his family doctor "within a day or two", or, it developed much earlier as he suggested to Dr. Christian and he did not seek medical assistance for months.

**48**  Such inaccuracies are troubling, particularly so where they represent the factual basis for the opinions which link apparent injuries to the collision in question. They are even more troubling when the various medical documents given to Dr. Christian are not in evidence at this trial.

**49**  Absent from the body of evidence presented during this trial are the clinical records of Dr. Ketch and the results of the x-ray and CT examinations of the plaintiff's cervical spine. These documents, together with a consulting report (January 16, 2007) by Dr. Govender and nearly two years of clinical records of Dr. Gary O'Connor (November 19, 2003 to October 11, 2005) were all considered by Dr. Christian but not placed in evidence.

**50**  Given the absence of these various records the Court is left to assess the actual sequence and complaints from the two page letter provided by Dr. Ketch. Aside from the initial notation that "he was stiff and sore all over", Dr. Ketch records the plaintiff's initial complaints as related to his right wrist and that he ". . . got numbness and tingling in his upper back if he sits for a while . . .". In relation to the back, Dr. Ketch noted that his back was "sore to the touch due to muscle spasm and inflammation". Dr. Ketch recommended stretches and some medications. There is no indication in this report of a complaint related to his neck let alone a complaint of pain in his neck.

**51**  The content of this report appears to indicate that the April 6, 2004 visit was focused entirely on the plaintiff's complaints of hip pain.

**52**  On July 18, 2006, some 32 months after the collision, Dr. Ketch, in his report, refers to Mr. Dobranski's complaint of "persistent upper back pain and numbness down his arms when he sits too long".

**53**  Dr. Ketch then describes a CT scan confirming a "moderate disc bulge at C6-7" and a referral to Dr. Goplen for "definitive care and assessment". He then goes on to describe Mr. Dobranski as ". . . a stoic man who denied his discomfort and was able to modify his posture or change his position to compensate . . ."

**54**  In Dr. Ketch's entire report the word neck appears on one occasion and that is in the following sentence:

Prior to the accident on November 19, 2003 he had not presented with any concerns regarding his neck and back.

[Emphasis added]

**55**  Dr. Christian saw Mr. Dobranski on August 7, 2007. His report serves to highlight serious concerns with respect to the accuracy and reliability of Mr. Dobranski's memory of these events and, in particular, his symptoms and medical problems.

**56**  Dr. Christian records in his report, as previously noted, that "It was a week or so later apparently when he saw his family doctor". He goes on to record, however, that "At that time it was his neck and his wrist that were the main areas of concern".

**57**  This portion of Dr. Christian's report appears under the heading "History as Reported by The Examinee". He also records the following:

Following the impact, he was off work for a week to ten day[s] or so he recalls. He works in the computer programming area and his job is mainly sitting and because of persisting pain in the neck and interscapular area he was unable to work for that period of time.

**58**  This version of events is, as I have already indicated, inconsistent with and, indeed, contradicted by that provided from the limited evidence of Dr. Ketch.

**THE HISTORY OF THE PLAINTIFF'S HIP**

**59**  Mr. Dobranski has a history of difficulties with his right hip. In his teens he developed a medical condition which resulted in him being placed on high dose steroids. This treatment regime apparently resulted in him developing avascular necrosis of the right hip and led to a hip replacement. The total hip replacement lasted some 14 years until problems surfaced in 2001. These problems led to a revision of the total hip replacement because of a failure of the acetabular liner.

**60**  After seeing his family doctor in early 2004 he was referred back to his surgeon, Dr. O'Connor, who recognized that the revised hip had failed. In Dr. Christian's report he describes this as arising from a complaint in "February of 2004" but in Dr. Ketch's report it is recorded on April 6, 2004. Dr. O'Connor carried out a repeat procedure in August of 2004.

**DR. CHRISTIAN'S CONCLUSIONS**

**61**  Dr. Christian's conclusions and opinions arising from his assessment of the plaintiff are found in his report beginning on page 9. They include the following:

This gentleman was involved in a fairly severe deceleration type of injury, which has caused a grade two soft tissue injury involving the cervical spine. He has residual symptoms of tingling in the tops of the shoulders and the tips of the fingers as a result of this. He clearly has some pre-existing degenerative disease. I would consider the moderate posterolateral disc bulge at C6-7 noted on the CT scan, to be a pre-existing condition and not likely related to the injury.

OPINION

I think that, as he has had no difficulty with problems like this prior to this injury, a causal relationship between his ongoing symptoms in his neck and upper extremities can be established between the injury in question and these symptoms.

It is now almost four years since the injury and there has been no significant change in his symptoms over that period of time. I would say that the injury caused an aggravation of pre-existing condition of the cervical spine and therefore subsequent symptoms are likely to be significantly more problematic than if the injury had not occurred. There is no question that the longer symptoms of this nature persist the more likely they are to be permanent and, for this reason, I would say that it is more likely than not that these symptoms will be ongoing and will, to some extent, restrict his ability to function in the workplace in the future. These symptoms require him to get up and stretch from his computer for periods of time and his productivity therefore has been somewhat reduced because of this problem. I would expect this to be a permanent situation.

**62**  The troubling feature of this aspect of Mr. Dobranski's claim is the absence of any documented reporting of the neck pain until months after the collision in question. As Dr. Christian notes, however, there is no evidence of problems like this before this injury.

**63**  I accept Dr. Christian's opinion with respect to these claims. This includes the fact that Mr. Dobranski suffered from pre-existing degenerative disease which included the moderate disc bulge at C6-7.

**64**  Nevertheless, on the whole of the evidence I am satisfied that the tingling in the tops of his shoulders and the tips of his fingers result from an aggravation of his pre-existing condition.

**65**  At this stage it is likely that these symptoms and the minor restriction they represent, requiring him to get up and stretch from time-to-time, or to alter his position, will be ongoing and will, to a limited extent, restrict his activities in the future.

**66**  With respect to the subsequent hip surgery, Dr. Christian concludes, at page 10, that:

I would say that, although it is certainly understandable that this man should feel that there is a direct relationship between this injury and the hip problem, looking at the situation objectively I would have to say that it is somewhat difficult to identify a causal relationship between this injury and the necessity for further hip surgery. There are a number of factors which determine the life of a hip arthroplasty. Although direct trauma to the hip one would assume could have a detrimental effect on it, it would be difficult to definitely state that this was the actual cause of the deterioration of the hip. If a significant trauma had been applied to the hip at the time of the injury one would have expected that the hip pain would be produced at the time of the injury. The record clearly identifies and this gentleman clearly states that the problem with groin pain on the right side came on at the least two months after the accidence. Furthermore the operative report does not describe any features to suggest that trauma to the hip was the cause of its premature demise.

**67**  When this considered opinion is combined with that formulated by Dr. Ketch in his report where he expresses the view that ". . . the trauma to his right hip in the accident, possibly contributed to the premature wear and tear . . .", one is forced to conclude that the evidentiary burden has not been met and it is unsafe to conclude that the subsequent hip surgery was caused in any way by any aspect of the collision of November 19, 2003.

**THE DAMAGE CLAIMS**

**68**  For the purpose of the damage assessment I find that, in the collision in question, the plaintiff suffered an injury to his right wrist. The immediate effects were swelling, pain and restricted movement. Shortly after the collision he self prescribed the use of a wrist brace which he used for a period of some weeks. The wrist improved after some three to four weeks and he was left with no difficulties after six months.

**69**  Within a day or two of the collision the plaintiff developed neck and upper back pain which caused some tingling and numbness in his upper arms and down to his fingers. Despite these symptoms he sought no medical assistance for some three months.

**70**  These difficulties peaked within three or four months and gradually improved, eventually plateauing and leaving him with occasional discomfort and tingling which he managed by stretching and altering position. While he continues to be affected by these symptoms they are limited in terms of any overall restriction on his activities. I accept that these ongoing symptoms, on occasion, are more pronounced. I do not accept on the whole of the evidence that they represent a significant reduction in capacity or overall productivity.

**71**  Mr. Dobranski also suffered some lower back pain for a few months which, as he put it, was manageable.

**72**  In the written submissions in this case, counsel describe Mr. Dobranski's pain as "constant and chronic". It goes on to suggest that by "February 18, 2004 Mr. Dobranski was not getting better".

**73**  These submissions are problematic. Firstly, they ignore the fact that in his evidence Mr. Dobranski described several aspects of improvement in his condition in the three months from the time of his injury to February 18, 2004. Secondly, and perhaps most significantly, February 18, 2004 was the first occasion on which Mr. Dobranski attended on any medical professional. His family doctor did not see him at the time of the accident and, with respect, was completely unable to establish a base line from which to assess the injuries or his recovery from them.

**74**  Mr. Dobranski may well be stoic in his approach to these matters, but being stoic does not alter or reduce the burden of proof. More importantly it does not explain or eliminate the effect of inconsistencies and contradictions found within the body of his evidence.

**NON-PECUNIARY DAMAGES**

**75**  This category of damages is awarded for losses which cannot be made good by money and are awarded on a functional basis to provide substantive compensation for those pleasures or activities which have been lost.

**76**  The present case is further complicated by the existence of a serious pre-existing hip problem which, on the evidence, was not aggravated by the collision in question.

**77**  The subsequent surgery required by the deterioration of this artificial hip, the recovery from it and the physical and psychological restrictions related to it further complicates any accurate assessment. This factor is further complicated by the absence of any real evidence in this area.

**78**  The plaintiff seeks an award of $60,000 under this head of damage and relies on the decision of D.M. Smith, J. in ***Kahle v. Ritter***, [*2002 BCSC 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1D9-00000-00&context=), [*22 M.V.R. (4th) 275*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1D9-00000-00&context=).

**79**  The facts in that decision centered on a rear-end collision in which the 30 year old plaintiff was injured. He attended his doctor and was subjected to a thorough physical examination within five days of the accident at which both subjective and objective evidence of injury was recorded.

**80**  Five years after the injury in that case there was detailed medical evidence showing "a continuing pattern of chronic pain and discomfort in his neck and low back that will likely remain with him for the rest of his life".

**81**  I consider the injuries in ***Kahle*** and, in particular, their overall impact on the plaintiff's lifestyle and his enjoyment of it to be far more severe and pronounced than those in the present case.

**82**  One of the important differences here is the existence of a significant factor in the form of the existing hip problem which acts as an outside factor in addition to the injuries suffered in this snowmobile collision.

**83**  I have concluded that an award of $30,000.00 for non-pecuniary damages is fair compensation for Mr. Dobranski's pain and suffering.

**PAST LOSS OF INCOME**

**84**  Under this head of damage the plaintiff seeks an award of $45,000.00 calculated on the basis of an approximate loss of $7,000.00 per annum over the years since the collision.

**85**  The essence of the plaintiff's claim under this category is found in the following extract from his written submissions:

1. While the exact figure of past loss of income is difficult to ascertain, upon hearing Mr. Dobranski's testimony and with reviewing the Financial Statements of Big Sky Software Ltd., which was the company Mr. Dobranski owned and operated for his employment, the Plaintiff submits that a reasonable award of past loss of income can be determined.
2. Mr. Dobranski testified that there are other factors besides the accident injuries which affect his yearly revenue, the most significant of which is the strength of the US dollar. The other factor, the time Mr. Dobranski lost as a result of his recovery from his hip replacement surgery. Mr. Dobranski's income cannot be quantified in hours lost, as based on the salary work, whether it takes Mr. Dobranski 40 hours to complete his weekly billable hours, or 60 hours to do the same work, his pay remains the same. Where Mr. Dobranski does lose income however, is in his ability to use the extra hours to complete work on other contracts. Mr. Dobranski testified that he had the opportunity to do computer programming work for other companies, in particular he testified to the fact that he has turned away a contract with a local glass company, due to his inability to perform as much more as a result of his injuries. As Mr. Dobranski's major contract was with Packaging Corporation of America, which he described as his "bread and butter," he had to dedicate all of his time to completing the billable hours for this contract due to the restraints placed on him by the injuries.
3. The Plaintiff suggests that a conservative estimate of an approximate annual loss of $7,000 can be attributed to the accident.
4. The Plaintiff thus submits that a reasonable award for loss of past income is $7350 for the 2 weeks of work missed immediately after the accident, based on an approximate weekly gross revenue for the fiscal year ending on June 30, 2004 as well as a conservative estimate of $7,000 a year for each year since the accident until the time of trial taking into account any fluctuations in the US economy, as well as the fact that Mr. Dobranski turned down other contract work which he would have been able to do had the accident not occurred. The total claim for past wage loss is thus approximately $40,000 taking into consideration that it has not been a complete 5 years since the day of the accident.

**86**  The general philosophical approach to the issue of personal injury damage awards was reviewed by the Supreme Court of Canada in the context of severely disabled plaintiffs in the trilogy ***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=); ***Thornton v. Board of School Trustees of School District No. 57 (Prince George)***, [*[1978] 2 S.C.R. 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250X-00000-00&context=); and ***Arnold v. Teno; J.B. Jackson Ltd. v. Teno; Teno v. Arnold***, [*[1978] 2 S.C.R. 287*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250Y-00000-00&context=). The principles established in the trilogy were further developed and refined in ***Lewis v. Todd***, [*[1980] 2 S.C.R. 694*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1XR-00000-00&context=) and ***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=).

**87**  Over the nearly three decades since these decisions the approach has been further refined in a host of decisions. The "new" approach detailed in these decisions abandoned the traditional global award approach in favour of a more itemized approach which relied heavily on statistical, actuarial and economic evidence which was usually the province of expert witnesses.

**88**  The general approach is that an award should be moderate and fair to both sides and not confuse compensation with retribution nor with sympathy or compassion for the victim (***Andrews****, supra*, at p. 243). In striving to achieve this balance a plaintiff should, so far as possible, receive full compensation for specific pecuniary losses.

**89**  In achieving fairness to the defendant the Court must be assured that the claims advanced are legitimate and justifiable. In the words of Dickson, J., in ***Andrews***, at p. 463:

An award must be fair to both parties but the ability of the defendant to pay has never been regarded as a relevant consideration in the assessment of damages at common law. The focus should be on the injuries of the innocent party. Fairness to the other party is achieved by assuring that the claims raised against him are legitimate and justifiable.

**90**  The approach to the difference between past losses and future losses is taken from a decision of the House of Lords, ***Mallett v. McMonagle***, [1970] A.C. 166 at 176:

The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

**91**  This approach was specifically adopted and approved 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=) at paras. 27 and 28:

Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle,* [1970] A.C. 166 (H.L.), *Malec v. J.C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.), *Janiak v. Ippolito*, [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=). For example, if there is a 30 per cent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 per cent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* [*(1977), 18 O.R. (2d) 337*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0SJ-00000-00&context=) (C.A.), *Graham v. Rourke* [*(1990), 74 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5T5-M3YH-00000-00&context=) (Ont. C.A.).

By contrast, past events must be proven, and once proven they are treated as certainties. In a ***negligence*** action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty: *Mallett v. McMonagle, supra, Malec v. J.C. Hutton Proprietary Ltd., supra,* Cooper-Stephenson*, supra*, at pp. 67-81.

[Emphasis added]

**92**  The difficulty, as I perceive it, with the present head of damage is that it is a claim for past loss of income. Such a claim must be proven on a balance of probabilities.

**93**  What is readily apparent from the plaintiff's written submissions is that they have substituted for the burden of proof imposed upon them speculation and estimation from generalized theory instead of proven facts.

**94**  In my respectful view, there is no factual basis whatsoever for concluding that the plaintiff suffered "an approximate annual loss of $7,000.00" which can be attributed to the accident which continues "as a conservative estimate" for the approximate five years up to the date of trial.

**95**  The plaintiff is a 40 year old man who was born in Regina on January 11, 1968. In 2000 he apparently established a computer software company, Big Sky Software Ltd., after completing a two year computer information systems program at Okanogan University College. His business was the development of specialized software and his major client was a group of paper mills located in the southern United States.

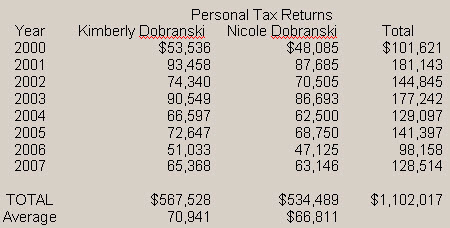
**96**  Mr. Dobranski testified that he was the "sole director and employee" of Big Sky. His major client, according to his evidence, employed him on a contract basis and paid him an unspecified amount calculated on him being available 40 hours per week. He went on to testify that he had other, unspecified clients, for whom he did 20 to 30 hours per week with some weeks being 80 hour weeks and some 40.

**97**  He went on to testify that he kept his main contract and gave up the smaller ones. He suggested that this could have been $20,000.00 to $30,000.00 per year but that he could not give an accurate estimate.

**98**  He testified that "I think I missed a couple of weeks after [the collision] and a fair bit after the [hip] surgery". The uncertainty of this evidence is apparent but the problems are elevated by the fact that the evidence is so vague. No documents were produced which reflect billing breakdown or summaries. No specific clients were identified and no documents related to lost clients were produced.

**99**  The plaintiff submits that he suffered a loss because it took him longer to do the work he previously completed in a shorter period but no records reflecting that were produced.

**100**  The other evidence provided includes personal tax returns and corporate financial statements. These documents were entered and identified but were largely not referred to in the evidence. The personal tax returns indicate that the plaintiff and his wife, Nicole Dobranski, filed returns disclosing the following taxable income in the years indicated:

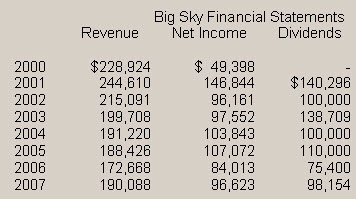


**101**  The injuries in this case occurred on November 19, 2003 and, according to the plaintiff, he missed approximately two weeks and then began working at some lower capacity. Throughout, however, he continued to receive his contract remuneration.

**102**  Mr. Dobranski's average taxable income over the period 2000 to 2002 was $73,778 and from 2000 to 2003 it was $77,970. From the table above it seems clear that the years 2001 and 2003 were exceptional years with taxable income in excess of $90,000; the next highest was 2002 with an income of $74,340. If the two somewhat anomalous years are taken out, the average income is $63,920.

**103**  I understand that the plaintiff's submission is that his income would have been significantly higher had he not been injured, but this table and these calculations are one means of examining that submission, and, in my view, they do not support that submission.

**104**  The financial statements provided for Big Sky cover the same years. The company year end is June 30 and the statements reflect a year's operation ending on that date in each year. It should also be noted that the operations of Big Sky changed after its first year of operation. In 2000 it paid management salaries of $96,170 while in each year after that dividends were paid out:



**105**  If the revenue in these statements reflects work completed by Mr. Dobranski, the company's only employee, the total value of that declined from a high of $244,610 in 2001 to a low of $172,668 in 2006, a drop of about 29%. No other year within the eight year period comes close to that revenue total however, and, the average over the period 2000 to 2002, the three full years preceding the injuries, is $229,541. This average, of course, includes the highest revenue period of 2001.

**106**  The average of the four years ending on June 30, 2003 (prior to the injuries on November 19, 2003) drop that average to $222,083 and, after an apparently banner year in 2001, show a drop of $29,519 from 2001 to 2002 (or 12%) and a further drop of $15,383 (or 7%) from 2002 to 2003.

**107**  While these tables and figures are a useful base from which to examine the claim under this head, I regret to say that the established data simply doesn't support the submission advanced by the plaintiff.

**108**  When you add to this two other important factors -

1. the fact that the plaintiff's evidence is that his income fluctuates with the strength of the US dollar; and
2. that in August of 2004 he underwent a further hip replacement surgery unrelated to these injuries and had a prolonged recovery;

the evidence of loss becomes murky at best. The absence of evidence of the historical fluctuations of the value of the US dollar and of the records or evidence of his hip surgery and recovery makes any accurate conclusions very near impossible.

**109**  Recognizing that even in these circumstances the Court must attempt to quantify a loss and recognizing that a loss in fact occurred, I would quantify that loss in this case by taking the average taxable income of $70,941, deducting 4 weeks, and find that during the two weeks following the injury he suffered a loss of income of $3,000. Over the course of the next six months during which he recovered from his wrist injury, but continued to suffer from neck and back pain, as well as radiation of tingling and numbness down his arms, I find that he suffered a further loss of $15,000 from the additional projects he would have undertaken but for the injuries.

**110**  I am well aware this amounts to gazing into the crystal ball but I fix the plaintiff's past loss of income at $18,000.

**111**  As of August of 2004 the plaintiff underwent further hip replacement surgery necessitated by the failed revision of his previous replacement. There is simply no evidentiary or factual basis for separating the results of that failure, the subsequent surgery and recovery from it, from the effects of the injuries which may have been at work.

**FUTURE WAGE LOSS/LOSS OF EARNING CAPACITY**

**112**  It is clear from my earlier findings that this plaintiff was injured in the collision in question and that some residual effects remain and are likely to be permanent.

**113**  The residual symptoms as outlined by Dr. Christian ". . . require him to get up and stretch from his computer for periods of time and his productivity therefore has been somewhat reduced . . ."

**114**  The plaintiff testified that he is not as efficient and productive as he used to be. He went on to say that he never considered the injuries to be severe and that he 'can do everything now that he could before but he has a problem with his upper neck that he just lives with'. He also testified that he cannot work with his arms over his head as much as he did prior to the injuries.

**115**  The approach to future economic loss is that described by Dickson, J. (as he then was) in ***Andrews***, *supra*, at p. 15:

We must now gaze more deeply into the crystal ball. What sort of 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, a loss of earning capacity for which compensation must be made . . . A capital asset has been lost: what was its value?

**116**  To establish entitlement the plaintiff must prove an injury which will affect his ability to function in the future. In this head of damage the standard of proof is simple probability rather than the balance of probabilities: ***Athey v. Leonati***, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), and ***Rosvold v. Dunlop***, [*[2001] B.C.J. No. 4*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=).

**117**  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=), Finch, J. (as he then was) described at para. 8 some of the potential criteria:

The means by which the value of the lost, or impaired asset, is to be assessed varies 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.

**118**  These criteria are not exhaustive and indeed are not preconditions. They are rather one suggested approach. What is critical is the fact that the approach varies from case to case and must be tailored to consider the particular circumstances of each individual case.

**119**  The general questions to be addressed are those identified by Southin, J.A. in ***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=) and ***Palmer v. Goodall***, [*[1991] 53 B.C.L.R. (2d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=):

1. Whether the plaintiff's earning capacity has been impaired to any degree by his or her injuries, and
2. If so, what amount in light of all of the evidence should be awarded for that impairment?

**120**  As Southin, J.A. observed in ***Palmer*** at p. 59:

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

**121**  This passage, in my view, serves to highlight the importance of approaching this category of claim as the loss of a capital asset. Where, as in the present case, the plaintiff is a relatively young man, self-employed, with a significant and apparently stable history of earning from established clients, it is all too easy to fall into the trap of looking in the evidence for a quantification of a loss in his recent earnings and to project that loss into the future.

**122**  The projection in this case is of the potential impact of his limitations over the course of his working career, not the calculation of what, if any, reduction of recent earnings he has suffered.

**123**  ***Brown v. Golaiy****, supra*, was decided in 1985 but Finch, J. identified in para. 10 a whole series of decisions which considered awards for the loss of capacity to earn income before concluding in para. 11:

11 Counsel agreed that when the plaintiff was employed as a truck driver he earned about $20,000 a year. In my view the equivalent of one year's income as a truck driver is an appropriate allowance to make for his loss of capacity to earn income in the future. It is unlikely that he would miss that much time from work all at once. It is uncertain when, or if, he will miss time from work at all. He has, however, been diminished in his ability to find employment, to work, and to pursue certain kinds of employment. The award on this account must be a rather rough and ready estimate. I fix $20,000 as the amount of the plaintiff's loss for impaired capacity to earn income in the future.

**124**  The plaintiff in this case seeks an award in this category of $190,000. The submission is specifically predicated on the fact that this approximate sum is the annual revenue of Big Sky Software Ltd. at the time of the accident.

**125**  I am aware of no authority, and I was provided with none, which accept the proposition advanced here that a specific plaintiff's loss of earning capacity arising from personal injuries should be estimated by substituting the annual gross revenue earned by the plaintiff's company even when the plaintiff may be the only active employee.

**126**  Absent some authority I am not prepared to accept or adopt such an approach.

**127**  In the same year, that of the accident, the plaintiff's income tax return shows taxable income of $90,549. This, as mentioned previously, is the second highest taxable income achieved in the eight years for which we were provided evidence. This is, with respect, a better comparator to be used if the rough and ready estimate approach adopted in ***Brown v. Golaiy*** is utilized.

**128**  I accept that in this case there is a loss of capacity to some degree and that it is permanent. I further accept that the approach adopted by Finch, J.A. is an appropriate and fair allowance to make for his loss of capacity to earn income in the future. I fix the damages under this head at $90,000.

**SPECIAL DAMAGES**

**Snowmobile Repairs**

**129**  Mr. Dobranski, on his way back from the scene of the collision, took his snowmobile in and left it at Banner Sea'N'Ski which repaired the damages to the snowmobile. The invoices for these repairs total $2,954.13 and the plaintiff will recover those costs as special damages.

**House Renovations**

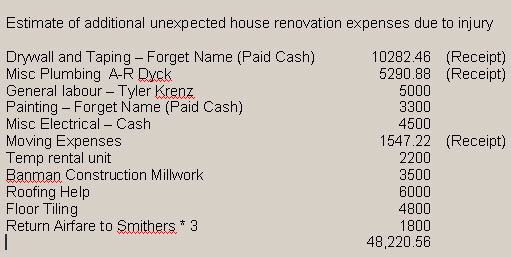
**130**  This area of the plaintiff's claim is problematic. It consists of what I will categorize as four separate areas of claim that totals $48,220.56.

**131**  The bulk of this claim consists of costs related to the costs of completing and renovating a new home purchased by the plaintiff and his wife. The submission is that ". . . Mr. Dobranski was forced to hire contractors to complete home renovations that he, himself, could easily have completed". The evidence from Mr. Dobranski was that he built his first house in 1996 and his second in 1999. He went on to testify that "I did everything I could on my own, cement work, drywall, taping, etc."

**132**  He then testified that ". . . we were negotiating at the time the purchase of a new property. I was going to do the renovations and move in". Mr. Dobranski went on to testify that he flew his wife and kids to Smithers "because we were not ready to move in" and that because of his hip surgery in August 2004, and problems with his neck, back and wrist "I was in no condition to be dealing with this stuff". This summary represents almost the entirety of the evidence led with respect to this claim with the exception of a series of invoices and estimates that cover some of the work. Those invoices begin on March 31, 2004, with a drywall estimate for $10,282.46. They include, as well -

1. a receipt dated June 4/04 from A.R. Dyck Heating for $5,290.88 (no particulars of work or location);
2. two invoices from Kevin Powers (the drywaller) dated May 25, 2004 and June 8, 2004, which appear to indicate that the total cost was $8,700.07 and not $10,282.46 as claimed.

**133**  Most of the other components of this renovation claim are unsupported by any invoice, cancelled cheque or even detailed evidence of what was done. Instead, the Court was provided with the following summary:



**134**  To be blunt, the evidence is completely inadequate to establish that any aspect of this claim is legitimate. Firstly, there is no evidence whatsoever as to either the sale of the plaintiff's existing home or of the purchase of the new one. There is no evidence of the dates of any sales agreement on the one or the purchase agreement of the other and no evidence of a completion date on either.

**135**  Such invoices as these are dated on the order of six to eight months after the injuries and there is little in the way of evidence that addresses the plaintiff's capacity to do any portion of the work represented by these claims. Included within the claim are costs of flying the plaintiff's wife and two children to Smithers ($1,800) on dates not specified, the costs of renting accommodations at Discovery Bay Resort for May 27, 2004 to July 1, 2004 at a cost of $2,200 and moving expenses of $1,547.22 on two separate receipts, the first for a move on May 30, 2004 and the second on July 22, 2004.

**136**  There is no evidence that in any way establishes that these claims are legitimate and foreseeable claims arising from the injuries the plaintiff suffered in the collision on November 19, 2003.

**137**  There will be no award for any portion of these claims.

**138**  In summary the plaintiff, for the reasons set out above, will recover:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-Pecuniary Damages | $30,000.00 |  |
|  | Past Loss of Income | 18,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Earning Capacity | 90,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | 2,954.13 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL | $140,954.13 |  |

**139**  In addition, costs will follow the event.

W.G. PARRETT J.

**End of Document**

[***Dufty v. Great Pacific Industries Inc., [2000] B.C.J. No. 1988***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1B4-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vernon, British Columbia

Bauman J.

Heard: July 17 - 21, 2000.

Judgment: October 5, 2000.

Vernon Registry No. 18454

**[2000] B.C.J. No. 1988** | 2000 BCSC 1474 | 99 A.C.W.S. (3d) 1083 | [2000] B.C.T.C. 750

Between Patricia Rae Dufty, plaintiff, and Great Pacific Industries Inc., Overwaitea Foods Limited, Omers Realty Corporation, Marathon Realty Company Limited, La Societe Immobiliere Marathon, Limitee and Village Green Leaseholds Inc., defendants

(161 paras.)

**Case Summary**

**Torts — Occupiers' liability for dangerous premises — *Negligence* of particular occupiers — Retail store — Invitees, liability of particular occupiers (incl. duty and standard of care) — Sidewalks, walkways, ramps, etc. — Damage awards — Injury and death — Body injuries — Back, aggravation of pre-existing condition — Crumbling skull plaintiff — General damage awards — Loss of earning capacity — Negative contingency deductions.**

|  |
| --- |
| Action by Dufty, a 56-year-old woman for damages for personal injuries she sustained when she tripped and almost fell at the entrance to a retail store operated by Great Pacific Industries. Dufty was distracted by the bright lights within the store causing her to stumble on a buckle in the entryway carpet. She stumbled and twisted and was able to stop herself from falling, but suffered back pain. The store claimed that it had a reasonable system of inspection in place to look out for defects in the entryway. The front end clerks were to monitor the status of the entrance. The log showed that the last sweep was several hours prior to the accident. After several weeks off work as an activity aide at a hospital, she returned, but suffered a further injury to her back in attempting to prevent a patient from falling. She did not return to work after that and remained unemployed. Her family physician believed that she was employable in a sedentary position only. At issue was the relative contribution to her continuing state of disability caused by the first accident, the workplace accident and her pre-existing state of health. Great Pacific claimed that Dufty's physical state would have been the same by this point regardless of the first accident given the prior degeneration of her spine. Its orthopaedic surgeon gave the opinion that this type of accident would not have caused the lingering problems of which Dufty complained. A CT scan showed a possible herniation of a disc which was caused or contributed to by the first accident.  HELD: Action allowed.  Dufty was awarded general damages of $45,000 and damages for past loss of income of $41,232, as well as damages for loss of future earning capacity of $36,500. The store was negligent in not reasonably maintaining the front area. No regular system of maintenance was in place, or if it was, it was not implemented on that day. Dufty was a crumbling skull plaintiff as a result of her pre-existing degenerative disc disease. As the tripping accident caused or contributed to her ongoing symptoms to the present day, along with the workplace accident, it was not appropriate to apportion damages between the two incidents. However, her claim for past loss of income was limited to the loss up to the date of the workplace accident, plus a portion only of the loss afterwards. A negative contingency of 75 per cent was applied to the post-workplace injury claim on the grounds of other contributing causes. The same negative contingency reduction was applied to her future income loss claim. |

**Statutes, Regulations and Rules Cited:**

Occupiers' Liability Act, [*R.S.B.C. 1996, c. 337, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JKPJ-G0P7-00000-00&context=)(1), 3(2).

**Cases Cited:**

2000

1. Dawson v. Gee, [*2000 BCSC 147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X207-00000-00&context=), [*[2000] B.C.J. No. 154*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X207-00000-00&context=).

2. Rakhra v. Brandt, [*2000 BCSC 394*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X06B-00000-00&context=), [*[2000] B.C.J. No. 445*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X06B-00000-00&context=).

3. Zubek v. Clarkson, [*2000 BCSC 148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X20F-00000-00&context=), [*[2000] B.C.J. No. 188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X20F-00000-00&context=).

1999

1. Dyck v. Dave Buck Ford Sales Ltd. [*[1999] B.C.J. No. 1789*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G0XV-00000-00&context=) (B.C.S.C.).

2. Zylstra v. Hughes [*[1999] B.C.J. No. 2616*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1TV-00000-00&context=) (B.C.S.C.).

1998

1. Erickson-Louie v. Berland [*[1998] B.C.J. No. 1104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-22FN-00000-00&context=) (B.C.S.C.), aff'd [*(1999) 132 B.C.A.C. 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X22R-00000-00&context=) (B.C.C.A.).

2. Hepworth v. Wesbild Holdings Ltd. [*[1998] B.C.J. No. 717*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S29G-00000-00&context=) (B.C.S.C.).

3. Mejia v. Sakic [*[1998] B.C.J. No. 414*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1W7-00000-00&context=) (B.C.S.C.).

4. Romero v. Bordon [*[1998] B.C.J. No. 1469*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M29T-00000-00&context=) (B.C.S.C.).

5. Shahidi v. Oppersma [*[1998] B.C.J. No. 2017*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JCBX-S0H9-00000-00&context=) (B.C.S.C.).

1997

1. Barta v. Sandhu [*[1997] B.C.J. No. 2719*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M26N-00000-00&context=) (B.C.S.C.).

2. Cleghorn v. Insurance Corp. of British Columbia [*[1997] B.C.J. No. 2510*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M22C-00000-00&context=) (B.C.S.C.).

3. Mantel v. McLeod [*(1997), 31 B.C.L.R. (3d) 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21HS-00000-00&context=), [*[1997] B.C.J. No. 480*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21HS-00000-00&context=) (B.C.S.C.).

4. McTavish v. MacGillivray [*[1997] B.C.J. No. 1693*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M162-00000-00&context=) (B.C.S.C.), aff'd [*[2000] 5 W.W.R. 554*](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=), [*136 B.C.A.C. 43*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05N-00000-00&context=) (B.C.C.A.).

5. Nixon v. Kanciruk [*(1997), 47 B.C.L.R. (3d) 330*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M247-00000-00&context=), [*[1997] B.C.J. No. 2652*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M247-00000-00&context=) (B.C.S.C.).

6. Partridge v. Wanek [*[1997] B.C.J. No. 402*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21F5-00000-00&context=) (B.C.S.C.).

7. Shaw v. Wood [*[1997] B.C.J. No. 2665*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M24P-00000-00&context=) (B.C.S.C.).

8. Sprague v. Brigham [*[1997] B.C.J. No. 2924*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2GK-00000-00&context=) (B.C.S.C.).

**Counsel**

K.B. Allan, for the plaintiff. K.J. Madsen and S. Goodwin, for the defendants.

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| **BAUMAN J.** |

1. INTRODUCTION

**1**  In this action the plaintiff seeks damages under the Occupiers Liability Act, *R.S.B.C. 1996, c. 337* for injuries suffered in an incident on the premises of the two remaining defendants, Great Pacific Industries Inc. and Overwaitea Foods Limited (collectively "Overwaitea").

**2**  Liability and damages are in issue as are questions of contributory ***negligence*** and causation.

**3**  The latter issue is complicated by the fact that the plaintiff suffered a workplace back injury after the back injury which she suffered at the Overwaitea store. The law discussed in Athey v. Leonati, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), [*140 D.L.R. (4th) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), [*[1997] 1 W.W.R. 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), [*203 N.R. 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), [*31 C.C.L.T. (2d) 113*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), S.C.J. No. 102 is engaged by the facts at bar.

1. FACTS / LIABILITY

**4**  On Sunday evening, 2 April 1995, at just before 7:00 p.m., the plaintiff, then 56 years of age, entered the Vernon Overwaitea store to shop for a family dinner to be held over the Easter holiday.

**5**  She preceded her sister and her elderly mother, who were planning to join her for the shopping trip.

**6**  The plaintiff approached the front doors of the Overwaitea; they are protected by a large drive-through canopy.

**7**  It was dark. The plaintiff noticed a carpet on the cement sidewalk outside the door and leading through it into the foyer of the store.

**8**  According to the plaintiff, the lighting inside the doorway was quite bright. The automatic door opened and it is the plaintiff's evidence that, attracted to the bright interior lights, she looked up as she passed through the door.

**9**  The plaintiff then caught her foot in what she described as a four inch buckle in the carpet as it met the door frame. The plaintiff stumbled and twisted as she successfully avoided falling to the ground. Shortly thereafter she felt discomfort in her lower back.

**10**  The plaintiff then examined the carpet. It was her evidence that it was a dark carpet and that it ran into another dark carpet immediately inside the store. She said in evidence that the two carpets were similar enough to appear to her as one continuous carpet.

**11**  The plaintiff maintains that she was not in a hurry that evening and that she was wearing her eyeglasses and her running shoes.

**12**  The plaintiff was in immediate discomfort, although she characterized it as minor initially.

**13**  It is her evidence that she went to the store's service desk and told the female attendant what had happened. The plaintiff recalls that the employee called someone to attend to the problem.

**14**  The plaintiff then awaited the arrival of her sister and mother. That took 20-25 minutes and the plaintiff felt more uncomfortable while waiting.

**15**  On meeting her sister, the plaintiff related the incident with the carpet and, somewhat remarkably, her sister advised that she had stumbled over the same piece of carpet.

**16**  The plaintiff became upset that the store employees had not yet attended to the problem and went off to the service counter to complain.

**17**  The plaintiff and her sister and mother then shopped. Within 10-15 minutes the plaintiff felt too uncomfortable to continue.

**18**  The plaintiff felt uncomfortable at work the next day, but she persevered. The following day she felt more discomfort in her back and left the job at 11:00 a.m.

**19**  She saw her family doctor, Dr. Mori, later that day.

**20**  I turn to outline the inspection and maintenance procedures in place in the store during the relevant period.

**21**  The store's "front-end clerks" bag groceries, help customers to their cars with their groceries and generally keep the front-end of the store clean and tidy.

**22**  Steven Bond was an Overwaitea front-end clerk in April 1995 and he was on duty the evening of the incident.

**23**  On his discovery (read in as part of the plaintiff's case) he stated that the front-end of the store was swept and monitored by the front-end clerks.

**24**  He said that a front-end inspection was to be carried out routinely by clerks.

**25**  On discovery, Bond said that he believed such inspections were to be done "every hour maybe". However, he also indicated that on a slow Sunday evening: "A sweep and a mop of the front-end would not be necessary as often as when the store is packed basically."

**26**  A maintenance or a "sweep" log was maintained by the front-end clerks. The log for 2 April 1995 shows entries for 12:34 p.m., 2:25 p.m., 3:00 p.m., 4:15 p.m. and then no entry until 7:30 p.m. with no entry thereafter.

**27**  Bond's evidence on discovery concerning the large time gap was read in as well (at questions 311 to 315):

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Well, let's take this one, Exhibit 3. There is a time frame of three hours and 15 minutes between an entry at 4:15 and 7:30. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Okay. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | I'm going to suggest to you that that fell outside the time frame in which the store management wanted the floors routinely mopped and cleaned? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | They expected it to be done on an hourly bases or thereabouts, didn't they? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I think so, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So my question is, when on this log Exhibit 3 there was a substantial time gap -- well, more than one hour or thereabouts, did anyone review these logs with you and say, "We want it done more regularly"? |  |
|  | A |  | Sometimes we would get asked why there was such a gap or why the last time the floor was swept was such a ways back. |  |
|  | Q |  | Did anyone discuss with you the unsatisfactory time frame of three hours, 15 minutes, in regards to Sunday, April 2nd, '95? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. Not that I remember. |  |

...

**28**  Quite apart from front-end sweeps of the store, however, it does not appear that there was any organized system for inspecting the outside of the store and in particular, Bond could recall no occasion in his time at the store when he was asked to check the mats at the front entrance. This area of the store was subjected only to casual observation as employees were walking about the front and outside of the store.

**29**  According to store manager Donald Clark who gave evidence in the defence case, there was no sweep log maintained for the area outside of the front door although clerks inevitably tidied and swept that area "many times each day".

1. CONCLUSION / LIABILITY

**30**  Section 3(1) of the Occupiers Liability Act provides:

Occupiers' duty of care

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

...

**31**  Pursuant to s. 3(2) of that Act the duty of care extends to the condition of the premises.

**32**  Coulson v. Canada Safeway Limited [*(1988), 32 B.C.L.R. (2d) 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JP9P-G1KG-00000-00&context=) (C.A.), [*[1989] 2 W.W.R. 264*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JP9P-G1KG-00000-00&context=), [*[1988] B.C.J. No. 2067*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JP9P-G1KG-00000-00&context=) (B.C.C.A.) is a leading case dealing with the occupier's duty of care in the context of a large grocery store.

**33**  Justice Hutcheon (for the court) cited with approval portions of Justice Trainor's reasons in Rees v. B.C. Place, [1987] B.C.W.L.D. 756, [*[1986] B.C.J. No. 2594*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-K054-G1HC-00000-00&context=) (B.C.S.C.):

...

"The first requirement to satisfy that obligation is to take the kind of steps that were taken by the defendants here to put into place a system to safeguard against dangerous substances being allowed to remain on the surface of the concourse. And then secondly to be sure that there was compliance by the people who were carrying out that responsibility with the system in place."

**34**  Hutcheon J.A. then concluded:

The system in place in the store was to rely on the observations of employees and customers. That is a system that takes the chance that for a period of time no one will be present in aisle No. 2. In this case there is no evidence of the reasonableness of that period. For all the evidence discloses Mrs. Coulson was the only one, apart from the mischief maker, who walked down that aisle after the sweeping shortly after eight o'clock in the morning.

...

**35**  Justice Williamson applied Coulson in Gogol v. F.W. Woolworth Co. Limited [*[1996] B.C.J. No. 2047*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S0VK-00000-00&context=) (B.C.S.C.) in finding liability where: "The system for checking the floors was haphazard and depended on the sales clerk or stock persons apart from their regular duties."

**36**  In Lamont v. Westfair Properties (Pacific) Ltd. 2000 B.C.S.C. 513; [*[2000] B.C.J. No. 513*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X060-00000-00&context=) (B.C.S.C.), Justice McEwan repeated the observation that "the duty is not absolute: an occupier is not an insurer." (See Fry v. Confederation Life Insurance Company et al. [*[1989] B.C.J. No. 985*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-FJDY-X22Y-00000-00&context=) (B.C.S.C.).

**37**  Justice McEwan cited the passage by Justice Lawton in Beaman v. Canada Safeway [*(1993), 115 Sask. R. 100*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6Y1-JB2B-S04P-00000-00&context=), [*[1993] S.J. No. 617*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6Y1-JB2B-S04P-00000-00&context=) (Sask. Q.B.) as expressing the standard:

Constant surveillance and instant response might very well prevent such an accident, but such a high standard is not required. The Defendant is not obliged to have his employees standing around to observe or follow each customer and instantly sweep up after those who spill items on the floor. Unrealistic procedures are not required. Reasonableness is the standard, not perfection.

**38**  There he held that the defendant's system of regular cleaning, supplemented on an as-needed basis, was reasonable.

**39**  In the case before me I do not find the system in place at the Overwaitea store at Vernon to be reasonable. First, it did not cover the actual entrance to the store or at least the exterior part of that entrance. Inspections there were left to casual observation by staff as they entered and exited the store.

**40**  Second, the system in place was somewhat haphazard. It did not, as to front-end sweeps and inspections, seem to have a regular, mandatory schedule.

**41**  Third, and in any event, what system there was in place was apparently not implemented in a reasonable way, at least not on 2 April 1995 - witness the long gaps in the sweep log for that date.

**42**  That fact was coupled with the absence of any effective discipline procedures to ensure compliance.

**43**  In short, I find the system in place not to be reasonable in the circumstances of the location of the hazard which the plaintiff encountered and that in any event that inadequate system was not itself reasonably implemented.

**44**  As to the issue of contributory ***negligence***, it has been said many times, most recently by Justice Burnyeat in Coleman v. Yen Hoy Ent. et al, [*2000 BCSC 276*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X02P-00000-00&context=), [*[2000] B.C.J. No. 403*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X02P-00000-00&context=), that while there is a duty on the plaintiff to be aware of her surroundings, it is not the case that she is required to "glue her eyes to the ground".

**45**  As in Coulson (supra), I find that the bright lights encouraged the plaintiff to do just as she did: to look up and through the entrance into the well lit store.

**46**  I do not allocate any contributory ***negligence*** to her.

1. FACTS / DAMAGES

**47**  Before the Overwaitea incident, the plaintiff led a fairly active lifestyle. She was an avid gardener and entertainer at home.

**48**  She did have some health problems, however, which significantly interfered with her ability to work.

**49**  She was for example off work for 20 days in February 1991 as the result of a back injury at work.

**50**  More significantly, she was off work from late 1991 or early 1992 until the fall of 1994 with plantar fascitis.

**51**  She was able to return to work then with the aid of prescribed orthotics which effected what the defence medical expert called a "somewhat miraculous cure".

**52**  In the days after the Overwaitea incident, the plaintiff suffered pain in the lower back area, which radiated down her legs and up to her mid-chest area. She had significant short term pain in the upper neck area.

**53**  Overall, her pain was aggravated by the plaintiff's duties in her work as an Activity Aide at Vernon Jubilee Hospital. Her job was fairly physical and included attending patients, carrying food trays and pushing wheelchairs.

**54**  The plaintiff's family doctor, Dr. Mori, prescribed muscle relaxants and referred her to a physiotherapist.

**55**  Over the ensuing period, she saw the physiotherapist on at least eight occasions.

**56**  Her lack of progress there brought her back to Dr. Mori, who then recommended that she attend a chiropractor which she did, seeing Dr. Roze regularly beginning in May 1995.

**57**  By the fall of 1995, Dr. Roze was concerned by the plaintiff's lack of progress. He wrote to Dr. Mori as follows on 30 November 1995:

Mrs. Dufty continues to have daily discomfort in the right lumbo-sacral region of the spine. This is accentuated by work-related tasks, such as patient transfers and lifting. There is a dull ache that travels down the right posterior lateral thigh, posterior calf and into the right foot. All reflexes are normal and she continues to have good motor strength in the limbs.

Treatment has consisted of manipulation of the right L5 vertebra - she has been issued mobilization and stretching exercises of the lumbar spine.

She appears (to be) recovering reasonably well, particularly if she has two or three days off work. However, I am concerned about the recurrent right leg symptoms - I'm aware that she has had a history of sciatica before but it appears that that has resolved.

**58**  Dr. Mori arranged for a CT scan and made a referral to Dr. Fyfe, an orthopaedic surgeon.

**59**  The CT scan was performed on 15 January 1996 from L3-S1. There was noted to be some asymmetry of the epidural fat at L5-S1 with increased soft tissue density being present on the right.

**60**  The consulting radiologist concluded that there was a possibility of a small right posterolateral disc herniation.

**61**  The plaintiff's appointment with Dr. Fyfe could only be arranged for 26 August 1996. Before I turn to that, I should note the plaintiff's work situation.

**62**  The plaintiff reported for work and endeavoured to carry out her duties at Vernon Jubilee Hospital for 1 1/2 days after the Overwaitea incident. She was off work due to her back pain from 4 April 1995 to 6 May 1995. She was able to work from 9 May 1995 to 13 June 1995, but was off work again due to back pain from 14 June to 12 July. This was pursuant to the recommendation of her chiropractor. The plaintiff worked steadily from 13 July 1995 to 23 August 1996.

**63**  Just before seeing Dr. Fyfe, the plaintiff suffered a back injury at work on 24 August 1996.

**64**  An elderly female patient standing by her bed had begun to sit down (in thin air as it were) and the plaintiff, who was standing behind her, placed her knee under the patient's buttocks to ease her down to the floor. The plaintiff said in evidence that she believed that this manoeuvre aggravated her existing symptoms arising out of the back injury in the Overwaitea incident.

**65**  The plaintiff maintains that Dr. Fyfe on 26 August 1996 told her to stay off work until her back sorted itself out.

**66**  The plaintiff says that she returned to her normal level of back discomfort (that is, that brought on by the Overwaitea incident) two weeks later.

**67**  In a follow up report of 9 October 1996, Dr. Fyfe writes:

...

I have seen this woman again and she seems to be making headway since being off work with some diminution of leg and back pain. - You probably have the report of the CT myelogram - it does show that there is a conjoined nerve root of the right L5/S1 (nerve root sleeves) and this is probably what they originally called a bulging disc.

Apart from that they can seen [sic] nothing on the CT scan or the myelogram to account for all the pain, especially in her leg.

She does have some degeneration of the facet at L4/5 and L5/S1, but again there does not seem to be any pressure or impingement on the nerve roots which would account for the symptomatology she is experiencing.

There may be enough there to account for some back pain, but not why she is having all this pain in her leg.

**68**  The plaintiff has been off work from 27 August 1996 until the present, with a return to the job for five days in February 1999 after a brief success with an epidural injection by a Dr. Jefferys. That relief was unfortunately short-lived.

**69**  The plaintiff continued with her chiropractic visits until December 1996. In his report of 20 September 1999, Dr. Roze, the chiropractor, summarized her treatment:

...

Ms. Dufty showed initial improvement with chiropractic care and of course benefited through the entire period of treatment. However, with the rigours of her work, (activity worker at V.J.H.) her condition never did resolve and appeared to deteriorate. This was evident by the increase in back pain and further changes affecting her right leg. Ms. Dufty coped with work (July 13th - August 23, 1996) because of a dedicated conscientious attitude and the regular use of ASA and NSAIDs to reduce inflammation. However, at no time did her condition ever stabilize. Then on August 24, 1996, she relapsed from an injury at work. During the following treatments she benefited very little from my care and when I saw her in November I told her I would contact her M.D. and recommend a CT scan for further evaluation.

Upon her last visit on December 10, 1996 she was still experiencing low back pain with more emphasis on the right side. A clear right leg neuralgia was apparent with parasthesia from time to time. When she rested and was inactive her condition was better but never gone. Activity always increased the pain pattern and then she was aggravated for days following. All these symptoms indicated a chronic pain pattern consistent with degenerative posterior joint changes. The possibility of a discal herniation would have to be determined by further assessment.

...

**70**  The plaintiff began seeing a new family physician, Dr. Alex Barss when she moved to Lumby in 1998.

**71**  In his report of 7 May 1999, he summarized her reporting in mid-1998:

...

I reviewed her back injury in detail on August 25, 1998. At that date she stated that she had had a 50% recovery since the initial injury. At that point in time she was suffering from mostly lower back pain but more recently she had some medial scapular pain and some upper neck pain. She stated this neck pain had been an intermittent problem for several years. She had severe pain with lifting. She found stairs difficult. She had difficulty with prolonged standing in one position, with sitting, driving, and vacuuming. She stated that she was having difficulty with her sleep up to six times per night, with difficulty returning back to sleep. She had chronic fatigue. She also noted that her memory was poorer and had problems with irritability and was easy to anger which was unlike her usual self. She had pain with left lateral flexion which was limited and rotation to the right and left was limited to 60 degrees with pain. She had extension of the lumbar spine to 30 degrees. She had tenderness over trigger areas in the trapezius muscle in her elbow, costochondral joint area, SX joints, and inner knee. These were all positive for the fibromyalgia trigger areas.

...

**72**  Dr. Barss offered this opinion:

...

Ms. Dufty suffers from a mechanical back disorder with ligamentous injury and perhaps facette joint strain at the L4-5 and L5-S1 lumbar areas. I would consider her unemployable for any job that requires bending, repetitive lifting, and possibly jobs involving prolonged standing or sitting in one position. At the present time, Ms. Dufty is suffering from depression along with the back difficulties as described above. I think perhaps a second cortisone shot could be tried in the next month or two and that she could go through a second work conditioning program with a view to eventual return to occupations that don't require a healthy back. Even with a job which did not put stress on the back, it is likely that she will have intermittent flare-ups of her lumbar complaints related to the posture stresses or occasions of incorrect lifting.

...

**73**  The plaintiff was seen by Dr. George Aitken, a specialist in orthopaedics, for an independent medical examination on 8 March 2000.

**74**  In his report of 14 March 2000, Dr. Aitken provides his clinical impression of the plaintiff today:

At the present time this woman's condition is, at best, only fair.

Historically she developed pain in the lumbo-pelvic region within 24 hours of the subject stumble, and says that she has remained symptomatic to varying degrees since that time.

The best time appears to have been following the first epidural injection that she had. (She's also had a second epidural and then two facet joint blocks since then by Dr. Jefferies).

The specific diagnosis, however, is somewhat elusive.

It seems highly improbable, however, that, as a result of her stumbling in the store on April 2, 1995, she would experience any significant trauma to the spine which would account for the marked decompensation that she has experienced since that episode.

Rather it would appear that she likely was at risk, because of her age, size, occupation, and past history, as well as any inter-current events.

Clearly it does appear that the episode itself caused a jolt to the spinal axis with muscle spasm and restricted motion, as well as pain.

**75**  Dr. Aitken expresses the view that Mrs. Dufty is permanently disabled at this time, that she has progressed to symptomatic degenerative disc disease which continues to render her disabled. He foresees some improvement for her. "But unfortunately this improvement is likely to be of no use to her in returning to gainful employment."

**76**  The plaintiff has explored various work options in an effort to mitigate her loss. In February 1998, she started an at-home lingerie manufacturing business using her sewing talents. She pursued that for six months, but did not make any money. At her age and given her physical limitations, it is very doubtful that she will enjoy remunerative employment between now and retirement at age 65.

1. CAUSATION

**77**  Causation presents as the most difficult issue in this case.

**78**  The plaintiff suffered a somewhat innocuous stumble at the Overwaitea store on 2 April 1995 and from that she traces the cause of her very significant past wage loss and loss of future capacity claims.

**79**  To a lay person, that cause and effect possibly seems an extreme reach.

**80**  To a highly trained medical person like Dr. Aitken, it sounds a similar note.

**81**  To repeat a portion of his opinion: "It seems highly improbable, however, that, as a result of her stumbling in the store on 2 April 1995, she would experience any significant trauma to the spine which would account for the marked decompensation that she has experienced since that episode."

**82**  Dr. Roze for his part says this in his letter of 20 September 1999:

...

The type of injury that Ms Dufty suffered is certainly capable of causing an acute sprain to the facet joints of the lower back. It is also plausible that a discal herniation could result from this type of injury particularly if there is a discal weakness present. The presence of circumferential bulges at two of the lower back articulations would indicate a weakness of annular disc tissue may have already been present. In my twenty five years of practice I have seen similar case injuries from seemingly simple situations such as bending over, sneezing, and aborted falls and slips.

...

**83**  The interjection of the workplace incident on 24 August 1996 complicates the causation issue.

**84**  Dr. Aitken in his report of 14 March 2000 asks and answers this question:

1. **You have asked that I specifically provide my opinion as to whether the work accident that occurred in August 1996 is the cause of Mrs. Dufty not working at the present time?**

**Answer:** Yes to the larger extent most probably. I recognize that she did experience sudden activation and acceleration of her problems in the episode of April 1995, but I would not attribute her ongoing problems to that episode to any large degree.

[Bold and underlining in original.]

**85**  It is necessary of course to consider this issue and in particular this answer, in the context of the Supreme Court of Canada's decision in Athey v. Leonati (supra) where Justice Major summarized again the law on causation.

**86**  In para. 17 he writes:

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's ***negligence*** was the **sole cause** of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (The Law of Torts, 8th ed. (Sydney: Law Book Co., 1992) at p. 193), a "fire ignited in a wastepaper basket is ... caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is **part** of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their ***negligence***.

...

[Emphasis in original.]

**87**  And in dealing with the inapplicability of what he calls the "respondent's analogies" Justice Major says this under the heading "Divisible Injuries" (at para. 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.

...

**88**  That brings me to this portion of Dr. Aitken's cross-examination when he was being questioned concerning the cause of the plaintiff's ongoing complaints:

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | That raises, perhaps, the next question, doctor. You said that the injury, the tripping accident, to some degree affected the spine and problems that flowed from it. Page 8, bottom answer, you say: |  |

"That I would not attribute her ongoing problems to that episode to any large degree."

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You're not saying that the tripping accident did not contribute to her back problem. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | You're correct. I'm not saying that. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | When you say "to any large degree", are we talking thirty percent, perhaps? I mean -- |  |
|  | A |  | In the twenty-five to thirty percent. It's one of the factors which would contribute towards the decompensation of her -- of her spinal comfort, shall we say. |  |

...

**89**  That seems, at first blush, to put this plaintiff squarely into the Athey situation summarized in the quoted para. 25 from Justice Major's reasons.

**90**  However, Justice Major in Athey goes on to deal with the issue of independent intervening events, such as a disease or non-tortious accident which manifests itself or occurs after the plaintiff is injured.

**91**  He cites Jobling v. Associated Dairies Ltd., [1981] 2 All E.R. 752 (H.L.). Justice Major recalls that there, the defendant negligently caused the plaintiff to suffer a back injury. However, before the trial it was discovered that the plaintiff had a condition completely unrelated to the accident which would have proved totally disabling within a few years and damages were reduced accordingly.

**92**  Justice Major then explains away these cases at paras. 32 and 33:

... 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. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

In the present case, there was a finding of fact that the accident caused or contributed to the disc herniation. The disc herniation was not an independent intervening event. The disc herniation was a product of the accidents, so it does not affect the assessment of the plaintiff's "original position" and thereby reduce the net loss experienced by the plaintiff.

...

[Emphasis in original.]

**93**  Justice Major proceeds to discuss the so-called "thin skull" and "crumbling skull" doctrines.

**94**  As to the latter, he says this at paras. 35 and 36:

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position **better** than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, supra, at pp. 779-780 and John Munkman, Damages for Personal Injuries and Death, 9th ed. (London: Butterworths, 1993) at pp. 39-40. Like-wise, 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 short-comings, and not a better position.

The "crumbling skull" argument is the respondents' strongest submission, but in my view it does not succeed on the facts as found by the trial judge. There was no finding of any measurable risk that the disc herniation would have occurred without the accident, and there was therefore no basis to reduce the award to take into account any such risk.

[Emphasis in original.]

**95**  So on the face of Dr. Aitken's opinion, we have a disabled plaintiff and the manifestation of her ongoing problems is attributable to the Overwaitea incident to a lesser degree (but beyond the de minimis range) and to the workplace incident in August 1996 to a larger degree. Accordingly, causation is made out in respect of the Overwaitea incident.

**96**  But that still begs the question: What was the plaintiff's original position?

**97**  Here it is necessary to reproduce a larger extract from Dr. Aitken's cross-examination at trial:

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So when you rendered the opinion that the incident of August, '96, is to the larger extent most probably the cause of her not working, are we talking fifty percent, sixty percent? How do we interpret -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Well -- |  |
|  | Q | -- those words? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | -- okay, I'm presented with a problem of a woman who has had an episode in April, '95, has been off work for a short period of time, gone back to work, worked for thirteen or fourteen or fifteen months, or whatever, and now is confronted with an episode in the workplace and does not return to work after that, barring a trial of return to work, I think in January to February of -- January to March of '99, which is another two and a half years down the road, and I'm asked to given [sic] an opinion as to which of the two episodes is more probable in causing her significant low back pain which prevents her from working. |  |

Now, I'm taking -- I'm making the assumption that the first episode is not a -- a very strenuous load which has been applied to her body. That's -- that's my assumption. I'm also making the assumption that in the episode which you've characterized as being a gentle, helping down into a seat -- I was characterizing that as being more -- more a significant event with greater load and probably with a -- a sudden -- sudden rapid movement to prevent the resident from collapsing.

So if you're asking which of these events was the more significant, and I allow that I didn't -- didn't go into it in the detail which you would have liked, and knowing from what happens in wards, seeing pa- -- seeing patients collapse and nurses jumping to -- to assist them, I thought that was a more serious -- more significant event.

But there's a background to all this of somebody who is ageing, and there's a doctrine which most orthopedic [sic] surgeons adhere to which is the McNabb Doctrine, named after the late Ian McNabb who was in his time Canada's foremost back specialist and is author of McNabb's Back [sic] Ache book. And he indicates that in most compensation systems it is taken that the -- the spine is a degenerating organ or structure, and that there are episodes of acceleration and activation of problems.

But the underlying basis for this is the patient's own biology and their -- their change in the transformation of soft tissues and discs and so on which occurs in exce- -- inexorably, shall we say. So you have an inexorable degradation of the spinal load bearing capacity. You have a fairly minor episode in the slip and fall episode, or slip and stumble, and you have another episode in the workplace which you're characterizing to me as not that significant but on the other hand is an episode, and it seems to me that the last one of these was the -- was the ultimate event which tipped the scales in some ways, and I know this is a legal term and not a medical term, but she has a degenerating or crumbling body, and it doesn't take very much to tip the balance.

...

**98**  On re-examination by Ms. Madsen, this exchange took place concerning the incident of 24 August 1996.

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, certainly it would reactivate or aggravate her pre-existing condition. Again, many patients may not have a problem with that kind of movement whereas those in a -- a situation of being at risk for developing symptoms could, as she -- as she probably did. |  |
|  | Q |  | Is it your opinion, then, that she would have had her -- the back complaints she had in March, 2000, regardless of the stumble at Overwaitea? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Oh -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | THE COURT: | Well, just a second. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | MR. ALLAN: opinion. |  | Yes, My Lord, we're going well past his |  |

THE COURT: Yes, well, it is redirect, but that seems to be well past redirect, isn't it?

|  |  |  |  |
| --- | --- | --- | --- |
|  | MS. MADSEN: | I'll withdraw the question. |  |

...

**99**  Writing now, I might wish that I had permitted Dr. Aitken to answer that question directly. However, I believe that he had already essentially answered the question in any event.

**100**  Dr. Aitken did opine that this plaintiff reactivated "her pre-existing condition". On the whole of Dr. Aitken's evidence, I take that to be reference to the plaintiff's already degenerating spinal structure. That degeneration in this plaintiff was subject, as Dr. Aitken says to "episodes of acceleration and activation of problems". The Overwaitea incident was one and the August 1996 workplace incident was another.

**101**  Dr. Jefferys' opinion of 24 August 1999 is consistent with that of Dr. Aitken:

...

In answer to your specific question regarding the consistency of the patient's pain with the tripping incident, I would state that the patient likely had pre-existing degeneration in the lower lumbar spine and in particular at L4-5 and L5-S1. These changes likely came on over several years. Such changes made it more likely that a relatively trivial injury, such as tripping, could initiate pain and therefore it is reasonable to conclude that the tripping incident did start off the patient's painful symptoms.

...

**102**  It may be said in support of the plaintiff's case that the pre-existing condition in her spinal structure was asymptomatic or quiescent at the time of the Overwaitea incident; that she was accordingly a thin skull plaintiff.

**103**  But this overlooks Dr. Aitken's opinion expressed on cross-examination that the plaintiff was undergoing "an inexorable degradation of the spinal load bearing capacity ... she has a degenerating or crumbling body, and it doesn't take very much to tip the balance."

**104**  This describes to me a "crumbling skull" plaintiff. "Inexorable degradation" indicates, in the words of Justice Major in Athey (at para. 35), "... a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future regardless of the defendant's ***negligence*** ...".

**105**  And in the case here, we are not even dealing with a "risk" for we know with certainty that this plaintiff's pre-existing condition - her degenerating spinal structure - has detrimentally affected her because the workplace incident in August 1996 is in Dr. Aitken's view, which I accept, the more significant source of her ongoing problems.

**106**  On the issue of the impact of the workplace incident in August 1996 on the plaintiff's overall position today, I should note the evidence of Dr. Roze, the chiropractor. In his opinion of 8 May 2000, Dr. Roze states:

...

Ms. Dufty had reached a slow but steady positive improvement by July 13, 1995 at which time she returned to her regular work activity. From that period on the patient's condition was a series of flare ups which usually followed a time of increased use. After three consecutive months of no real overall change her condition was declared permanent and stationary or maximum medical improvement. This chronic pain pattern did not stop throughout the course of time leading up to the August 24, 1996 work injury. I examined Ms Dufty on August 28, 1996, just four days following this accident and it was evident that she had suffered a flare up of pain to the same low back region. While Ms Dufty suffered an increase in intensity of low back pain and leg discomfort after a few treatments her symptoms once again returned to a similar stationary pattern (chronic).

...

**107**  He goes on to conclude:

...

Dr. Aitken stated when he saw her on March 14, 2000 that her condition was only fair and is permanently disabled. This is the same state of chronic physical impairment and pain that she established by the fall of 1995. As a result I would have to say that the injury that produced this was the subject cause (April 02, 1995 stumble).

...

**108**  I note that this opinion was preceded by counsel for the plaintiff's letter to Dr. Roze before November 1999.

**109**  That letter solicits Dr. Roze's view of the defence position:

... that the Overwaitea store should not be responsible for any injuries, income loss or otherwise after August 24, 1996 because there was a new accident which occurred at that time.

**110**  The letter then concludes:

...

The pertinent issue to be addressed in this matter is whether in your opinion the incident of August 24, 1996 at the hospital is of any real significance. Should this be treated as a new injury or is Mrs. Dufty correct in saying she had a flare up of pain which she states lasted a few days and then her back returned to its normal degree of pain and discomfort.

We would solicit your views at this time. This issue is of real importance in the Dufty claim as Mrs. Dufty has not been able to return to her work since August 24, 1996 and it would seem at this time that she will be unable to work in the future, certainly in her former position at the hospital. Mrs. Dufty is 59 years of age and normally would have worked minimally to age 65 so there is both a significant future income claim as well as a significant past income loss.

...

**111**  I observe that this letter provides more detail on the importance of Dr. Roze's answer to the plaintiff's case than is perhaps prudent when one is soliciting an independent view of an expert who is not to be seen as advocating any particular cause.

**112**  Dr. Aitken, on the other hand, placed reliance on the fact that after January 1996 the plaintiff reported no symptoms of pain radiating into her legs until after the August 1996 workplace incident.

**113**  I reproduce these questions and answers from Dr. Aitken's evidence.

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | My question is, if Mrs. Dufty is not having pain in her lower extremities for the six months before the work accident and then has pain in her lower extremities, one or both, up until at least until the time that the chiropractor stops seeing her, does that change your opinion at all as to what is the cause of her present symptoms? |  |
|  | A |  | Well, it -- when there's a change from low back pain which is constrained within the -- the trunk and the buttocks and the pain is referred down into the lower extremities, that can either occur from compression of one of the roots of the sciatic nerve or it can be referred on what is called scleratomal basis. |  |

Now, the scleratoma is part of the embryo which develops into the limba and takes with it the same supply from the midline, and if you have a problem with a disc or (indiscernible) joint or a muscle or a ligament in the midline, you have pain referred down the limb.

So if there's change from central back pain to referred pain down the leg, that means it's become what we call more peripheral. Then it's -- that's the worst thing of the situation, and most of the physiotherapists that I know strain or strive to have the pain become centralized. That means it recedes from the periphery into the midline. That's an indication of getting better. So if there's pain down the leg that means the pain has gotten worse, so I take that as being an aggravation of the pre-existing problem.

...

**114**  Dr. Aitken is highly qualified specialist in orthopaedics. He has based his opinion in part on the plaintiff's own reporting to her chiropractor. I prefer his opinion to that of Dr. Roze.

**115**  I have been dealing with this discussion under the heading "Causation" and that may not be the most appropriate description for the exercise in which I am engaged.

**116**  On this point I turn to the Court of Appeal's decision 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=), [*148 D.L.R. (4th) 225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-61BC-00000-00&context=), 9 W.W.R. 739, [*37 C.C.L.T. (2d) 299*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-61BC-00000-00&context=) (B.C.C.A.).

**117**  There, the court was dealing with a plaintiff whose existing, but symptom free, multiple sclerosis was exacerbated by the motor vehicle accident for which liability was admitted by the defendants.

**118**  The trial judge had assessed damages on the basis of his assumption that the plaintiff would have experienced a relapse of her multiple sclerosis within five years of the accident in any event and that having suffered as a result of the accident, she was likely to be symptom free again within five years.

**119**  This led to a loss of future income award which was totally cut off after the date of the fifth anniversary of the accident and a dismissal of the plaintiff's entire claim for future care costs.

**120**  Justice Newbury (Donald J.A. concurring, Ryan J.A. concurring in separate reasons) criticized the trial judge's approach as one in which he mixed up considerations calling for a reduction in damages in the measurement of those damages with the consideration of causation.

**121**  Causation, absent presumably Justice Major's "divisible injuries" analogy in Athey, involves an "all or nothing" choice (para. 6 of Newbury J.A.'s reasons). But as Justice Newbury says (at para. 6) the measure of damages is more subtle because it involves a consideration of mere contingencies as well as probabilities and because of the range of results available in the discounting of the award:

The question is what award is appropriate to reflect the difference between the plaintiff's original state (including the risk, to which she was subject immediately prior to the accident, of the relapse of her latent condition) and the state in which she now finds herself.

**122**  Justice Newbury then went on to say (at para. 7):

I consider, then, that contrary to Mr. Grey's suggestion, this was a "thin skull" case - i.e., a case in which it was not appropriate to apportion liability as between the plaintiff and defendants as between two or more defendants, or as between two or more causes. The defendants must be held responsible for all the damages that flow, not from Ms. York's disease as a whole, but from the exacerbation thereof. I also consider that the trial judge was entitled to reduce the plaintiff's damages to reflect the risk of relapse that was inherent in her pre-accident state, even though there was only a weak evidentiary foundation for his choice of five years as the period during which Ms. York would have remained symptom-free.

**123**  That seems to me to point up the fallacy in suggesting that one must determine whether the plaintiff on the one hand is "thin skull", that is abnormally susceptible to something but asymptomatic at the time of the tort, or on the other hand, a "crumbling skull" individual, that is, one demonstrated to be suffering ongoing symptoms at the relevant time; one whose underlying condition is not quiescent or dormant. But the two are not separate species of the abnormal plaintiff. In my view, a crumbling skull plaintiff is simply a thin skull plaintiff who is found to be subject to the measurable risk that his or her pre-existing condition will detrimentally affect him or her in the future or who is actually symptomatic at the time of the tort.

**124**  I interject to note that Justice Hutcheon would have classified the former type of plaintiff as neither "thin skull" nor "crumbling skull", but in a third category of "degenerative disease of the spine that is asymptomatic at the time of the accident": per his concurring minority opinion in Pesonem v. Melnyk [*(1993), 79 B.C.L.R. (2d) 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M3N5-00000-00&context=), 6 W.W.R. 578 (B.C.C.A.). But one can also say, as did Dr. Aitken, that a person whose spine is inexorably degrading (but not to the point of overt symptoms) is "crumbling".

**125**  In the result in York v. Johnston, the court held the defendant responsible for all of the damages that flowed not from the plaintiff's disease as a whole, but from the exacerbation thereof.

**126**  Justice Newbury took into account the contingencies of an inevitable relapse and temporary symtomology and future deterioration and applied fully a 75% discount to the plaintiff's calculated future income loss to age 65.

**127**  I confess to having struggled with classifying the case at bar as of the sort of one or another of the precedents.

**128**  It is not a Jobling situation because the workplace incident here did not obliterate the Overwaitea tort, that is, that tort is still a contributing cause to the plaintiff's overall position today.

**129**  However, it is not an Athey situation because there is here, as there was not there, a material risk that the plaintiff's pre-existing condition would have detrimentally affected her in the future.

**130**  And finally, it is not a York v. Johnston situation because here the "measurable risk" has indeed come to pass before the date of trial.

**131**  It is possibly more like a Penner v. Mitchell situation [*[1978] 5 W.W.R. 328*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-92W1-F27X-6097-00000-00&context=), [*89 D.L.R. (3d) 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-92W1-F27X-6097-00000-00&context=), [*10 A.R. 555*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-92W1-F27X-6097-00000-00&context=), [*6 C.C.L.T. 132*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-92W1-F27X-6097-00000-00&context=) (Alta. S.C.) where the contingency of being off work for an unrelated cause actually occurred before trial. But again, the situation at bar is not so clear cut. Because it is clear on even the defence expert's evidence that the Overwaitea incident is contributing to the plaintiff's present overall position along with the August 1996 workplace incident (the latter to a more significant degree).

**132**  To conclude on this aspect of the matter, I find that the plaintiff's ongoing problems have been in part caused by the Overwaitea incident and it is therefore not appropriate to apportion between that incident and the workplace incident in 1996.

**133**  However, I have also concluded that there was a measurable risk, on the facts a high risk, that the plaintiff's pre-existing condition would have detrimentally affected the plaintiff in the future. Indeed, as I have earlier suggested, this risk has become a certainty because we know, based upon Dr. Aitken's opinion, that the August 1996 workplace incident reactivated or aggravated her pre-existing condition.

1. DAMAGES

**134**  I turn to assess damages.

1. Non-pecuniary damages

**135**  The plaintiff seeks $55,000 by way of non-pecuniary damages. Cited in support are the cases listed in the Appendix to these reasons.

**136**  The defendants take the view that the plaintiff suffered an injury which essentially resolved within 3 months and that she was able to work at her physically demanding job for 13 months before her workplace accident in August 1996.

**137**  I accept the plaintiff's evidence that even during this period she was suffering pain and that she coped with rest and medications.

**138**  On the whole of the evidence, I award her the sum of $45,000 under this head.

**139**  As to whether I should reduce this particular award to reflect contingencies in the manner I have discussed under the heading "Causation", I apply the reasoning of Newbury J.A. in York v. Johnston (at para. 25) and I decline to do so.

1. Past Loss of Income

**140**  Here the plaintiff advances a claim inclusive of fringe benefits and superannuation of $150,998.87 to the date of trial. This period includes of course the initial period during which the plaintiff was off work after the Overwaitea incident and before the August 1996 workplace incident, a total of 46 days. It also includes a significant period after the August 1996 incident to the date of trial.

**141**  It is here that the contingency of the plaintiff being off work regardless of the Overwaitea incident due to a triggering of her pre-existing condition must first be considered in reducing her damages.

**142**  The plaintiff is entitled to the total past wage loss from the Overwaitea incident to 24 August 1996 (the workplace incident). On the basis of the plaintiff's work chronology schedule, this totals $4,643.64 (including fringe benefits and superannuation).

**143**  But as to the remainder of the plaintiff's claimed past wage loss - the sum of $146,355.23, it seems to me that it must be reduced by the negative contingency which I have discussed. Here I have noted that the contingency has actually become the reality and arguably the wage loss claim must be cut off as of 24 August 1996. That seems, however, like the all or nothing exercise which the court criticized in York v. Johnston.

**144**  Justice Newbury suggested that rather than drawing the line that he did, the trial judge should have considered all the possibilities that arose on the evidence.

**145**  Although this was said in the context of the trial judge's treatment of damages for loss of future capacity, in principle, why should it not apply to measuring damages for past wage loss in the circumstances before me? If the trial had taken place in July 1996, I would have looked forward, armed with Dr. Aitken's opinion, and I would have applied a significant negative contingency to what I would then measure as the plaintiff's loss of future income.

**146**  As to the measure of that reduction on the basis of Dr. Aitken's evidence, I would place it at 75%. It seems inconsistent to take that into account as a contingency in the calculation of future wage loss, but to ignore that it has become a reality in the period covered by the past wage loss claim.

**147**  I will accordingly reduce the wage loss claim for the period after 24 August 1996 to the date of trial by 75%. That results in a past wage loss claim for this period of $36,588.81.

**148**  The measure of the plaintiff's past wage loss is therefore the sum of $41,232.45.

1. Loss of Future Income

**149**  Here the plaintiff claims as the present value of her future loss to age 65 the sum of $182,379.96 based on the expert actuarial report of J. Levi.

**150**  The plaintiff argues that there should be little or no contingency deduction "given the security of her job at the hospital and given the relatively short period (55 months) in which future wage loss is to be measured."

**151**  For the reasons which I have expressed, there should be a very significant reduction to properly reflect the original position of this plaintiff.

**152**  I have already put that at 75%. To that I would add a negative contingency of 5% to reflect the very real possibility that the plaintiff would not work through to retirement by reason of other health related eventualities.

**153**  In light of the plaintiff's past work history (she was off work for a very significant period because of plantar fascitis) such a reduction is justified. I note in particular, as well, that both Drs. Laidlow and Mori suggested that the plaintiff seek more sedentary work before the Overwaitea incident.

**154**  I will accept the plaintiff's methodology for measuring the loss and applying the negative contingencies which I have identified results in an award of (rounded) $36,500.

1. Cost of Future Care

**155**  The plaintiff's claim for cost of future care should be discounted by 75% (that is the negative contingency that her original position would have manifested itself as it has regardless of the Overwaitea incident). That results in an award of (rounded) $630.

1. Special Damage

**156**  The plaintiff claims the sum of $3,367.34 under this head. I cannot calculate the appropriate amount on the material before me, but I will provide the appropriate formula.

**157**  The plaintiff will have the total of the claimed special damages to 23 August 1996 and 25% of those claimed in the period after that date.

1. Management Fee

**158**  In my view, the plaintiff's claim for a one-time management fee of $2,000 is without any real evidentiary foundation and I decline to make an award under this head.

1. JUDGMENT

**159**  Accordingly, the plaintiff will have judgment as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (i) | Non-pecuniary damages: | $45,000.00; |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (ii) | Past loss of income: | 41,232.45; |  |
|  | (iii) | Loss of future capacity: | 36,500.00; |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (iv) | Cost of future care: | 630.00; |  |

1. Special damages as agreed by counsel or spoken to if necessary:

**160**  The plaintiff is entitled to prejudgment interest on the eligible portions of the award and costs on Scale 3 unless there are circumstances which counsel wish to bring to my attention.

BAUMAN J.

\* \* \* \* \*

**161**

APPENDIX

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| 2000 |  |

1. Dawson v. Gee, [*2000 BCSC 147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X207-00000-00&context=), [*[2000] B.C.J. No. 154*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X207-00000-00&context=).
2. Rakhra v. Brandt, [*2000 BCSC 394*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X06B-00000-00&context=), [*[2000] B.C.J. No. 445*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X06B-00000-00&context=).
3. Zubek v. Clarkson, [*2000 BCSC 148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X20F-00000-00&context=), [*[2000] B.C.J. No. 188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X20F-00000-00&context=).

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| 1999 |  |

1. Dyck v. Dave Buck Ford Sales Ltd. [*[1999] B.C.J. No. 1789*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G0XV-00000-00&context=) (B.C.S.C.).
2. Zylstra v. Hughes [*[1999] B.C.J. No. 2616*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1TV-00000-00&context=) (B.C.S.C.).

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| 1998 |  |

1. Erickson-Louie v. Berland [*[1998] B.C.J. No. 1104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-22FN-00000-00&context=) (B.C.S.C.), aff'd [*(1999) 132 B.C.A.C. 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X22R-00000-00&context=) (B.C.C.A.).
2. Hepworth v. Wesbild Holdings Ltd. [*[1998] B.C.J. No. 717*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S29G-00000-00&context=) (B.C.S.C.).
3. Mejia v. Sakic [*[1998] B.C.J. No. 414*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1W7-00000-00&context=) (B.C.S.C.).
4. Romero v. Bordon [*[1998] B.C.J. No. 1469*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M29T-00000-00&context=) (B.C.S.C.).
5. Shahidi v. Oppersma [*[1998] B.C.J. No. 2017*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JCBX-S0H9-00000-00&context=) (B.C.S.C.).

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| 1997 |  |

1. Barta v. Sandhu [*[1997] B.C.J. No. 2719*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M26N-00000-00&context=) (B.C.S.C.).
2. Cleghorn v. Insurance Corp. of British Columbia [*[1997] B.C.J. No. 2510*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M22C-00000-00&context=) (B.C.S.C.).
3. Mantel v. McLeod [*(1997), 31 B.C.L.R. (3d) 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21HS-00000-00&context=), [*[1997] B.C.J. No. 480*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21HS-00000-00&context=) (B.C.S.C.).
4. McTavish v. MacGillivray [*[1997] B.C.J. No. 1693*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M162-00000-00&context=) (B.C.S.C.), aff'd [*[2000] 5 W.W.R. 554*](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=), [*136 B.C.A.C. 43*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05N-00000-00&context=) (B.C.C.A.).
5. Nixon v. Kanciruk [*(1997), 47 B.C.L.R. (3d) 330*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M247-00000-00&context=), [*[1997] B.C.J. No. 2652*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M247-00000-00&context=) (B.C.S.C.).
6. Partridge v. Wanek [*[1997] B.C.J. No. 402*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21F5-00000-00&context=) (B.C.S.C.).
7. Shaw v. Wood [*[1997] B.C.J. No. 2665*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M24P-00000-00&context=) (B.C.S.C.).
8. Sprague v. Brigham [*[1997] B.C.J. No. 2924*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2GK-00000-00&context=) (B.C.S.C.).

**End of Document**

[***E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia, [2001] B.C.J. No. 2700***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M4BT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Cohen J.

Heard: February 19 - 23, 26 - 28, March 1, 2,

April 23, 26, 27, August 2 and 3, 2001.

Judgment: December 19, 2001.

Vancouver Registry No. C963350

**[2001] B.C.J. No. 2700** | 2001 BCSC 1783 | 110 A.C.W.S. (3d) 289 | [2001] B.C.T.C. 1783

Between E.B., plaintiff, and Order of the Oblates of Mary Immaculate in the Province of British Columbia and Matthew Williams, defendants, and the Attorney General of Canada, third party, and Order of the Oblates of Mary Immaculate in the Province of British Columbia and the Roman Catholic Bishop of Victoria, fourth parties

(335 paras.)

**Case Summary**

**Torts — Vicarious liability — Particular persons — Religious orders — Master and servant — Employer, liability for acts of employees — Damages — Torts affecting the person — Assault — Abuse or sexual assault.**

|  |
| --- |
| Action by B against the Order of the Oblates of Mary Immaculate in the Province of B.C for damages arising from sexual abuse inflicted on him by Saxey, a baker employed by the Oblates to work at Christie Indian Residential school. B, now 51, claimed he was repeatedly sexually assaulted by Saxey between 1957 and 1962 while he was a student at Christie. The Oblates denied Saxey had opportunity to sexually assault B. It denied vicarious liability on the basis that Saxey had no authority over or responsibility for the children at Christie.  HELD: Action allowed.  B was awarded damages of $233,400. Although this was a civil case, the allegation of sexual abuse required a higher degree of probability within the civil standard. B proved to the required standard of proof that he was sexually assaulted by Saxey. The Oblates was vicariously liable for Saxey's actions. The Oblate disciplinarians made it clear to residents that they were to listen to and obey the lay staff at Christie. Evidence regarding the operational characteristics of Christie and expert evidence based on that evidence was sufficient to establish a significant connection between the creation or enhancement of a risk by Christie as an employer, and the wrong that accrued therefrom. B suffered psychological injuries as a result of the abuse. The assaults materially contributed to B's interpersonal difficulties, anxiety, post traumatic stress disorder, depression and alcohol abuse. B was awarded $150,000 in general damages including $25,000 in aggravated damages; $80,000 for loss of past earning capacity; and $3,400 for future care costs. |

**Counsel**

J.R. Shewfelt, for the plaintiff. M.S.B. Jaffer, Q.C., for the defendant/fourth party, the Order of the Oblates of Mary Immaculate in the Province of British Columbia. J.M. Ward and S.E. Dawson, for the third party, the Attorney General of Canada. F.D. Corbett, for the fourth party, the Roman Catholic Bishop of Victoria.

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| **COHEN J.** |

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1. The Claim

**1**  The plaintiff claims that between 1957 and 1962, while he was a resident student at the Christie Indian Residential School ("Christie"), located on Meares Island, near Tofino, British Columbia, and operated by the defendant Order of the Oblates of Mary Immaculate in the Province of British Columbia ("Oblates"), he was repeatedly sexually assaulted by one Martin Saxey ("Saxey"), a man who was employed by the Oblates to work at Christie, primarily as a baker.

**2**  The plaintiff, now aged 51, alleges that Saxey, who died in 1986, commenced sexually assaulting him when he was seven years old, and that the assaults continued on a regular and frequent basis until he was 11 or 12 years old. He also alleges that all of the assaults took place in Saxey's living quarters which were situated in a building on the grounds at Christie.

**3**  Plaintiff's counsel submitted two theories of liability: first, the vicarious liability of the Oblates based upon the contention that the unique circumstances and environment of Christie created and materially enhanced the risk of sexual assaults on the plaintiff by Saxey; second, the direct liability of the Oblates arising out of the ***negligence*** of Christie's principal for hiring Saxey, a person known to him to have a history of violent homicide. Plaintiff's counsel submitted that to hire a person with Saxey's background to work at Christie constituted an immediate and continuing breach of duty to all of the children attending Christie, including the plaintiff.

**4**  Counsel for the Oblates submitted that the constant supervision of the children, coupled with their daily schedules, left no opportunity for Saxey to have sexually assaulted the plaintiff. Furthermore, counsel submitted that even if the plaintiff could prove on the requisite standard that he was sexually assaulted by Saxey, the current law surrounding the issue of vicarious liability can have no application to the case at bar because Saxey was an employee who had no authority over, or responsibility for the children at Christie.

**5**  On the issue of direct liability, counsel submitted that the court must decide this issue based upon the standard of care expected of the Oblates in the context of operating a residential school in the 1950s and 1960s, and not based upon the current standard of what is known about the nature, degree or extent of sexual assaults upon children. Counsel submitted that the Oblates met this standard of care, and that any damages suffered by the plaintiff as a result of the alleged sexual assaults were not foreseeable.

1. The Parties

**6**  Prior to attending Christie, the plaintiff lived with his parents and siblings in Queens Cove, a village on the West Coast of British Columbia, then consisting of about eight families. The plaintiff, then six years old, and an older brother, L.B., arrived at Christie on September 18, 1956. He left Christie in June 1965.

**7**  The Oblates, incorporated by a special Act of the British Columbia Legislature, is the corporate vehicle through which the Oblates of St. Paul's Province own property and transact business. From 1900 to 1938, Christie was owned and operated as an Indian residential school by the Benedictine Order. In 1938, the Oblates purchased the land and buildings comprising Christie and from that time forward, Christie has been owned, operated and staffed by the Oblates.

**8**  With respect to Saxey's background, on May 2, 1951 he was sentenced to death after being convicted by a jury for murdering a man in February 1951 during an argument over a driftwood log. On September 13, [*1951, 101 C.C.C. 112*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FBFS-S2P4-00000-00&context=) the Court of Appeal reversed his conviction and ordered a new trial. On October 17, 1951 a second jury found him guilty of manslaughter. He was sentenced to six years in jail. Following his release, he became employed by the Oblates, commencing his employment at Christie on September 14, 1955.

1. Issues

**9**  The issues in this trial are those raised between the plaintiff and the Oblates. The Third and Fourth party issues have been severed and adjourned generally, as have the issues between the plaintiff and the defendant Matthew Williams. The issues then are, as follows:

1. Has the plaintiff met the required standard to prove that he was sexually assaulted by Saxey?
2. If the answer to 1 above is yes:
3. are the Oblates vicariously liable?;
4. if not, are the Oblates liable in ***negligence***?;
5. if the Oblates are vicariously liable, or negligent, what specific injuries has the plaintiff suffered as a result of the sexual assaults?;
6. if the plaintiff has proven that he suffers from specific injuries caused by the sexual assaults, what compensation is the plaintiff entitled to?
7. Decision on Liability

Issue 1

Has the plaintiff met the required standard to prove that he was sexually assaulted by Saxey?

Answer: Yes.

**10**  In this case, as in most cases of alleged sexual assault, there are no eye witnesses to the central events. The court's assessment of the reliability of the plaintiff's allegations in the instant case is made even more difficult and complicated not only by the fact that the plaintiff is recalling events that took place more than 40 years ago, but also by the fact that Saxey is now deceased.

**11**  The applicable law on this issue is that stated succinctly by Brenner C.J. in W.R.B. v. Plint, [*[2001] B.C.J. No. 1446*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23N7-00000-00&context=), where at para. 17 the Chief Justice said, as follows:

The test the law requires is not whether the plaintiffs hold an honest belief that the events of which they complain occurred; rather, it is whether they have proven to the standard that the law requires that those events in fact occurred.

**12**  As for the appropriate standard to be applied, the Chief Justice said, at paras. 10-12 of the decision, as follows:

The more serious the allegations the greater the care that must be exercised when considering the evidence. As stated by the Supreme Court of Canada in Continental Insurance Co. v. Dalton Cartage Co. Ltd. et al [*(1982), 131 D.L.R. (3d) 559*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-235C-00000-00&context=) at 563 per Laskin C.J.C.:

There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial Judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. I put the matter in the words used by Lord Denning in Bater v. Bater, supra, as follows [at p. 459]:

It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability, within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether ***negligence*** were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the Court to conclude that a proof on a balance of probabilities has been established.

This principle was recently considered and the leading cases summarized by Stromberg-Stein J. in V.(J.L.) v. H.(P.) [*(1997), 31 B.C.L.R. (3d) 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21JV-00000-00&context=) at 189-190, paras. 117-120:

The civil standard of proof on a balance of probabilities is a flexible standard that enables Courts to require a higher degree of probability or persuasion in a case involving allegations of sexual, physical and emotional abuse made by a child against a parent. The seriousness of the allegations and the gravity of the consequences require a high degree of probability that the allegations are true. This approach was set out by Lord Denning in Bater v. Bater, [1950] 2 All E.R. 458 (C.A.), at 459:

...

The Supreme Court of Canada considered the standard of proof in civil cases in Continental Insurance Co. v. Dalton Cartage Co. [*[1982] 1 S.C.R. 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-235C-00000-00&context=). In adopting Lord Denning's approach in Bater, Laskin, C.J.C. held that where allegations of conduct that is morally blameworthy are made in civil cases, the relevant standard remains the civil one though there is necessarily a matter of judgment involved in weighing evidence and a trial judge is justified in scrutinizing evidence with care. Asserting that there is no shifting of the burden of proof, he stated at p. 171: "[the] question in all cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established."

The issue of the standard of proof in civil cases was addressed again by the Supreme Court of Canada in R. v. Oakes [*(1986), 26 D.L.R. (4th) 200*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2393-00000-00&context=). Dickson, C.J.C. stated, "Within the broad category of the civil standard, there exists different degrees of probability depending on the nature of the case ... ." In support, at p. 226, he cited Bater.

In a case such as this, involving allegations of sexual, physical and emotional abuse by a father against his daughter, spanning approximately twenty years, a high degree of probability "commensurate with the occasion" is the appropriate standard of proof of misconduct by the defendant toward the plaintiff.

In V.(J.L.) v. H.(P.) [*(1998), 109 B.C.A.C. 165*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2DJ-00000-00&context=), [*[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=), the Court of Appeal upheld the trial judge's analysis. Lambert J.A. stated:

The argument on this appeal started with the finding of liability made by the trial judge, which rested on the standard represented by the balance of probabilities (using an exacting standard of assessing that balance based on the fact that these accusations of sexual assault involved moral blameworthiness). It was pointed out that the trial judge found that three of the serious sexual assault incidents had been established to have taken place under that standard of proof, that the remainder, and she particularized four and one assumes one other since there were eight in total, had not been proved to the required standard.

It was argued in relation to this question of liability that those findings were perverse in view of the fact that the evidence in relation to all eight incidents seemed, in the submission of the appellant, to be very much the same and that a conclusion with respect to credibility could scarcely properly be regarded as supporting a finding that three of these sexual assaults had been proved but five had not.

However, it is important to realize that it was not that the five had been proven not to have occurred but just that they had not been proven, to the required standard, to have occurred. So I see nothing perverse in the finding that the trial judge rested her judgment on a conclusion that only three of these incidents had been proven to the requisite standard to have occurred.

|  |  |
| --- | --- |
| [emphasis mine] |  |

**13**  In B.(M.) v. British Columbia [*(2001), 87 B.C.L.R. (3d) 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2R5-00000-00&context=) at para. 25 Prowse J.A. said, as follows:

I am unable to agree that Madam Justice Levine failed to apply to correct standard of proof to the evidence before her in coming to the conclusion that Mr. P. had sexually assaulted the plaintiff. She was fully alive to the fact that the allegations before her were of a criminal nature, and she stated (at para. 69 of her reasons) that she found the relevant facts to be proved "on a standard of a 'high probability' commensurate with the occasion." This standard was referred to by Lord Denning in Bater v. Bater, [1950] 2 All E.R. (Eng. C.A.) in the following passage at p. 459:

The case may be proved by preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher standard of probability than that which it would require considering whether ***negligence*** were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still does require a degree of probability which is commensurate with the occasion.

In my view, this statement is consistent with the general proposition that, while there are only two standards of proof known to our law: the civil standard of proof on a balance of probabilities, and the criminal standard of proof beyond a reasonable doubt, there are degrees of probability within the civil standard to take cognizance of the seriousness of the allegations at stake.

**14**  Recognizing then that where a civil claim alleges sexual abuse, a higher degree of probability within the civil standard is appropriate, and that in the instant case the matter turns largely, if not almost entirely on the plaintiff's credibility, I wish to start my reasons by stating that I found the plaintiff's testimony on this issue to be very compelling. I hold a strong impression that he was telling the truth when he testified about Saxey's sexual assaults upon him. I am also convinced that his anxiety on the witness stand when recalling the events was most genuine, and that he was very sincere when he said, in cross-examination, that he could still smell the room where the assaults took place, even as he sat in the witness box, and that while he could not describe the smell, he did not like it. When describing Saxey's living quarters, he said, "it's very disturbing and it's such a horrifying thought to have to try to think about that place".

**15**  Turning then to the plaintiff's account of the sexual assaults, he said that Saxey repeatedly sexually assaulted him beginning early in the fall of 1957, when he was seven years old, and that all of the assaults took place in Saxey's living quarters. The plaintiff recalled that Saxey assaulted him about twice a week until he was 11 or 12 years old.

**16**  When asked how he felt emotionally when Saxey approached him, the plaintiff said that he was upset and scared and wanted to get away and go play somewhere else but that Saxey kept on telling him that he had candy up in his room and that he would give him lots. The plaintiff said he ultimately went with Saxey because of the candy, and that in doing so he was scared.

**17**  The plaintiff, who testified that Saxey's living quarters was one bedroom and a living room area, and that Saxey lived by himself, described the first incident of sexual assault by Saxey, as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Can you describe what happened? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | He lured me into his place, he had a place in a two storey building and he was upstairs. And he lured me up there. And when he got me up into his room he said that he had some candy and I was going to grab that candy and go and he caught me and he brought me to his bedroom and he threw me on his bed. He got me on the bed he took my clothes off, my pants, my shorts, and I was scared, I didn't know what to do, didn't know what to say, I wanted to get out. But he held me down and he started having sex with me. |  |

**18**  When asked by his counsel to describe what happened after Saxey threw him on the bed, the plaintiff testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Now, after Martin Saxey threw you on the bed as you've testified, exactly what happened next? |  |
|  | A |  | He got my pants and shorts off and he started playing with my penis and then he spit between my legs and he put saliva between my legs and he closed my legs together, I thought he was going to tie me up when he did that. And then he continued, he pulled off his pants, and he put his penis between my legs and he partially penetrated my anus. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Were you lying down? |  |
|  | A | I was on my back, yes. |  |
|  | Q | What happened next? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | He continued having sex with me until he |  |
|  |  | ejaculated. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And did you try to get away at any time during this episode? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I was so scared I didn't know what to do. |  |
|  | Q | Did you say anything to him? |  |
|  | A | I couldn't say anything, I was too scared. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Was Martin Saxey violent with you during this episode? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I would say, yeah, he was, yeah. |  |
|  | Q | In what sense? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, he got me on his bed he was practically ripping my pants off, you know, I mean, he wasn't gentle about nothing, you know. |  |

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | [E.B.], what else do you remember about this episode of abuse? |  |
|  | A |  | After he finished, after he ejaculated, he got up, left, went into the living room area and I was left there and he threw me a towel. And I was left there to clean myself up. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Did you stay in the room afterward? |  |
|  | A | I wanted to run out. |  |
|  | Q | Did you? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | No. He was guarding the door. When I got into the living room he was sitting right by the door. He had some candy in his hand, it wasn't a lot of candy, but, you know, there was some, and he gave it to me and he said, "You be quiet, you don't tell nobody". And I left. I wanted to hide. I didn't know what to do. I know I stayed away from other boys because I felt a lot of shame. I was so violated. |  |

**19**  The plaintiff testified that the sexual assaults by Saxey upon him varied from time to time, stating as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Can you elaborate on how they varied? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Like I told you about the first time it was done that way, and the other times he would have me masturbating him and I would have to be facing right to him on my knees. And like he was sitting on the bed, you know, I would be kneeling in front of him. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Were there any other variations? |  |
|  | A | No, no. |  |

**20**  The plaintiff testified that he did not tell anyone about the assaults up to the time that he left Christie, and that he did not know of any other children being sexually abused while he was there. He said that he used to think he was the only one who was sexually assaulted at Christie. The plaintiff said the first time that he ever told another person about the sexual assaults was in 1978, and that person was his lawyer. When asked why he did not tell anyone about the sexual assaults while he was at Christie, he said it was because he was, "too scared and ashamed".

**21**  The main basis of the defence attack on the plaintiff's credibility is the assertion that the plaintiff gave different descriptions of the alleged sexual assaults to the experts, the police and at trial.

**22**  On cross-examination, counsel for the Oblates put to the plaintiff the clinical records of Ms. Eroca Shaler, a psychologist consulted by the plaintiff in 1995. She recorded in her clinical records that the plaintiff told her that in his first experience with Saxey, Saxey tried to bribe him into his place and that, "he did oral stuff as well as fondling, masturbation, frottage - several times", and that it made him angry just to have to think about it. The plaintiff confirmed that Ms. Shaler's clinical records, although not exactly in the words he used to her, correctly set out what he had told her.

**23**  The plaintiff also confirmed as being correct a written record made by the R.C.M.P. of what the plaintiff told the interviewing constable on October 27, 1995. The plaintiff described the sexual assaults to the police, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | And I didn't know about this that uh, that this man had uh, committed this felony, till later on. Over the years I had, I had heard through grapevine that he had uh, committed this, felony. And uh when I heard that uh, I was really I got really scared. Really anxious. Because uh, what he did to me in his house and at that residential school. Like he forced me into his bedroom. He, you know, almost like, uh, you know rippen' my pants off. And I was really scared and, didn't know what was happening what was going on. And why he was doing that, to me. And then uh, and he had my pants off and my shorts off and, he uh, he tried grabbed hold of my genitals like he knew what he was gonna do with me. And I started to cry. He got kind of um, angry. He was telling me to, to stop. Stop crying and to be quiet. I couldn't stop crying. I just continued crying. And uh, he grabbed my genitals and he started uh, masturbating me. He continued doing that. And uh, as soon as it was over he pushed me out of his door. He told me not to say anything to anybody. Told me to keep quiet about what happened. And I felt so ashamed. I didn't know what to do. I didn't know who to, who to turn to or who to talk to. And I went uh, like there was a basement, in the building I went down there. I went in the corner, and just started crying. And everybody else was all the boys were playing outside. Playing down on the beach. And I was alone. And I just cried cried... |  |

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | ...And this carried on and he continued to punish me and he'd always do, do the same thing. Take my pants off and he'd masturbate me all the time. This uh, went on till, right up to twelve years old... |  |

**24**  In his report dated November 4, 1996, Dr. P. Janke, the defence psychiatrist, set out what the plaintiff told him about the alleged sexual assaults, as follows:

At age seven [E.B.] began being sexually abused by Martin Saxey who was an employee at the residential school. He stated that it began when Mr. Saxey offered [E.B.] candy. He stated that every Friday the children who had money could buy some candy. As [E.B.] never heard from his parents he had no money.

[E.B.] indicated the sexual assaults began immediately and there was no grooming or preparation. He states that Mr. Saxey would take him to his room which was upstairs in a home occupied by one of [E.B.'s] aunts and uncles who themselves worked at the school, the aunt helping in the kitchen and the uncle working as a maintenance man.

[E.B.] states that Mr. Saxey gave him some candy and when [E.B.] was finished he wanted to leave but Mr. Saxey gave him more candy and "all of a sudden told me to go into his bedroom". [E.B.] states that when he went into the bedroom Mr. Saxey "grabbed me and threw me on the bed". [E.B.'s] pants were taken off and Mr. Saxey began masturbating [E.B.] then lay on top and simulated intercourse until he ejaculated. [E.B.] stated that Mr. Saxey told him to clean himself up and told him "don't tell anyone else or else". [E.B.] was then pushed out the door. He states the second incident occurred about two weeks later and the rate of the incidents increased to about three or four times per week. He indicated to me that the nature of the assaults remained essentially the same. [E.B.] indicated to me that as he got older and especially as he approached age 12 that Mr. Saxey seemed to be increasingly afraid while the assaults were occurring.

**25**  When the plaintiff's history as recorded by Dr. Janke was put to the plaintiff on his cross-examination, he confirmed it as being correct.

**26**  With respect to the plaintiff's direct testimony that the sexual assaults included partial anal penetration, defence counsel referred to the report and testimony of the plaintiff's psychiatrist, Dr. K. Riar on this point. In his report dated July 13, 2000 Dr. Riar described what the plaintiff told him about the alleged sexual assaults, as follows:

...[E.B.] indicated that the perpetrator lured him into his place by saying that he had some candy there and took him upstairs. It was daytime. Once in the perpetrator's residence [E.B.] said, "He had me by my arm and dragged me into his bedroom". Once there [E.B.] was put on the bed and the perpetrator took off his clothes. The whole experience was very frightening for [E.B.] and he did not know what to do. The perpetrator put [E.B.] on the bed and started having anal sex with him. He recalled that it was very painful and he was crying. Once the perpetrator finished he left him on the bed and he had to clean himself up. He then gave him an orange and pushed him out the door.

...

...The perpetrator also made [E.B.] perform oral sex on him approximately once a week but never ejaculated in his mouth...

**27**  When Dr. Riar learned that the plaintiff had given different descriptions of the alleged sexual assaults, he telephoned the plaintiff to check his understanding that the assaults included anal penetration. In cross-examination, Dr. Riar testified, as follows:

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| --- | --- | --- | --- | --- |
|  | Q |  | Thank you. Now, doctor, I understand that this was the two-hour interview that you told his lordship about? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |
|  | Q | And then you had two phone calls with him? |  |
|  | A | That's right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And I understand that you were sent a letter from his lawyer, Mr. Shewfelt? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And he sent this letter asking you to clarify something; isn't that correct? |  |
|  | A |  | I think I called him about some discrepancy after talking to Dr. Janke what he told me and what he told Dr. -- told me, and then I called Mr. Shewfelt asking him the clarification on that. |  |
|  | Q |  | His lordship knows about the discrepancy in the sense that he had told you that there was anal sex? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And he had not told Dr. Janke that; is that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So you received a letter from the lawyer, Mr. Shewfelt, and he says that it appears clear from the sworn statements as well as statements made in less formal interviews that the assaults did not entail deep anal penetration? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | However, given the multiplicity of the assaults and the mechanics as described in [E.B.'s] evidence, occasional shallow and incidental penetration is a possibility? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | And then he goes on to say "Perhaps you should speak to [E.B.]"? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |
|  | Q | And then you had the two calls with [E.B.]? |  |
|  | A | That's right. |  |
|  | Q | And? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That was the second one. The first one we had to interrupt, I don't know whether -- where he was calling from, the money kind of ran out or whatever. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | So this is just a short note? |  |
|  | A | Short, yeah. I think it's June 12th. |  |
|  | Q | June 12th? |  |
|  | A | 2000, yeah. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Told me -- intercourse with me, that would be Mr. Saxey? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |
|  | Q | He put his penis in him, meaning [E.B.]? |  |
|  | A | [E.B.], yeah. |  |
|  | Q | Would have sex with him on? |  |
|  | A | Continuous basis. |  |
|  | Q | Continuous basis. He had to clean himself? |  |
|  | A | Clean himself up and then leave. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then the longer call you had, that was in June -- on June 13th, the next day, sir? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And said that -- okay. If I read this correct, and correct me, doctor, I'm sorry, he says he always? |  |
|  | A |  | "Somehow got me. He took advantage of my [weaknesses], as did not have no candy with me, so I did not know what to do or think about it." Yeah. Then I talked to him about his own sexual problems. |  |
|  | Q |  | And, doctor, you were not here, but when he started talking about his sexual problems, he told his lordship that he would have difficulty explaining it? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So you would have written exactly what he said to you, right? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. On the phone, yeah. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And he says "Sexual problem unable to get up, premature ejaculation"? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |
|  | Q | "Always felt unable to satisfy a"? |  |
|  | A | "A woman". |  |
|  | Q | A woman? |  |
|  | A | Yeah. |  |
|  | Q | And? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Not told -- the woman did not tell them verbally, but their reaction, he felt that that was -- that's why they were rejecting him. |  |
|  | Q |  | Thank you. Doctor, from what I understand from your report, and I may come back to it, is that when you said in your report that there - you know, [E.B.'s] self-report to you was he was very clear that there was anal penetration; isn't that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And even after which we both agree to this, there is nothing -- I'm not making an issue of that, please don't take it that way, that even after you spoke to Dr. Janke you saw Dr. Shaler's reports? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |
|  | Q | You read the discovery? |  |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you still felt that he was very clear in his self-report to you that there was anal penetration; is that right? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

**28**  Dr. Riar also testified, on cross-examination, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then he tells you about Saxey, if I may please ask you to look at paragraph 2? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. 2 or 3? |  |
|  | Q | Paragraph 2 of page 3. |  |
|  | A | Okay. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | He says "While talking about abuse he indicated the sexual mistreatment by an employee"? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then he goes on, I'm skipping, that the downstairs was occupied by his grandparents? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then [E.B.] indicated that the perpetrator lured him into his place by saying that he had some candy there, and he took him upstairs? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | It was daytime. Once in the perpetrator's residence, [E.B.] said, "he had me by my arm and dragged me into his bedroom." Once there [E.B.] was put on the bed and the perpetrator took off his clothes. The whole experience was very frightening for [E.B.] and he did not know what to do. The perpetrator put [E.B.] on the bed and started having anal sex with him, he recalled that it was very painful and he was crying. Once the perpetrator finished he left him on the bed to clean himself. This is what he told you; is that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And not only did he tell you that once, he -- you confirmed that with him after his lawyer wrote a letter to you; is that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you also have seen what he told Dr. Shaler, which was different than what he told you? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you also have commented that he told Dr. Janke a different version; isn't that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And when my friend was asking you questions, you said that you and Dr. Janke had consulted about this, and he had told different versions to him and to you; is that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's my understanding, yeah. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Doctor, out of absolute fairness to [E.B.], I had asked him about this, about him having -- sorry, about him having told you about anal sex, and I would like to read what he said to you -- said to me -- or to his lordship. I will just be one second. I'm sorry, your lordship. .. |  |
|  | Q |  | Your lordship, it was page 109, sorry. It's question 743, your lordship. It's -- it's your report that I'm reading to him, doctor, and I say "The whole experience was very frightening for [E.B.] and he did not know what to do. The perpetrator put [E.B.] on the bed and started having anal sex with him. Is that what you told him, sir?" Meaning told you. "I don't think so, I don't think so I said anal sex." "You never told Dr. Riar anal sex?" Answer "No." Doctor, you're not sure that he did tell you that Mr. Saxey had anal sex with him? |  |
|  | A |  | If we are talking about the term, like if he used the term "anal", I'm not, your honour, sure whether he said anal sex, but he was very clear that there was intercourse. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | There was intercourse? |  |
|  | A | Yes. |  |
|  | Q | And between men that's what it would be? |  |
|  | A | Yeah. That's what I probably presumed, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And when we looked in your notes it does, you know, to refresh your memory, does say anal, doesn't it? |  |
|  | A |  | Yeah, I wrote that, but I must have asked him "Did he put his penis inside you?" And he must have said yes or something, yes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Okay. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | And if he used the term, I can't say that, whether he used that term or not. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | But that's what he meant? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yes. What I meant, yeah, I mean he told me that, that's what I wrote, that it was anal sex. |  |
|  | Q |  | Okay. Maybe I can start again. He told you that Mr. Saxey had intercourse with [E.B.]? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |
|  | Q | Okay. And that would have to be anal sex? |  |
|  | A | That's right. |  |

**29**  Defence counsel pointed out that in cross-examination, the plaintiff denied telling Dr. Riar that the sexual assaults included anal sex. He testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And the whole experience was very frightening for [E.B.] and he did not know what to do. The perpetrator put [E.B.] on the bed and started having anal sex with him, is that what you told him, sir? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I don't think I said anal sex. |  |
|  | Q | You never told Dr. Riar anal sex? |  |
|  | A | No. |  |
|  | Q | So he's mistaken on that? |  |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then he recalled that it was very painful and he was crying. Did you tell him that, sir? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And that once the perpetrator finished, he left him on the bed and he had to clean himself, he then gave him an orange and pushed him out of the door. Just so I understand you correctly, sir, its your evidence today that you never told Dr. Riar that Saxey assaulted you by having anal sex with you? |  |

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

**30**  Dr. Janke testified that he would normally expect some variability in the description given by a victim of sexual assault to different persons. He also testified that he would not expect any major differences, explaining that he would expect the victim to be able to relate all the major elements of the assault he had experienced, and not to make sudden recall or to add to the descriptions some extreme form of abuse, or for that matter retract it subsequently.

**31**  In my opinion, the plaintiff's testimony that he was frequently sexually assaulted by Saxey is reliable. In arriving at my conclusion, I think it must not be forgotten when assessing the credibility of the plaintiff's testimony about the assaults that the plaintiff was recalling details of events long after the time that they had happened to him, as well as the fact that, according to the plaintiff, the length of time between the assaults varied, and that given the frequency of the assaults they have tended to mix together in his mind so that he cannot now remember them all individually.

**32**  As for the controversy surrounding the plaintiff's testimony about partial anal penetration, it strikes me that the plaintiff did not consider this manner of the abuse upon him by Saxey as being a major element of the sexual assaults, but rather as being perhaps incidental to his description of the simulated intercourse. In any event, I do not consider there to be a serious conflict in the evidence between the plaintiff and Dr. Riar on this narrow point. First, the plaintiff did not deny that he told Dr. Riar that the sexual assaults included anal penetration. Rather, he denied telling Dr. Riar that the sexual assaults included "anal sex". By the same token, Dr. Riar did not purport to quote the plaintiff verbatim. He said, in chief, that he did not go into the graphic details of the sexual assaults with the plaintiff, partly because the plaintiff was, "quite anxious". Most significantly, when the plaintiff's direct testimony describing the assaults was put to Dr. Riar, and he was asked whether it was the same as what the plaintiff had described to him, Dr. Riar answered, "yes, along that lines, yes. I won't -- I don't recall partially, but that's what I would say, yes". In cross-examination, Dr. Riar was not sure whether the plaintiff had actually used the words "anal sex", although he was certain that the plaintiff told him that the assaults included intercourse. I think that plaintiff's counsel's argument that both witnesses were merely describing the same facts using different words is a reasonable inference to draw from their testimony.

**33**  Furthermore, I agree with plaintiff's counsel that the question of whether or not there was anal penetration is largely insignificant in any event in light of the following testimony by Dr. Riar:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Doctor, would you agree with me that if it was simulated intercourse and masturbation, the impact of that would be a lot less than anal sex? |  |
|  | A |  | Not necessarily. I mean it's the perception of the person. It depends on various factors. It doesn't depend upon what just happened. We know severity and penetration are one factor, but there are other factors too to make it severe, so I would say that that's not the way I'm thinking that it's severe, that he penetrated him. |  |

**34**  As for the other factors argued by counsel for the Oblates in her challenge to the reliability of the plaintiff's testimony about the manner and frequency of the sexual assaults, I think, with respect, that they are without merit.

**35**  First, Dr. Janke testified that he would expect to see behavioural problems in a child who suffered repeated sexual assaults. Concepcion Anita Tavara, whose religious name is Sister Anita, now retired, was at Christie from 1962 until 1964. She testified that if she was involved in supervising a dance on the weekend she would see the plaintiff, or she would see him at choir practice. She said that she did not notice any behavioural problems with the plaintiff.

**36**  Thomas Richard Cavanaugh, whose religious name is Brother Cavanaugh, was at Christie in 1964 as a child care worker. He testified that he knew the plaintiff and said that he could remember, "[E.B.] was a big boy for his age but he was certainly a good boy. He was a typical boy. Certainly he did things at times that you wished they wouldn't but at the same time he was a good kid."

**37**  When Brother Cavanaugh was asked whether he ever experienced any behavioural problems with the plaintiff, he said, "No not any".

**38**  Thomas Lorne Mackey, whose religious name is Father Mackey, said that he knew the plaintiff, and used to call him by the nickname, "Zeek". He said that the plaintiff would often just drop into his office while passing by, that he enjoyed the plaintiff's presence, that the plaintiff was a bit of a joker and a very pleasant fellow who had a great smile and a good sense of humour. As well, Father Mackey would see the plaintiff out on the ball field, or at dances and said that for a quiet fellow he did very well, that he was quite popular with the girls, and that it was just a pleasure to see him.

**39**  When Father Mackey was asked whether he ever noticed any behavioural problems with the plaintiff, he answered:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And did you ever notice any behavioral problems with him? |  |
|  | A |  | No, I didn't. He (didn't) stand out from that point of view he wasn't a troublemaker of any sort he was quiet but not morose or withdrawn, he was quiet, but as I say that gentle joyfulness and a good spirit, joking kind of fellow. So there was no evidence that he was hiding something very deeply buried and was morose about it to my knowledge. I always saw him as a very happy just quiet fellow, a little distant but not morose. |  |

**40**  Stella Theresa Distaso, whose religious name is Sister Mary Laura, started working at Christie in 1960. She was a teacher assigned to Grades 5 and 6, and was also a child care worker for the senior girls. She said she taught the plaintiff in Grades 5 and 6. When asked what he was like, she said:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Can you tell his lordship what [E.B.] was like? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yes. [E.B.] was just a regular student. He didn't stand out behaviour-wise in any way that I could remember. He (w)as a very happy boy, had big dimples and smiled frequently and I recall that. But never displayed any unusual behavior that would have sort of given me a clue that something was wrong. Never caused problems for me in the classroom and was just a good behaved, well behaved student. |  |

**41**  As plaintiff's counsel pointed out, the impressions of Sister Anita, Brother Cavanaugh, Father Mackey and Sister Mary Laura of the plaintiff date back well over 30 to 40 years about one child in a school of hundreds of children. Therefore, I agree with plaintiff's counsel that their evidence is self-serving on this point and should not be accorded substantial weight. In my view, this is particularly so in the case of Brother Cavanaugh's testimony, who after stating that he never had any behavioural problems with the plaintiff, said, when asked whether he ever had to punish the plaintiff for being out of bounds, or having left the boundaries or not obeying rules, "Yes, yeah, I had to punish him for a number of things". He also "vaguely" recalled that he might have punished the plaintiff for stealing from the candy goods store at Christie.

**42**  Another factor raised by the Oblates was the evidence of Brother Cavanaugh describing Saxey's living quarters, which were on the top floor of the staff building. He said there were two bedrooms, sort of a sitting room, and a place where Saxey could do a little cooking, and that access to Saxey's living quarters was by way of a set of stairs at the back of the building.

**43**  Defence counsel also referred to the evidence of the defendant Williams who testified, in cross-examination, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Can you describe for me Mr. Saxey's room in this house? |  |
|  | A |  | Always seemed clustered, got a bed, clothes hanging up and clothes on chairs, small, real warm. Lots of light in there all the time. That's about all there was. Just a couple of chairs, beds. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Were you actually in this room, Mr. Williams? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I had been there before, yeah. I know what the rooms look like. |  |
|  | Q |  | But were you in there when Mr. Saxey wasn't there is that it? |  |
|  | A |  | Yeah. There was times when I was there when he wasn't there. |  |
|  | Q |  | Was there just the one room in the upper floor of this house? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | There was two. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | How did you get from one room to the other was there a hallway of some sort? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | There was a division between them in the room. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But when you saw your friend being abused by Mr. Saxey you saw this from the outside door? |  |
|  | A |  | I ran upstairs and I was -- pretty well at the top stair when I seen it. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | But you didn't go inside? |  |
|  | A | Didn't have to. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | In fact, Mr. Williams, Barney Williams lived in that other room, didn't he? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | He was another native man that you said was the boat builder? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | Is he any relation to you? |  |
|  | A | No. |  |
|  | Q | He was a kind, old man at the school wasn't he? |  |
|  | A | Yes. |  |

**44**  Defence counsel submitted that the above descriptions of Saxey's living quarters, and who lived there were not consistent with the plaintiff's evidence on this point. Counsel referred to the plaintiff's description of Saxey's living quarters, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Was Martin Saxey's quarters one big room or did it have multiple rooms? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | It was one bedroom. |  |
|  | Q | It had one bedroom did it have other rooms? |  |
|  | A | He had one bedroom and a living room area. |  |
|  | Q | Do you know whether he lived there by himself? |  |
|  | A | Yeah, he lived by himself. |  |

**45**  Counsel contended that because Saxey shared his living quarters with Mr. Barney Williams this raised serious doubts that the abuse the plaintiff described could have gone on for so long without being detected.

**46**  However, as plaintiff's counsel noted, the defendant Williams' testimony about Mr. Barney Williams sharing Saxey's living quarters was by way of an affirmative answer to a leading question in cross-examination, and that there was no other evidence on this point from any source, nor an indication of where the factual or evidentiary foundation for the leading question came from. Counsel also noted that Brother Cavanaugh was the only defence witness to whom a question on this point was directed. He testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And with Mr. Martin Saxey there was someone else sharing that? |  |
|  | A |  | They were separate apartments really, the bottom section where Joe and Ester lived was the entranceway for that building was or that section of the building was in the front. And the only way Martin could get into his apartment upstairs was through a back door which was up on top, you had to go up a flight of stairs. |  |

**47**  Counsel said that none of the remaining defence witnesses who were at Christie, namely Father Mackey, Sister Mary Laura or Sister Anita, were asked about Mr. Barney Williams, and whether he shared Saxey's living quarters. In the circumstances, I agree with plaintiff's counsel that the court should draw an adverse inference from defence counsel's failure to pose this question to any of the other defence witnesses.

**48**  Further on this point, counsel noted that the Christie Codex Historicus for the date April 17, 1958 contains a reference to Mr. Barney Williams being "over from" the nearby village of Opitsat on that day.

**49**  Regarding Brother Cavanaugh's evidence about the layout of the interior of Saxey's living quarters, plaintiff's counsel said that this evidence was not reliable. He pointed out that Brother Cavanaugh testified, in chief, that he had not been into Saxey's living quarters "that much" while Saxey was living there, and that he was in Saxey's living quarters after it had been renovated.

**50**  In the result, I agree with plaintiff's counsel that the defence evidence does not undermine the reliability of the plaintiff's recollection as to the configuration of Saxey's living quarters. I also agree with plaintiff's counsel that the defence has not established that Saxey shared his living quarters with Mr. Barney Williams at the material times surrounding the events testified to by the plaintiff.

**51**  Finally, as to the plaintiff's evidence on the timing of the assaults, defence counsel referred to the following evidence of the plaintiff, in cross-examination:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then from 4:00 to 5:00 you had the study hour is that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | And again the teachers would supervise you? |  |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And in study hour you would go back into the classroom? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | And do your homework? |  |
|  | A | Yes. |  |
|  | Q | And the teachers would supervise you? |  |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then 5:00 o'clock was time to do some chores, clean up and go for supper at 5:30 is that correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And at this time the child care supervisors would supervise you? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then after supper, which would be around 6:30, there would be activities? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Like you already have told His Lordship, going to the movies, carpentry shop, playing games; is that correct? |  |
|  | A |  | And again a child care supervisor would supervise at that time? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you also told His Lordship that the principal would be walking around? |  |

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

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And did at any time Mr. Saxey ask you to do any jobs? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you also have stated that Mr. Saxey lured you to his room around 4:00 o'clock; is that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | And (he) would find (you) when you were playing? |  |
|  | A | Yes. |  |
|  | Q | And he would take you to his place? |  |
|  | A | Yes. |  |

**52**  Defence counsel argued that the evidence from the defence witnesses rendered the plaintiff's testimony on this point implausible. Defence counsel pointed to Sister Anita's testimony describing the children's activities during the "study hour" between 4:00 to 5:00 p.m. She said that the children came to classrooms where they were taught during the day, and that they would do the homework that was assigned to them as well as get extra help in any area that they were weak in. She said the teachers were always there with the children to help them, if they needed it.

**53**  When Sister Anita was asked what she would do if a student was missing, she said:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And if a student was missing on a regular basis or any time, what would you do that about that? |  |
|  | A |  | We would immediately send a note to the superior or the child care worker in charge and tell them that the child was not in class. |  |
|  | Q |  | Would it be -- any time that a -- you would notice that a child was missing? |  |
|  | A |  | No, we couldn't. There is just enough desks for the children so we would know if there was no one there, we also had to take roll when they came in. |  |
|  | Q |  | Okay. And if for any reason you were not able to do -- be at the study hour, what would happen to the student? |  |
|  | A |  | There would always be someone to relieve us we had extra staff for example the junior senior supervisors who did not have children to teach would be available as well as the sisters who were in the sewing room would be available to relieve us or if we had to go to Tofino for any reason or anything came up. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Would you ever leave the children alone? |  |
|  | A | No. Of course, never. |  |
|  | Q | Why? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | There were under our care, they were our children. We were responsible for them. This was no way we could possibly leave them alone. It was -- they were under our charge. |  |

**54**  In chief, Sister Anita said that after 5:00 o'clock the children would go back to the dorms and get washed up for dinner, and that they would most likely not have that much time for play because the children ate at 5:30. She said there was always someone in the dorm with them as they were cleaning up.

**55**  Father Mackey was also asked, in chief, about study hour. He answered, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Father, you are aware that there was study hour from 4:00 to 5:00 p.m. every evening? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Right. |  |
|  | Q | What would you (do) during the study hour? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | During the study hour I felt kind of free. First of all may have some things to do in my own office but most of the time I like to be outdoors so I would be either down at the boat house or up around the front of the building or visiting with some of the staff. I liked to go in to visit people in the laundry, I like to watch these things these old machines and so forth that were quite old. I had to keep an eye on all the machinery and then I would have to keep an eye on the tractors and that would be in the boat house, so I would take this opportunity to go around the grounds and just to stroll around and to be in touch with the different members of the staff. I considered it really important to have that contact with the different area of work that the staff was doing. Sometimes visiting in their own little units if they were not on duty at the time. |  |
|  | Q |  | And what else besides the staff were you concerned about during the study hour Father? |  |
|  | A |  | Oh, well of course I would have an eye out always for children. One of the reasons I did make a point of getting out of the building at that time after school hours was to be in contact with the children, and if anybody was seen outside I would see them immediately. I used to see, for example, the boys had an out door washroom so I would occasionally see a boy there going to the out door washroom which is understandable so that was the only thing that I would observe. Never, I didn't see anybody wandering around or anything like that at all. Nobody was out of place. The -- part of the regulations of the study hour was that I would ask the teachers that was always reinforced by Sister Laura who was the senior teacher to have a roll call for every study hour even outside of the regular class, to have the roll call. So that we would be quite sure that everyone was there and we wouldn't have any worry about some child not being where he or she should have been at that time. |  |

**56**  I disagree with the defence submission on this point because, in my opinion, the evidence does not establish that all of the assaults occurred at exactly the same hour of the day. It was the plaintiff's testimony that Saxey lured him to his room at, "around 4:00 o'clock", which, as I think plaintiff's counsel correctly suggested, could be interpreted to mean they took place sometime in the late afternoon, or possibly early evening.

**57**  Accordingly, I am satisfied that the plaintiff has proven, to the required standard, that Saxey commenced assaulting him when he was seven years old, and that the assaults continued on a regular and frequent basis until he was 11 or 12 years old; that all of the assaults took place in Saxey's living quarters at Christie; that the sexual assaults consisted of fondling, masturbation and simulated intercourse, which included partial anal penetration. However, given that the plaintiff failed to testify at trial about the allegation of oral sexual abuse, I find that this allegation has not been proven to the requisite standard.

Issue 2 (i)

Having concluded that the plaintiff was sexually assaulted by Saxey, are the Oblates vicariously liable?

Answer: Yes.

**58**  It is conceded by the defence that Saxey was an employee at Christie during the material times, and there is no denial regarding the nature of the employment relationship between Saxey and the Oblates.

**59**  As to the current test for vicarious liability, in Bazley v. Currie ("Children's Foundation"), [*[1999] 2 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M42M-00000-00&context=), and a companion case, Jacobi v. Griffiths ("Boys' and Girls' Club"), [*[1999] 2 S.C.R. 570*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M42N-00000-00&context=), the Supreme Court of Canada set out the law with respect to the imposition of vicarious liability on an employer.

**60**  In Children's Foundation, supra, McLachlin J. (as she then was), at para. 10, answered the question of whether employers could be held vicariously liable for their employees' sexual assaults on persons within their care, by approving of and summarising the Salmond test:

Both parties agree that the answer to this question is governed by the Salmond test, which posits that employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an unauthorized act.

**61**  In dealing with the second branch of test, the following approach was put forward by her Ladyship in para. 15:

First, a court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.

**62**  In considering "broader policy rationales" McLachlin J., in para. 41, set out the following principles to be followed in finding vicarious liability where precedent cases are inconclusive:

Reviewing the jurisprudence, and considering the policy issues involved, I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles:

1. They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".
2. The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
3. In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
4. the opportunity that the enterprise afforded the employee to abuse his or her power;
5. the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
6. the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
7. the extent of power conferred on the employee in relation to the victim;
8. the vulnerability of potential victims to wrongful exercise of the employee's power.

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| [emphasis in original] |  |

**63**  McLachlin J. provided further guidance, stating at para. 42:

Applying these general considerations to sexual abuse by employees, there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. The policy considerations that justify the imposition of vicarious liability for an employee's sexual misconduct are unlikely to be satisfied by incidental considerations of time and place. For example, an incidental or random attack by an employee that merely happens to take place on the employer's premises during working hours will scarcely justify holding the employer liable. Such an attack is unlikely to be related to the business the employer is conducting or what the employee was asked to do and, hence, to any risk that was created. Nor is the imposition of liability likely to have a significant deterrent effect; short of closing the premises or discharging all employees, little can be done to avoid the random wrong. Nor is foreseeability of harm used in ***negligence*** law the test. What is required is a material increase in the risk as a consequence of the employer's enterprise and the duties he entrusted to the employee, mindful of the policies behind vicarious liability.

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| [emphasis in original] |  |

**64**  McLachlin J. also laid out some additional factors in paras. 43-45, as follows:

1. the employee is permitted or required to be alone with a child for extended periods of time;
2. the employee is expected to supervise the child in intimate activities like bathing or toiletting;
3. the employment puts the employee in a position of intimacy and power over the child enhancing the risk of the employee feeling that he is able to take advantage of the child and the child submitting without effective complaint; and
4. time and place may be relevant.

**65**  Defence counsel submitted that the "opportunity" cases, as described by Binnie J. in Boys' and Girls' Club, supra, do "unambiguously determine on which side of the line between vicarious liability and no liability the case falls". In discussing the opportunity cases, Binnie J. states, at para. 45, as follows:

As McLachlin J. notes at para. 40 of Children's Foundation, "any employment can be seen to provide the causation of an employee's tort. Therefore, 'mere opportunity' to commit a tort, in the common 'but-for' understanding of that phrase, does not suffice" to impose no-fault liability. The "janitor" cases, for example, illustrate that the creation of opportunity without job-created power over the victim or other link between the employment and the tort will seldom constitute the "strong connection" required to attract vicarious liability.

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| [emphasis in original] |  |

**66**  Defence counsel relied heavily upon the decision in G.(E.D.) v. Hammer [*(1998), 53 B.C.L.R. (3d) 89*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-228H-00000-00&context=) (S.C.), where the defendant school board was found not to be vicariously liable for the sexual assaults committed by a janitor on a student. In that case, Vickers J. found that the janitor did not have power or authority to discipline a child misbehaving at the school. Relying on the Court of Appeal decision in Children's Foundation [*(1997), 30 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21WB-00000-00&context=), Vickers J. held that the janitor had no direct duties involving the students, and that in performing his duties as janitor he was not assigned specific duties to care for and provide support to children and children were not assigned to his care. At para. 52 Vickers J. said:

All that can be said to support a finding of vicarious liability is that Mr. Hammer was employed as a janitor at the school and his duties provided him with the opportunity to commit the wrongful acts. In my view, that is insufficient to impose liability on the Board.

**67**  In Boys' and Girls' Club, supra, Binnie J. cited with approval the decision of Vickers J., and other "opportunity" cases, stating at para. 51, as follows:

While these cases did not have the benefit of the Children's Foundation framework of analysis, they do illustrate the historical reluctance of judges in this country to fix employers with no-fault liability on the basis merely of job-created opportunity even where accompanied (as in the present appeal) by privileged access to the victim. In such cases it may be acknowledged that proximity and regular contact may afford a pool of potential victims. Nevertheless, while each of the enterprises in the above cases foreseeably created risks that were not otherwise present, it was concluded (to put it in terms of the Children's Foundation analysis) that there was an insufficiently strong connection between the type of risk created and the actual assault that occurred to warrant imposition of no-fault liability.

**68**  G.(E.D.), supra, was appealed: see [*(2000), 86 B.C.L.R. (3d) 191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2R4-00000-00&context=) (C.A.). The trial judge's finding on vicarious liability was not an issue on the appeal. In reasons handed down March 27, 2001 Prowse J.A. noted that this was not surprising given Binnie J.'s approval of the trial decision.

**69**  Counsel for the Oblates submitted that the fact situation in the case at bar was one of "mere opportunity". Counsel argued that Saxey, a baker at Christie, had no special power or authority over the children, and said that while Saxey's position as an adult at Christie lead to respect from the children, this would be no different from the respect a janitor would receive from children at a public school, as was the case in G.(E.D.), supra.

**70**  Counsel also submitted that the test is not whether it was "reasonably foreseeable" that the plaintiff might be sexually assaulted while at Christie, or that "but for" Saxey's position at Christie he would not have assaulted the plaintiff, but rather, according to McLachlin J., at para. 42:

...there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks.

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| [emphasis in original] |  |

**71**  Defence counsel also referred to the decision in Boys' and Girls' Club, supra, where Binnie J. reviewed cases where the employer's enterprise created a risk that went beyond the mere creation of an initial opportunity for the assailant to encounter his victims. Counsel said that in such cases, it was only when a strong connection between the job-creating enterprise and the sexual assault was enhanced by job-created power and intimacy that vicarious liability was found. Counsel reviewed A.(C.) v. C.(J.W.), [*(1998) 60 B.C.L.R. (3d) 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M0YH-00000-00&context=) (C.A.); B.(K.L.) v. British Columbia [*(1998), 51 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3XM-00000-00&context=) (S.C.). Counsel also reviewed M.B. v. British Columbia, [*[2000] B.C.J. No. 909*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61DP-00000-00&context=), appeal dismissed [*(2001), 87 B.C.L.R. (3d) 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2R5-00000-00&context=) (C.A.); and John Doe v. Bennett [*(2000), 190 Nfld. & P.E.I.R. 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8W1-JP9P-G43T-00000-00&context=) (Nfld. S.C.(T.D.)).

**72**  Defence counsel also submitted that other residential school cases decided to date have relied on the enhanced job-created parent-like power and intimacy to find vicarious liability. For example, in B.(W.R.) v. Plint [*(1998), 52 B.C.L.R. (3d) 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-22T9-00000-00&context=) (S.C.), the United Church and Canada were found to be jointly vicariously liable for the assaults committed at an Indian residential school by the dormitory supervisor. Relying on the Court of Appeal decision in Children's Foundation, supra, Brenner J. (as he then was) determined that there was a sufficient connection between the duties of the dormitory supervisor and his misconduct, as a result of the power conferred on him by his employment. He stated, at para. 24, as follows:

In the case at bar Plint, as a dormitory supervisor, had the authority of a parent conferred upon him. He was not just a person into whose care children were placed for a relatively small portion of the day. He awoke the children and ensured they were readied to go to school. He met them when they returned from school, supervised their homework and in all respects functioned as their parent at AIRS.

**73**  The test from Children's Foundation, supra, was also applied in M.(F.S.) v. Clarke, [*[1999] 11 W.W.R. 301*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G172-00000-00&context=) (B.C.S.C), a case involving sexual assaults by a dormitory supervisor at an Indian residential school. In that case, Dillon J. found that there was a strong connection between the type of risk created by the employment of the dormitory supervisor and the sexual assaults: the supervisor was in a parental position with prolonged and intimate contact with the children in his care; the children were away from their home and parents making them particularly vulnerable; the social architecture of the school ensured that the dormitory supervisor was not viewed just as a parent, but as the most powerful influence in the children's lives; the supervisor was white as were all the staff, making the supervisor even more unassailable; and the supervisor's room was immediately adjacent to the dormitory. At para. 140, Dillon J. said:

There is no doubt that Clarke's duties as dormitory supervisor created an obvious opportunity for abuse within a relationship of absolute dependency for the child and uncurtailed power for Clarke.

**74**  Dillon J. found that the precedents set by the Children's Foundation, supra, and Boys' and Girls' Club, supra, favouring vicarious liability where the employee was in a parent-type relationship, were decisive.

**75**  Counsel also cited V.P. v. Canada (Attorney General) and Starr [*(1999), 186 Sask. R. 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K701-JYYX-6453-00000-00&context=) (Sask. Q.B.), and D.W. v. Canada (Attorney General) and Starr [*(1999), 187 Sask. R. 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K701-JYYX-6455-00000-00&context=) (Sask. Q.B.), two decisions involving the same perpetrator at the same Indian residential school. In both cases the trial judges found vicarious liability: in V.P., at para. 107, because, "the discipline power the administrator had over the student residents gave the administrator meaningful power over the children and staff and meaningful parent-like power over the children"; and in D.W., at para. 24, because the perpetrator was the legal guardian of the children with 24-hour-a-day parental authority and control over them.

**76**  Counsel for the Oblates submitted that the instant case is one involving the creation of opportunity, without job-created power over the victim or other link between the employment and the sexual assaults. Counsel said that parent-like authority of the employee over the student is the common finding in the cases that leads to the imposition of vicarious liability and that Saxey only received the normal respect expected to be given by children at an educational institution. Counsel submitted that there was nothing parent-like about his relationship with the plaintiff and there was nothing to constitute the "strong connection" required by the risk created by the employer's enterprise and the wrongful act. Counsel said that while Saxey's duties provided an opportunity for him to come into close contact with the plaintiff, his duties as a baker did not put him in a position anywhere close to that of a surrogate or foster parent-like relationship. Thus, counsel argued, the opportunity cases do provide an unambiguous precedent, with the result that there should be no finding of vicarious liability against the Oblates for the sexual assaults committed by Saxey.

**77**  I disagree with the defence argument on this issue for several reasons. First, the mere fact that many cases imposing vicarious liability happen to involve "parent-like" fact situations should not be construed as meaning that such situations are a prerequisite for the imposition of vicarious liability. To the contrary, McLachlin J. in Children's Foundation, supra, after noting the "parental relationship" and other factors in that case stated, at para. 58:

This is not to suggest that future cases must rise to the same level to impose vicarious liability. Fairness and the need for deterrence in this critical area of human conduct - the care of vulnerable children - suggests that as between the Foundation that created and managed the risk and the innocent victim, the Foundation should bear the loss.

**78**  As well, Justices McLachlin and Binnie expressed the view in Boys' and Girls' Club, supra, that creation of a parent-type relationship does not constitute a precondition to vicarious liability in child abuse cases. At para. 26 McLachlin J. said, as follows:

Finally, I would reject any suggestion that an employee's job must bear a sufficient similarity to parenting to invoke vicarious liability in child abuse cases. Such an analysis seems to me to focus inordinately on the power exercised by the employee to the exclusion of other factors in the test propounded in Children's Foundation and is to be eschewed.

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| [emphasis in original] |  |

**79**  Secondly, the decision in G.(E.D.), supra, arose in a very different factual context than the instant case. It concerned sexual assault by an employee, a janitor at a public school. As Vickers J. notes at para. 16 of his decision, the janitor had no job-created power or authority over the plaintiff. The circumstances which existed at Christie were vastly different by comparison. For example, the defendant Williams described the strict regimen at Christie:

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| --- | --- | --- | --- | --- |
|  | Q |  | Mr. Williams, what was the discipline at the school like? |  |
|  | A |  | Very threatening if you didn't, you would get punished. They were very stern, you had to. There was -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Sorry? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | There was no ifs, ands or buts about what you had to do. There was no excuses, you had to do it. |  |
|  | Q |  | When you say you had to do it, what's the it that you have in mind? What sorts of things did you have to do? |  |
|  | A |  | Everything. We had no life of our own. You had to get up when they told you to get up, dress up when you were told to dress up, kneel when you were told to kneel, stand when you were told to stand, we had no life. Everything they told us to do, that's what I mean. |  |

**80**  The defendant Williams' recollection of the treatment by both religious and lay staff members was of physical and emotional violence, deprivation, belittling, and intimidation. He described the discipline at Christie as "very threatening" and "very stern". L.B. described discipline at Christie as "very strict, very harsh".

**81**  Plaintiff's counsel submitted that fear played a large role in maintaining order and discipline within Christie during the time of the plaintiff's attendance. He said that the link between fear and obedience was clear from the plaintiff's cross-examination, as follows:

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| --- | --- | --- | --- | --- |
|  | Q |  | [E.B.], I understand that you were a fairly obedient child at school, right you listened to your supervisor isn't that correct? |  |

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

|  |  |  |  |  |
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|  | Q |  | And when the child care supervisor asked you to do something you would do it isn't that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Lots of fear, yes. |  |
|  | Q | Sorry I didn't hear you? |  |
|  | A | Lots of fear, yes. |  |

**82**  With regard to the plaintiff's fear at Christie, Dr. Riar testified, in cross-examination, as follows:

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| --- | --- | --- | --- | --- |
|  | Q |  | Page 3, paragraph 2. The brother who looked after them was very strict. This would be the brother who was looking after the children, right? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |
|  | Q | And he used to strap other children? |  |
|  | A | That's right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | [E.B.] was very afraid of him and kept his distance from him? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

**83**  The defendant Williams rejected counsel's suggestion that the First Nation's cultural value of respect for one's elders was no different than the respect for adults taught at Christie. He stated "[t]hey didn't teach you stuff like that in that school. They taught you fear, lots of fear. They got everything they wanted through fear and intimidation. I don't think that's respect".

**84**  Most importantly, children at Christie were told to show respect to the adult staff members and do what the staff asked them to do. Such a rule applied to all staff members including Saxey. On examination for discovery, Brother Cavanaugh gave the following important piece of evidence:

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| --- | --- | --- | --- |
|  | Q | Were the children told to show respect for adults? |  |
|  | A | Yes, I would say so. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | That would include the adult staff members at Christie? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's correct. |  |
|  | Q | All of them? |  |
|  | A | That's correct. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | They were instructed to speak respectfully to all adult employees? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I would say so, yes. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | They were instructed to listen to staff members when they spoke to the children and obey what they said? |  |
|  | A |  | I would say they -- they would have to respect the adults and do what they were asked to do. |  |

**85**  Sister Anita agreed with these answers given by Brother Cavanaugh. She added "I would say when they were assigned a charge they would have to do what the kitchen staff said and in the laundry, they would have to do what the laundry staff said".

**86**  Brother Cavanaugh also testified that children who worked in the kitchen took their instructions and directions from the cooks. He agreed that all kitchen staff had the power to instruct the children when they were doing chores in the kitchen.

**87**  The plaintiff testified that he and other children at Christie had to do what they were told to do by adult staff members. L.B. testified that he recalled children being told at the beginning of the year, and just about every month, that the children had to listen to the lay staff if they requested children to do something. The defendant Williams testified that the children were expected to listen to and obey staff, including Saxey.

**88**  The defendant Williams described how the Oblate disciplinarians made it clear to the children that they were supposed to listen to and obey the lay staff:

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| --- | --- | --- | --- | --- |
|  | Q |  | How as children, did you know that you were supposed to listen to the staff? |  |
|  | A |  | Didn't take long. You get slapped around a couple of times, you're told "you listen to that man, when he tells you something," you learn fast who to listen to. |  |

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| --- | --- | --- | --- |
|  | Q | Who is it that told you that? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | It was guys like brother Osborne, Father Sheahan. Brother O'Brien used to tell us the same thing you but he wasn't cruel about it he used to just tell us kindly listen to him and you won't get hurt, you won't get in trouble. |  |

**89**  The plaintiff testified about how Brother Blackburn would "threaten to shove a bar of soap in your mouth and wash out your mouth" for speaking against a lay staff member. L.B. recalled that both the religious and the lay staff had "ultimate power in that institution".

**90**  The defendant Williams testified that all staff, including the lay staff, assigned chores to children Christie. He further testified that chores were occasionally assigned "on the spot". His recollection, from the perspective of a child at Christie, was that all of the lay staff had the authority to instruct the children to "do this and do that. And you had to do it." He described some of the chores assigned to children to be "washing pots and pans, cleaning tables, sweeping floors, cleaning out bathrooms, splitting wood. Mopping stairs, hallways and cleaning out the chapel".

**91**  L.B. recalled that lay staff assigned various tasks in the course of taking garbage to the dump, doing laundry, repairing the road, transporting supplies, and cleaning up the schoolyard and beach. The plaintiff identified that lay staff would instruct children to do tasks in the course of their supervision of particular chores relating to garbage detail, laundry chores, kitchen chores related to cleanup, and food preparation.

**92**  Brother Cavanaugh was asked in direct examination whether "children would be asked to do spot chores." He responded "not normally". Plaintiff's counsel argued that whether such spot chores were "normally" assigned was not the relevant point. He said that given the supervisory role of lay staff in assigned chore situations, a child at Christie would reasonably perceive all staff members as having blanket authority, regardless of the particular context. He claimed that such implicit power and authority was an unavoidable corollary of the lay staff's supervisory functions during assigned chores.

**93**  Plaintiff's counsel contended that while Saxey had bakery duties, he was clearly more than just a baker at Christie. He pointed to the Olbates' interrogatory answers which identified Saxey as a "Boat Operator and Baker". Principal Kearney's staff lists for 1959 to 1961 identify Saxey's functions as "bakery and maintenance". A report of the Regional Dietician in 1964 identifies Saxey as being "[f]ull-time at school" and only a "[p]art-time baker". Sister Anita recalled that Saxey was "primarily the baker and the boat driver and maintenance person". The defendant Williams recalled Saxey as "a baker" who sometimes "worked on freight". Counsel submitted that Saxey's general role at Christie was evidenced by the July 1960 letter from Principal Noonan which identifies Saxey as the "main cog around here right now". Counsel said that the evidence discloses no clear demarcation of Saxey's employment duties, powers and responsibilities.

**94**  Counsel also said that due to understaffing at Christie, there could be no rigid delineation of employment duties for any staff member. Duty allocations were entirely oral. If work needed to be done at Christie, everyone, staff and children were expected to contribute. According to the evidence of Sister Anita and Brother Cavanaugh, Christie was not a place where staff were heard to say, "I'm not going to help you with that particular task because it's not a part of my job description".

**95**  Counsel also pointed to a photograph of Saxey "burning trash" with a tractor. He said that this was another one of many miscellaneous tasks that comprised Saxey's role at Christie. The plaintiff testified that Saxey used to give rides to the children on the tractor. He was cross-examined, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Now, the rides that he would give is when the children arrived at the dock is that correct? |  |
|  | A |  | No, like he was on garbage detail too, eh, and he would run the garbage down the beach and after dumping the garbage he would give them a ride around the beach. |  |
|  | Q |  | So he would give the children a ride on the tractor? |  |

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

**96**  The plaintiff also testified that Saxey "spent a lot of his time in" the bakery and that sometimes he would see Saxey preparing dough for the bread in the bakery. The plaintiff also recalled seeing children in the bakery at the same time as Saxey. He described how there were stairs coming from the upstairs senior boys' dormitory from which he could see into the bakery. He testified that he recalled seeing children through that window in the bakery "helping Martin bake bread". The plaintiff further testified, as follows:

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| --- | --- | --- | --- | --- |
|  | Q |  | Okay. Exactly what were they doing, what's the visual memory that you have? |  |
|  | A |  | I would see them with the bread pans, that they put the dough in, they were putting the grease in them. |  |

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| --- | --- | --- | --- |
|  | Q | Do you [have] any other memories? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | They were rolling the dough, making it into bread size. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Anything else? |  |
|  | A | And cleaning up after they finished. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Do you remember whether Martin Saxey was the only adult that you saw in the bakery on those occasions? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | He's the only one I recall. |  |

**97**  Evidence was called that Saxey baked bread at night. However, there is no evidence that Saxey was never in the bakery at other times of the day. The defendant Williams testified that he often saw Saxey in the bakery from the morning until the late afternoon. He recalled that many children worked in the kitchen and bakery, both boys and girls.

**98**  Brother Cavanaugh estimated the amount of bread baked at Christie to be 30,000 loaves per year. He testified that there was "a lot of work involved in making the bread". Father Mackey estimated that Saxey would "bake in the realm of 200 loaves a night not every night consistently but depending on need". He agreed that such an amount of baking required "very much" cleanup. Counsel argued that given the magnitude of the daily task of bread baking, it is inconceivable that children would not be involved in some of that work, as testified to by the defendant Williams and the plaintiff.

**99**  Counsel also argued that the documentary evidence supports the testimony of the plaintiff and the defendant Williams on this point. The 1953 Regional School Inspector's Report states that older girls are "obliged to do chores in the bakery and kitchen". The 1954 Regional School Inspector's Report states that "[s]enior girls receive practical training in the bakery, kitchen, laundry and sewing room". The 1955 Regional School Inspector's Report states "[a]ll senior and intermediate girls assist in the kitchen and bakery". The 1959 Regional School Inspector's Report states "[t]he senior girls receive good experience as a result of their chore duties in the kitchen and bakery". There is a photograph from 1960 showing several girls at Christie preparing loaves of bread dough. The photo is titled "Bakery". A 1964 report states that children's chores included "slicing the bread".

**100**  Plaintiff's counsel submitted that the Oblates called evidence for the apparent purpose of drawing a strict distinction between the kitchen and the bakery. However, counsel submitted that it was unlikely that the people at Christie between 1957 and 1962 recognized such a distinction. For example, Sister Mary Laura testified that the "Bakery" photo was actually taken in the adjacent kitchen. After baking, the bread was sliced and stored in the adjacent kitchen. The bakery was accessible only by passing through the kitchen. Counsel submitted that, in reality, the bakery was simply the part of the kitchen where bread was baked.

**101**  The testimony of Brother Cavanaugh was only that children did not work in the bakery; the bakery being the small room "just outside of the kitchen sort of adjacent to the kitchen". In direct examination, the only reason he could think of for this practice was because of the danger posed by the dough-making machine and the ovens. In cross-examination he added that he believed that "Martin would prefer to bake by himself." Brother Cavanaugh did not testify that children performed no bakery-related chores in the adjacent kitchen. The documentary evidence clearly indicates they did.

**102**  Father Mackey's testimony was to the same effect. Counsel said that he focused on the narrow and irrelevant issue of whether children worked in the adjacent room "where the oven was":

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So would there ever be any children in the bakery with him? |  |
|  | A |  | If you mean in the bakery where the oven was your lordship never. No, no, Martin would not allow anybody else in there with him. It was his area and he was in charge. |  |

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | I don't want you to guess but do you know if the children had any role in such clean up? |  |
|  | A |  | This is absolutely not a guess your lordship. As I said earlier, Martin was very jealous of his bakery and would not allow any of the children to do any of the clean-up in the bakery. |  |

**103**  Counsel argued that as the staff member responsible for bread baking, Saxey would certainly have had implicit, and probably had explicit authority over the children performing kitchen and bakery-related chores, such as clean-up, bread slicing and dough preparation. He said that whether those children were in the bakery, or a few feet to the north in the adjacent kitchen was immaterial.

**104**  Father Mackey's categorical assertion that Saxey permitted "absolutely no one in the bakery" is contradicted by documents recording that Ms. Paul, the cook, lost a part of her finger in the big bread mixer in December 1963. Brother Cavanaugh testified that this particular machine was located in the bakery. Counsel submitted that, indeed, this accident, which preceded the arrival of both Brother Cavanaugh and Father Mackey, may have prompted a change in practice concerning access to the bakery room after 1964.

**105**  Counsel submitted that this much was clear from the evidence of Father Mackey: Saxey was "in charge" of the bakery and had powers second only to the principal in that regard. The bakery was a room adjacent to the kitchen and accessible only through the kitchen. He said that there was abundant evidence that the kitchen was a part of Christie where many children worked under the direct authority and supervision of lay staff members. Father Mackey testified that Saxey exercised his authority to "not allow anybody else" in the bakery and to "not allow any of the children to do any of the clean-up in the bakery". Counsel also contended that the fact that Saxey had such power and authority over the children by virtue of his employment was highly relevant, and the fact that Saxey chose to exercise his power and authority so as to exclude children from the bakery was beside the point.

**106**  Counsel also argued that the fact that the plaintiff never helped Saxey in the bakery did not mean that the plaintiff was shielded from the power and authority that Saxey held by virtue of his position and status within Christie's institutional environment. He said that children in this setting would perceive Saxey as having authority regardless of whether they encountered him in the bakery, in the kitchen, or elsewhere at Christie.

**107**  Among the specifically enumerated subsidiary factors to be considered in determining the sufficiency of the connection between the employer's creation or enhancement of the risk of sexual assault is "the opportunity that the enterprise afforded the employee to abuse his or her power". See Children's Foundation, supra, at para. 41. McLachlin J. commented further on the factor of opportunity, at para. 40:

Of course, opportunity to commit a tort can be "mere" or significant. Consequently, the emphasis must be on the strength of the causal link between the opportunity and the wrongful act, and not blanket catch-phases. When the opportunity is nothing more than a but-for predicate, it provides no anchor for liability. When it plays a more specific role - for example, as permitting a peculiarly custody-based tort like embezzlement or child abuse - the opportunity provided by the employment situation becomes much more salient.

**108**  On this point, plaintiff's counsel noted that Saxey lived in the upper floor of a building situated on that portion of the grounds of Christie to which the junior and senior boys were given free access. Directly outside his window were the swings where children played. He had unrestricted access to everywhere where children might be found playing. The plaintiff testified that during recess the children would routinely play on the swing or in the yard close to where Saxey lived.

**109**  The defendant Williams recalled that Saxey "lived in amongst us".

**110**  The children and the lay staff at Christie referred to each other by their first names. There was no rule at Christie prohibiting the adult staff members from forming casual acquaintances with the children. Staff members did in fact play with the children and were allowed normal physical contact in the course of such play. Counsel said that whether or not Saxey elected to engage in such activity with the children was immaterial.

**111**  The plaintiff testified that during longer periods of free time, children played at different locations such as in the gym, the beach, on the rocks, or in the trees. Brother Cavanaugh testified that children were allowed outside in the evening until it was close to bedtime.

**112**  When asked whether a supervisor was present during recess, the defendant Williams testified "No. They were usually busy doing whatever they had to do". The plaintiff recalled that the children would often climb trees in the back wooded area and that there "never used to be an adult there, there just used to be boys". During free time, the plaintiff testified that adults could be found "wandering around". He agreed, in cross-examination, that the supervisors were seldom immediately present but were "around":

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | What you're saying is that they weren't standing right there but they were around is that correct? |  |

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

**113**  According to Brother Cavanaugh, the reality of the supervisory structure at Christie was that "you'd be involved with part of the group in an activity, or whatever, and the other group was free to -- to roam around".

**114**  The plaintiff recalled that there were organised sports on some days, but not every day. L.B. did not recall organised activities being a common or every-day event. The plaintiff recalled some improvement in terms of sports during his final year at Christie, with the arrival of Father Mackey. Counsel submitted that it is likely that organised sports were much less common prior to the tenure of Father Mackey as principal, and that the higher federal grants in the mid-1960s may have allowed for more organised sporting activities as well.

**115**  Organised events, such as volleyball or basketball, involved a portion of the students, while the remainder were free to participate in other activities at other locations (to "roam around" as Brother Cavanaugh stated). The defendant Williams testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | What did those children who did not have chores do after supper on a week day? |  |
|  | A |  | Go to the gym, play volley ball, basketball, marbles. |  |
|  | Q |  | Were there children at different locations at the same time? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Like what do you mean? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Some children in the gym, some children on the beach, some children in another building? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. |  |

**116**  Counsel argued that organised activity ensured that those students who were not directly involved were unsupervised, and that any given organised activity would have consumed the attention of the limited staff and confined them to a particular location. He said that in such circumstances, organised activity would have actually enhanced the opportunity for abuse.

**117**  In light of the evidence outlined above, I agree with plaintiff's counsel that G.(E.D.), supra, and the other cases relied upon by defence counsel are of limited value to assessing the plaintiff's claim against the Oblates. I am persuaded by plaintiff's counsel's argument that the cases relied upon by the defence do not "unambiguously determine on which side of the line between vicarious liability and no liability the case falls". Therefore, I find that this issue must be determined by the application of the policy based approach as prescribed in Children's Foundation, supra.

**118**  In addressing this approach, plaintiff's counsel contended that, in summary, Saxey's living quarters was located in the midst of an overcrowded and understaffed playground populated by especially vulnerable children; and that the closed boundaries of Christie, its custodial character, its isolation, and the high ratio of students to adult staff members materially enhanced the risk of abuse. Counsel also submitted that while Saxey's approach to the plaintiff was one of superficial enticement with candy and other sweets, it was clear from a close reading of the plaintiff's evidence that Saxey used authority to exert power over the plaintiff:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And did you know after a couple of years of this pattern of abuse that when Martin Saxey came to you and started talking about candy, did you know what was really going on? |  |
|  | A |  | I used to -- I used to try and avoid him and stay away from him. I used to want to run and hide every time I seen him I would be scared to be close to him. I never wanted to see him. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Did you go with him because you wanted the candy? |  |
|  | A | No it's more like being threatened. |  |
|  | Q | Did you feel threatened? |  |
|  | A | Yeah. |  |

**119**  Plaintiff's counsel argued that while the plaintiff did not say that he was threatened, he said it was "like being" threatened and that the only thing that is "like" being threatened is the experience of being told to do something by a person in authority. Counsel also argued that job created authority need not be the sole source of authority facilitating Saxey's sexual assaults upon the plaintiff. He said it was sufficient that the authority conferred upon him contributed to his ability to perpetrate the assaults, and thus, materially enhanced the risks of the assaults occurring.

**120**  On the other hand, defence counsel submitted that of the factors put forward by McLachlin J. in Children's Foundation, supra, few of them applied to the facts in the case at bar. Counsel also referred to the following point made by McLachlin J. at para. 46 of the case:

The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability - fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

**121**  Defence counsel contended that Saxey's employment as a baker at Christie did not give him "special opportunities" and, in particular, did not give him a power or dependency relationship with the children at Christie. Counsel submitted that if sexual abuse perpetrated by a baker at a residential school can give rise to vicarious liability, it is difficult to see how this could be based on anything other than the mere fact that it was a residential school. Counsel also contended that such wide-ranging vicarious liability was not what was foreseen by the Supreme Court of Canada decisions. With respect, I disagree with the defence position and prefer plaintiff's counsel's analysis and argument on this issue.

**122**  Plaintiff's counsel submitted that the key to the determination of this issue is whether the operational characteristics of Christie, as an enterprise, created and materially enhanced the risk of the sexual assaults perpetrated by Saxey upon the plaintiff. He carefully and thoroughly reviewed the evidence of the operational characteristics of Christie under several headings, which he summarised, in argument, as follows:

1. The children were separated from their families and held in custody all day and every day. Brothers were separated from sisters; older siblings were separated from younger siblings. Christie was geographically isolated, enhancing its closed institutional character and exacerbating the severance of relations with parents and extended family.
2. Christie was chronically overcrowded and understaffed. The number of children held in custody exceeded the capacity of the supervisory staff to effectively supervise.
3. Adult employees of Christie, including Saxey, lived within the closed boundaries of the school, facilitating unrestricted and unsupervised access to the children for prolonged periods of time. There was no effective mechanism to prevent sexually predatory behaviour. Employees of Christie, including Saxey, were permitted to form casual acquaintances with the children.
4. The children were conditioned under a regime of education, religion and discipline to demonstrate respect and obedience toward all of the adult employees of Christie, including Saxey. The institutional character of Christie was such that Saxey was explicitly or implicitly clothed with power and authority over the resident children.

**123**  Plaintiff's counsel referred to the testimony of Dr. Janke, an expert in the theory and practice of sexual offender treatment, who testified that there are identifiable environmental factors that enhance the likelihood of sexual offences occurring. He said, in cross-examination:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | I notice that you have some involvement in the treatment of sexual offenders? |  |
|  | A |  | That's correct. I have had extensive involvement in the treatment of sexual offenders. |  |
|  | Q |  | And I'm just looking at your c.v. that can be found in Exhibit 10, tab 9 A. |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And as you look through the c.v. for things relating to the treatment of sexual offenders the first one I see is under the heading of committees, fourth one down, working group sexual offenders treatment programs. I wonder if perhaps you can elaborate a little bit on what that is? |  |
|  | A |  | The forensic psychiatry services at that time wanted to have standardized or to set standards for the treatment of sexual offenders. In both -- because at that time we were with the adult services as well, it would be it would apply to both adult and youth services. Because of my at that time very intense involvement with the sexual offender treatment program of youth forensic psychiatric services, I was a member of that committee. We had at that time a well established sexual offender treatment program that had some written protocols but certainly had a very clear understanding of what was expected. And so that was part of my contribution, was to help clarify that and in fact provide it to the adult services at that time. |  |
|  | Q |  | Okay. Doctor I'm not going to go through all of these items relating to your qualifications in sexual offender treatment programs. But I take it from looking at the c.v. it's an area in which you feel amply qualified to give evidence? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And part of your professional work involves day-to-day treatment of sexual offenders? |  |
|  | A |  | Less so now although I do have some ongoing -- I do have some patients in my private practice who have had a past history of sexual offending. I now am involved in more the assessment role in the in-patient assessment unit but in my participation in other committees I do have a role in ongoing treatment issues and I have consulted. |  |
|  | Q |  | Does any of your learning or any of your professional work in sexual offender treatment programs entail teaching sex offenders how to minimize the risk of re-offending? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That would be the primary thrust of the treatment. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And is there a body of scientific knowledge that you possess that outlines specific types of social or domestic situations that recovering sex offenders (ought) to avoid? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And are there identifiable environmental factors meaning social and domestic that enhance the likelihood of sexual offences occurring? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | What are those? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That would be the sex offender not only having access to potential victims but being put in a position of power and authority over the individuals and having the unsupervised opportunities to be with the victims. |  |

**124**  Plaintiff's counsel then presented Dr. Janke with the following list of Christie's operational characteristics, established by the evidence:

1. staff and students lived at Christie 24 hours per day, 7 days per week;
2. Christie was accessible only by boat, only in good weather, and with no docking facilities;
3. children were separated from their parents for 3 to 9 month periods, year after year;
4. older siblings were separated from younger siblings;
5. sisters were separated from brothers;
6. Christie was staffed by 16 to 20 adult employees and populated by 145 to 158 children;
7. Christie had only four disciplinarians/supervisors (approximately 35 to 40 children each);
8. approximately 80% of the children were aged 12 years or younger;
9. discipline was enforced by fear of corporal punishment;
10. staff were entitled to form casual acquaintances with the children;
11. children performed domestic chores alongside domestic staff such as cooks or laundry staff; and
12. children were told that they had to respect the adult staff and do what they were asked to do by the adult staff.

**125**  Dr. Janke then testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Doctor, looking at those factors collectively would you say that they materially enhance the possibility of sexual abuse? |  |
|  | A |  | As outlined in the assumptions, yes, I would say that that was an environment in which sexual abuse could easily occur. |  |

**126**  Keeping in mind the evidence of the link between fear and obedience at Christie, and that children were told to show respect to the adult staff members and do what the staff asked them to do, Dr. Janke gave the following important evidence about factors 9-12, which stood out in his mind as being particularly risky. On factor 9, he testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And are there any of those factors individually that stand out in your mind as particularly risky? |  |
|  | A |  | Point nine, discipline enforced by fear of corporal punishment is a powerful motivator, would give a potential abuser an easy tool to intimidate a potential victim... |  |

**127**  In re-examination, Dr. Janke testified:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. And number nine, the discipline enforced by way of corporal punishment, if I said that this would be normally done only by a child care supervisor and not any of the other adults, would that make a difference? |  |
|  | A |  | Only slightly so, because I would expect a child in that setting to generalize that fear to all the adults that were dealing with him. |  |

**128**  Regarding factors 10, 11 and 12, Dr. Janke testified:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And are there any of those factors individually that stand out in your mind as particularly risky? |  |
|  | A |  | ...The staff entitled to [form] casual acquaintances with children is in one sense a two-edged sword, obviously it allows someone to befriend a potential victim and no one to think there's anything unusual about it, but it also potentially allows the child or victim to have someone they felt they could confide in. So that's a two-way street. |  |

Children perform, number 11, again it allows children to be in relatively unsupervised situations with people who would not necessarily be expected to meet the same standards as teaching staff.

Number 12 is one that is ubiquitous to adult child offender situations, where there's -- in almost all circumstances the child had a sense they should respect and obey adults.

**129**  In re-examination, Dr. Janke testified:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But if the alleged abuser was, as in Mr. Saxey's case and I'll put these assumptions to you, doctor, that he was a baker at the school, he had no positional authority over the children, Mr. Saxey had children and grandchildren at the school, [E.B.] had numerous family members at the school, and there were no children working in the bakery with Mr. Saxey, what - how would this change? |  |
|  | A |  | The fact that there were no children working in the bakery would eliminate even a perceived position of authority, it would remain my opinion that children in that setting would perceive adults as having authority. The presence of family members of [E.B.] there clearly reduces the isolation and gives him the opportunity to disclose to someone. It doesn't mean the abuse wouldn't happen, but it certainly reduces it. The fact that Mr. Saxey had other relatives there would play a role only in, well it would play two possible roles, one, reducing his opportunity to be unsupervised with a child from the school and, two, he would have access to other potential victims in a much more intimate setting where he would have more power and control. |  |

**130**  With respect to Dr. Janke's evidence that the presence of family members of the plaintiff clearly reduced the isolation and gave the plaintiff the opportunity to disclose to someone, it overlooks, as plaintiff's counsel pointed out in his submission, three of the institutional features of Christie: that children were separated from their parents for three to nine month periods, year after year; that older siblings were separated from younger siblings; and, sisters separated from brothers. As plaintiff's counsel also pointed out, within the highly regimented environment of Christie, the plaintiff's relatives did not treat him like a relative. The plaintiff testified on this point, as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Did they treat you like a grandchild? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Back in our homeland they did. There was a big difference from being residential and back at our home because there were, I don't know, more free to communicate with them. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Where was it more free? |  |
|  | A | At home. |  |

**131**  I conclude that the evidence regarding the operational characteristics of Christie, as well as Dr. Janke's opinion based upon that evidence, satisfies the principles to be followed in finding vicarious liability as set out by McLachlin J. in Children's Foundation, supra. In my opinion, the evidence establishes "a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom". This being so, I find the Oblates vicariously liable to the plaintiff for the injuries he sustained as a result of the sexual assaults upon him by Saxey.

Issue 2 (ii)

**132**  Having concluded that the Oblates are vicariously liable to the plaintiff, I do not consider it necessary for me to go on and decide whether the Oblates are liable in ***negligence***.

Issue 2 (iii)

What specific injuries has the plaintiff suffered as a result of the sexual assaults?

Answer: Interpersonal difficulties, anxiety, symptoms of PTSD, depression and alcohol abuse.

The Parties' Positions

**133**  Counsel for the plaintiff submitted that the plaintiff suffers, or has suffered, from a number of psychological problems attributable to the sexual assaults. These include: bedwetting; interpersonal difficulties; sex-related difficulties; anxiety; symptoms of PTSD, including flashbacks, nightmares and intrusive thoughts; depression, including suicidal thoughts, loss of appetite and lack of sleep; and alcohol abuse. Counsel also submitted that the sexual assaults effected the plaintiff's level of academic achievement and contributed to his alcohol abuse, which in turn effected his earning capacity.

**134**  With the exception of sex-related difficulties, counsel for the Oblates did not dispute that the plaintiff suffers, or has suffered from these psychological injuries. Counsel for the Oblates did submit, however, that the Oblates are not liable for these injuries. Instead, counsel pointed to a myriad of traumatic life circumstances suffered by the plaintiff since his attendance at Christie. In addition, counsel emphasised a number of factors that put the plaintiff at significant risk for developing an alcohol addiction in any event.

The Plaintiff's Evidence

**135**  The plaintiff testified extensively about the effects of the sexual assaults while he was still a student at Christie. He testified that he felt scared and threatened by Saxey. He felt violated and ashamed. He began his life-long problem with anxiety at this time. He was too frightened to tell his siblings or other relatives at Christie, or any of the staff members about the sexual assaults.

**136**  The plaintiff testified that as a child the sexual assaults caused him to withdraw from the other students. He also testified that the abuse caused sleeplessness and nightmares. He was frightened at night and would put his head under his pillow and cry himself to sleep. He began to disregard his personal hygiene. He lost his appetite. He had difficulty concentrating in school and his grades suffered as a result. He testified that he was physically punished, though did not give specifics, and was verbally chastised by his teachers as a result of his poor grades.

**137**  The plaintiff also gave evidence concerning his bedwetting problem while at Christie. The plaintiff testified that he was ridiculed by the other children as a result of his bedwetting, and that he tried to cover it up by staying in bed after the other boys left the dormitory so he did not have to change his sheets in their presence. The teasing was exacerbated by the fact that the plaintiff had begun to disregard his personal hygiene, and sometimes smelled of urine as a result. He was frightened to tell anyone about his bedwetting and felt ashamed. He also testified, in cross-examination, that he was strapped for wetting the bed.

**138**  The plaintiff testified about traumatic events at Christie apart from the sexual assaults, partly set out above. In particular, the plaintiff testified that often the teaching staff was quite strict and would, for example, hit the children with a ruler if their nails did not pass morning inspection. He also testified about one experience where a nun required him to stand in the corner of his classroom for the duration of the class. He had wet the bed and not bathed, and the nun chastised him for being "stinky". He testified that his classmates knew why he was being punished.

**139**  The plaintiff left Christie in June of 1965. In September he attended grade nine at a school in Mission, British Columbia. He had trouble concentrating, his grades were poor and he did not enjoy school. He left school in December 1965 and did not return.

**140**  After leaving school in 1965, the plaintiff's life can largely be described as tumultuous. His unfortunate work history is plagued by alcohol-related problems, frequent periods of unemployment, and job-related injuries. His personal life was also tumultuous, and he was convicted of several criminal offences.

**141**  After leaving school in 1965, the plaintiff obtained a job at the Zeballos mine. He testified that for the first time, alcohol started to become a problem. He testified that his early use of alcohol was intended to alleviate the pain stemming from his sexual assaults. In chief, the plaintiff explained his early use of alcohol as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Why were you drinking? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Because of the sexual abuse that happened and because I made the money and I was able to afford the booze, and I thought the booze would drown out the thoughts of that sexual abuse that happened to me when I was younger. |  |

Approximately six months after starting his employment, he was dismissed because of alcohol abuse.

**142**  The plaintiff began work with Northern Hemlock Logging ("Northern Hemlock") in Zeballos in April 1966. He was dismissed from this position approximately one year later, in 1967, because he was missing days due to drinking, or attending work while intoxicated or while hung over. He testified that during this time he was having difficulty coping with memories of the abuse, and suffering from nightmares.

**143**  After being dismissed from Northern Hemlock, the plaintiff was convicted of the first of several criminal offences, most of them alcohol related. He was sentenced to 30 days imprisonment for the theft of a bottle of wine. The plaintiff described the circumstances of the offence as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Can you elaborate on how the offence occurred and what your circumstances were at the time? |  |
|  | A |  | I was drinking prior to that offence and ran out of money, ran out of booze, and I wanted to drink more, and I knew where the bootlegger was hiding and I went to his place and that's when I got that wine. And the bottle of wine, I stuffed it in my coat and I ran. |  |

**144**  The plaintiff served 20 days in Oakalla prison, and returned to Zeballos. He was unemployed for approximately three months, before returning to work with Northern Hemlock for approximately one and a half to two months in 1967. He was again terminated in late 1967.

**145**  After being terminated from Northern Hemlock, the plaintiff testified that he was once again incarcerated for an alcohol-related offence. He described the circumstances, in chief, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Can you explain the circumstances behind that charge? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I stole a boat at the time. |  |
|  | Q | Can you give us more detail then that? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I was living in Queens Cove with my sister and brother-in-law, and we went in into Zeballos and I started drinking in Zeballos, and my brother-in-law and my sister left me behind, they went back out to Queens Cove, and I was drunk, and I wanted to go back with them, but they had already taken off, so I went down to the boat, where the boats were, and I stole a boat from there to get out -- back out to Queens Cove, and I was pretty intoxicated at the time, I don't know, but I did manage to get out to Queens Cove with that boat. |  |

The plaintiff was sentenced to six months, and served four months in secured custody. He was released in early 1968.

**146**  The plaintiff commenced work in April of 1968 with Butler Bros. Logging ("Butler Bros.") in Grant Bay. In chief, he described the period between being released from prison and commencing work with Butler Bros. as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Does that take us to April 1968 or were there other events in your life? |  |
|  | A |  | I was drinking a lot in that period of time, and I was out of work, I didn't go to work, and I was going between Queens Cove and Zeballos, between those two. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Why were you not working? |  |
|  | A | Well, alcohol was getting the best of me. |  |
|  | Q | How were you coping with the abuse at that time? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That was -- it was difficult, because you know, those nightmares hadn't left me, and when those nightmares came, bring on the sexual abuse that happened to me and I couldn't -- I couldn't cope with it, and I thought alcohol would take that away, but it seemed I drank heavier and heavier. Instead of drinking beer I was drinking whiskey and wine and I was mixing them because I wanted to so much get rid of that nightmare that was happening, and thinking about that sexual abuse. I didn't know how else to deal with it. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Were you drinking every day at this time? |  |
|  | A | Pretty much, yeah (drinking). |  |

**147**  The plaintiff worked for Butler Bros. from April 18 to 24, 1968, and from June 20 to July 24, 1968. He testified that he could not remember why he ceased working from April 24 to June 20, 1968. He testified that he ceased working on July 24 because "I was drinking and I got fired".

**148**  The evidence from Butler Bros. indicates that the plaintiff was a satisfactory worker, but that he "leaves his job for no reason". It was plaintiff's counsel's submission, which I accept, that the use of the word "leaves" rather than "left", combined with the plaintiff's testimony supports the inference that the plaintiff failed to attend work due to his alcohol problem on more than one occasion, likely accounting for the period of interrupted employment from April 24 to June 20, 1968.

**149**  The plaintiff was unemployed from July 1968 to October 16, 1968, when he was hired by MacMillan Bloedel in Port Alberni. The plaintiff was terminated, according to MacMillan Bloedel records, "for cause" because he was "A.W.O.L. - Unable to Locate" on November 8, 1968. The plaintiff described the circumstances of his termination, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | [E.B.], tab 97 Exhibit 4, MacMillan Bloedel records, say that your employment with MacMillan Bloedel was terminated November 8th, 1968, and the notation in those records is A W O L - unable to locate. Does that assist you in remembering how your employment with MacMillan Bloedel came to an end? |  |
|  | A |  | Yeah. I started drinking, and I had missed three days and I got scared to report back to work, and so I left Port Alberni completely and I went back to Zeballos, and I never notified the company where I was. |  |

**150**  After leaving MacMillan Bloedel, the plaintiff testified that he lived between Zeballos and Queens Cove and was unemployed for the balance of 1968. He returned to work for Northern Hemlock in Zeballos in January 1969 and worked steadily until mid-May 1969. He testified that during this period he continued to suffer from nightmares, and continued to drink.

**151**  On May 14, 1969 the plaintiff was involved in a serious accident during the course of his employment. He was struck on the head by a falling rock during a landslide, and suffered from a linear skull fracture, as well as other broken bones and lacerations. Following the accident, he suffered from arthritis in his neck and lower back, causing him chronic pain, which has increased in intensity over the years. The plaintiff also testified that he had headaches and memory problems after the accident.

**152**  The plaintiff continued drinking after the accident. He testified, in chief, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | ...So can you remember what you did between August -- the end of August, 1969 and January 1970? |  |
|  | A |  | Well, I started drinking again, even though the doctor advised me not to drink alcohol, because of that serious head injury I had. But I know I went back drinking alcohol, and I was drinking hard liquor and having had gone through that experience, that seemed to -- it made it worse, because that sexual abuse that had happened to me, it had a really horrifying effect, because those nightmares, they were there, and they seemed to -- seemed to like they were coming back more often, and they were like just about every night they were coming back. So I was drinking and I drank a lot, and I didn't know -- I didn't know what to do to make myself -- I didn't know how to handle it. And I got -- I got in trouble because of my drinking. |  |

**153**  The plaintiff returned to Northern Hemlock on July 12, 1969, less than two months after the accident. He was terminated after approximately three months. When asked to describe why he was terminated, the plaintiff replied, in chief:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Tell us the story about how you lost your job in October 1969? |  |
|  | A |  | Well, I was drinking pretty heavy, and I was missing days there too, and I used to always be scared to see that, see the supervisor, fear of what he would be saying to me and fear of him -- hearing him say, you know, you're fired, you know. And I couldn't -- I couldn't bring myself do that, so I drank and drank, and my drinking got really heavy, and those nightmares, the sexual abuse, the accident and all that, that was a lot to be carrying around on my shoulders. It was a heavy burden, I had nobody to turn to, I was scared to get help. |  |
|  | Q |  | [E.B.], what actually happened on the day you got fired, can you recall the events? |  |
|  | A |  | The boss came to me and told me I was fired, told me to pick up my cheque. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Did he give you a reason? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yeah. He told me that I was drinking too much and I was missing days. |  |

**154**  The plaintiff testified that after being terminated in October 1969 he continued to drink heavily. He was then incarcerated on January 6, 1970 for breaking and entering a bar. He testified that he was intoxicated during the offence, and that he committed the offence to steal more alcohol.

**155**  After being released in May 1971, the plaintiff began work with Frank Beban Logging, near Queens Cove. He worked for approximately two months, before being terminated for missing work due to alcohol abuse.

**156**  The plaintiff met his future wife, S.B., in the fall of 1971. He began living with her in Kyuquot, British Columbia.

**157**  The plaintiff began work with P.A.L. Logging in the spring of 1972, but was terminated six weeks later after beginning to drink heavily when S.B. left for Vancouver. He testified, in chief, as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | How did that job come to an end? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | [S.B.], my wife, took off and she came to Vancouver, and I was left alone and I was upset, the relationship broken up and I drank after, I didn't go back to work with Sharbo, I left and went back drinking. I thought things were going to be working out because I had a job, that my relationship would be better. When I went back drinking, I drank heavy, and I was having nightmares were coming back, I was being upset, the sexual abuse and what happened were having an impact on me. |  |

**158**  The plaintiff then moved back to Zeballos and was hired on with Tahsis Company. S.B. returned from Vancouver to Zeballos, and she and the plaintiff began to drink heavily. As a consequence, the plaintiff lost his job, which he had occupied for four to six weeks, due to missed days.

**159**  However, when the couple moved back to Kyuquot in the fall of 1972, the plaintiff began a stable, 14 month period of employment with Kyuquot Freight. The plaintiff described his relationship with his employer as very supportive. He testified that during this period his relationship with S.B. was stable, that the nightmares he had been suffering from subsided and that having a "good friend" in his boss helped him cope with his problems. The plaintiff testified that during his employment with Kyuquot Freight, his alcohol abuse declined. He continued to drink, but described it, in chief, as "social drinking".

**160**  Unfortunately, this period of stability was brought to an end by the death of the plaintiff's mother due to alcohol related causes in 1973. While the plaintiff continued to work at Kyuquot Freight for several months after his mother's death, he subsequently quit and returned to Zeballos. He testified that everything that happened in his life up to that point, including the loss of his mother, the 1969 accident and the sexual abuse, "was piling up so much". The plaintiff fell back into a period of alcohol abuse, culminating with a sentence of two months imprisonment on November 3, 1973 for stealing an ambulance in order to get home after a night of drinking.

**161**  Following his incarceration, the plaintiff continued his downward spiral of alcohol abuse. He testified that he was employed at several positions in various places between early 1974 and 1976, all of which he was terminated from due to his alcohol abuse.

**162**  During this period his personal life was equally as tumultuous. The plaintiff testified that when he and S.B. lived together in Gold River in 1974, they were having a relationship "break down" due to communication problems concerning sexuality and other issues. The plaintiff testified:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Do you have any memory of as to how you were coping with the abuse during the time you were living in Gold River in that apartment? |  |
|  | A |  | No, I -- it became difficult because our relationship, we were having a break down in our relationship and I used to think that because [S.B.] wasn't communicating with me and letting me know -- or if we couldn't talk about our sexuality and how it was in our relationship. It's so difficult. Even for me to approach [S.B.] on the subject, I was scared and I felt like I was at fault because I felt like, you know, it was my fault for not satisfying her. |  |

**163**  Despite these problems, the plaintiff and S.B. married on February 22, 1976. He was unemployed and drinking heavily at the time. Shortly after the marriage the plaintiff and S.B. moved back to Zeballos, and he was rehired by Tahsis Company. The couple had their first child in September 1976. Shortly after their child was born, the plaintiff was terminated from his employment with Tahsis Company due to alcohol abuse. The plaintiff and his family subsequently went on social assistance, and he remained unemployed for all of 1977. Sometime that year, the plaintiff separated from S.B. and began living on the streets in Nanaimo. While on the streets he was attacked and struck on the head with a baseball bat.

**164**  On December 28, 1977 the plaintiff was remanded into custody on a charge of the sexual interference with the nine year old daughter of S.B.'s first marriage. As a term of his release, he attended an alcohol treatment program on the Christie grounds. The plaintiff testified that his return to Christie was "horrifying", and that he brought alcohol with him to the treatment centre to "forget all the sexual abuse, the abuse that happened in that school". His second child was born in April of 1978 while he was at the treatment program. The program was not successful, and he continued to drink after his release.

**165**  The plaintiff was sentenced, on appeal, to two years less-a-day, and incarcerated from November 24, 1978 to April 1980. During this time he initially continued to work with Frank Beban Logging, a job he had obtained in Spring 1978, though was returned to Snowdon correctional facility to serve the remainder of his sentence in closed custody after being terminated for drinking while at the logging camp. The plaintiff testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | What was your emotional health like at the time that you were released from prison? |  |
|  | A |  | It was unstable. It was hard to cope with. When I was getting out, when I was getting released, I was talking about going, getting drunk and I was saying well, probably -- you know, I'll probably end up in the drunk tank. And that didn't happen. I had to live with what I was carrying. It was hard to cope with, hard to talk about. I had nobody to confide with and I wanted to but I was too scared to touch on the subject, my life and all the happenings that have happened. |  |

**166**  Following his release from prison, the plaintiff remained unemployed. Between his release and the first half of 1983, he was incarcerated twice. He testified that during this period he was drinking heavily.

**167**  On May 30, 1983 the plaintiff testified that he was drinking with some strangers in Victoria who beat him unconscious and stole his money. He suffered from multiple soft tissue injuries to the face and scalp, as well as a fractured rib.

**168**  The plaintiff testified that the effect of the beating was "like snapping me awake. Like when you put on a light bulb". He continued to drink for approximately three or four months before entering a six-week alcohol treatment program in Courtenay. From that time, however, he has largely maintained sobriety.

**169**  It is clear, on the plaintiff's testimony, that there is a long history of alcohol abuse in his family. Both the plaintiff's mother and father died of alcohol-related causes. He testified that of his eight siblings who survived to adulthood, three sisters and one brother have also died of alcohol-related causes. His remaining sister and three brothers are alcohol abusers, though only one was not sober at the time of his testimony.

**170**  The plaintiff testified that after attending the treatment program, he started to make efforts to confront his problems related to the sexual abuse. He began taking upgrading courses, though he remained unemployed throughout 1984 and into 1985.

**171**  The plaintiff's third child was born in February of 1985. He testified that at the time of her birth, his relationship with S.B. "had split up, for a short period of time." However, sometime between February and June of 1985, the plaintiff and S.B. reconciled, and he again lived with her and the three children.

**172**  The plaintiff began a full-time welder program in June 1985. He completed the program on November 9, 1987.

**173**  Upon finishing the program, the plaintiff did not return to the work force, but took several life skills courses, as well as a course in mathematics, throughout the late 1987 to mid-1989 period.

**174**  The plaintiff described the state of his marriage in 1988 as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Were you with your wife [S.B.] when you were taking these courses? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, I was. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | What was your relationship with her like at this time? |  |
|  | A |  | Even though we lived together, we weren't -- we weren't really friends. It's like, you know, she lived in one room and I lived in another room sort of thing. There was very little communication... |  |

**175**  In June of 1989, the plaintiff was elected to a two-year term as a Band councillor in Campbell River. He also began work as a taxi driver in Campbell River on a full-time basis, attending to his Band responsibilities in his spare time.

**176**  The plaintiff testified about his relationship with S.B. at this time. He testified, "we were living together but there was hardly any communication between us". The plaintiff was cross-examined, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | There were also problems with -- between you and [S.B] and you've set this out in this letter where [S.B] would tell people that you and she were not having any intimate relationship and that was not true; is that correct she would tell people that she was not sleeping with you? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | And that was not true? |  |
|  | A | That was true. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But when she was saying it that was not true, you two were living together; is that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | We lived together but didn't sleep together. |  |

**177**  Following the end of his Band councillor term in 1991, the plaintiff quit his job and returned to Zeballos with S.B. and his children. He described the motivation for his decision as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Why were you not working? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I was trying to spend time to piece my life together, and I was hoping to have a good family life with my wife and children on a reserve. Trying to piece my life together was a tough struggle... |  |

**178**  However, the plaintiff testified that his oldest daughter subsequently ran away from home to live in Vancouver. Shortly thereafter, S.B. also left for Vancouver with the other children. The plaintiff testified that he blamed himself for his separation from his wife. He also testified that during this period the sexual abuse effected his social life in the sense that it made him "anti-social", and that he did not like being around other people.

**179**  As to his state of mind during this period, the plaintiff testified that he was very depressed, and that he felt powerless and hopeless. The plaintiff testified that during his time in Zeballos the depression that has plagued his life escalated significantly. He testified that he was depressed "pretty well" every day, to varying degrees. He also had suicidal thoughts. He kept a rifle and a single bullet beside his bed on a shelf.

**180**  With regards to his depression generally, the plaintiff testified that throughout his adult life he was "always depressed" and experienced weekly episodes of depression. During those episodes he did not eat or sleep, and he tended to drink. He described his depressive episodes, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | [E.B.], you've expressed how you felt on those days you were depressed. How did it affect your behaviour on those days? |  |
|  | A |  | Some days it was difficult. It was hard to cope with life, it was hard to cope with society. Like, you know, like a real raging bull, you know, it's coming at you really fast, you know. |  |

**181**  The plaintiff remained in Zeballos until mid-1992, during which time he was unemployed. He testified, in chief, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | [E.B.], when I asked you earlier why you weren't working, you said you were trying to piece your life together and it was a struggle. What were you struggling against? |  |
|  | A |  | Well, the marriage being abandoned, children being taken away. The sexual abuse that happened, my new beginning, trying to begin a new life in sobriety. |  |
|  | Q |  | You mentioned the sexual abuse, what sort of symptoms were you having in 1991 when you were living in Zeballos, 1991 and 1992? |  |
|  | A |  | I was having -- I was depressed and there was, you know, nightmares that I had that would start to come back again. They were coming back more. |  |

**182**  In the fall of 1992, S.B. returned to Zeballos and the couple briefly reconciled. The plaintiff then moved to Vancouver and took up residence with his wife and children. He attended another life skills course in early 1993. He described the course as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Do you remember what you learned at the course? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yeah, this life skill course that I took covered a lot of ground. It dealt with drug and alcohol, sexual abuse, counselling, a lot of that. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Why did you take the course? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Because I was spending time piecing my life together to cope with all that had happened, trying to find ways how I could deal with it, finding ways -- what I can do about it. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Do about what? |  |
|  | A | The sexual abuse. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Was the sexual abuse a bigger issue for you at this time than at previous times? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, it was. |  |
|  | Q | Why is that? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Because I really wanted to do something about it and because there was -- there was a lot of other cases that were starting, that started up. I was reading in the newspapers. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Apart from that, why was it a bigger issue for you? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, it's -- I had to find some way to deal with it so I could piece my life together. |  |

**183**  During this period the plaintiff continued to be plagued by depression. The plaintiff testified about a severe bout of depression in early 1993, soon after his move to Vancouver. He admitted suicidal thoughts to his family doctor and was prescribed antidepressant medication. He testified that he spoke to his family doctor regarding the relationship between his depression and the sexual abuse he experienced at Christie.

**184**  After the 1993 course, the plaintiff enrolled in the Native Education Centre in Vancouver. He took several courses. During 1994 the plaintiff again experienced some problems with his personal life, including abuse his grandchildren were suffering. He testified, in cross-examination, that seeing what his grandchildren were going through brought back memories of his own abuse.

**185**  During this period, the plaintiff testified that he again experienced depression and had suicidal thoughts. With regard to his mental health at this time, he testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Do you recall thinking of suicide in 1993, two years before you fell off the log? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I was, yes. |  |
|  | Q | What do you remember about that? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Because I remember, I always thought of it like way back in the '70s, '80s when I was living alone in Zeballos and I told you about that gun that I had and that one bullet that I had. I always thought of that. And I always - I was always depressed. Other times, especially times like this here when I was living here in Vancouver, I was going through a lot of depression. Even when I was - even when I was trying to upgrade my education here I was going through that, I went through a lot of depression because of my relationship being in turmoil and having to see, you know, my grandchildren going through all that abuse and neglect. |  |

He also testified that while in Vancouver sometime after March 1995, he swallowed approximately six Tylenol 3 tablets in an attempt at suicide.

**186**  The plaintiff withdrew from the Native Basic Education program at the Native Education Centre in 1995 and returned to the logging industry in March of that year.

**187**  On March 15, 1995 the plaintiff fell from a log while crossing a stream and was knocked unconscious (the "1995 Accident"). The plaintiff testified that he has not worked since the 1995 Accident.

**188**  While they are still married, the plaintiff is no longer in a relationship with S.B. He testified that his marriage was abandoned in 1991, though he briefly reconciled with S.B. several times.

**189**  In addition to the psychological problems outlined above, the plaintiff testified that he suffers, or has suffered, from a number of other psychological problems, including: symptoms of Post-Traumatic Stress Disorder ("PTSD"), including nightmares and flashbacks; sex-related difficulties; and anxiety. He testified that many of these symptoms first appeared at the time of the abuse and have continued to plague him throughout his adult life.

**190**  The plaintiff testified that thoughts of the abuse are with him every day of his life. He testified that at times the thoughts are visual flashbacks of the sexual abuse that happened to him at Christie. He also testified that after the sexual assaults began, he had a recurring nightmare involving a big, slimy ball. The plaintiff described this nightmare as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then can you describe how the nightmares after the sexual abuse differed? |  |
|  | A |  | This other one is nightmares that I was having was repeating itself over and over. There was a like a big ball rolling in your head up my back, you know, in the back of me all the time, this big ball that was rolling up my back, it was like a slimy feeling and it was like a real big slime ball anyway, that was rolling up my back, and it would come up here all the time like I was really horrified by that feeling that I got from it. I don't know, I don't know how to really explain that feeling that I got from it. The effect of it was I couldn't bring myself to tell anybody about it and that nightmare that I was having at that time. It was -- I don't know, it's so -- I didn't I just didn't like that feeling. |  |

**191**  In cross-examination, the plaintiff agreed that he frequently had nightmares until his twenties, and thereafter "these nightmares were still there but not constant." He testified that he continued to experience the recurrent nightmares until his counselling sessions with Ms. Shaler in 1995-1996, though he continues to experience other sleep disturbances.

**192**  The plaintiff also testified that sex evokes within him "a lot of hurt, a lot of shame, anxiety, a lot of worry." He testified that the abuse generally affected his ability to perform sexually and to satisfy S.B. However, beyond this the plaintiff had some difficulty articulating the specifics of his sex-related difficulties at trial.

**193**  In particular, the plaintiff testified that he had difficulty talking about his sex-related difficulties in a group situation, and that:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | [E.B.], can you explain in detail how the abuse affects your sexual functioning? |  |
|  | A |  | It's hard for me to really explain about my performance and my sexuality because to me, you know, it's been so shameful all my life, I can't -- you know, I can't really think or even try to think about it. |  |

He did testify, however, that he felt more comfortable talking about his difficulties one-on-one, and that he did discuss the effects of the sexual abuse on his sexual functioning with Dr. Riar and Dr. L. Krywaniuk, a neuropsychologist he has seen and who testified on his behalf. Dr. Riar took notes during a telephone conversation concerning the plaintiff's specific sexual problems, including an inability to sustain an erection, premature ejaculation and his feelings that he was unable to satisfy a woman.

**194**  The plaintiff also testified that he experiences anxiety attacks commencing "right from the abuse". He described these attacks as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Can you describe in your own words the anxious feeling? |  |
|  | A |  | Yes, I get it down below my belly button and that flares up, it comes up my body and it's like washes over me and I get dry mouth, I get weak, shaky. |  |

The plaintiff testified that the anxiety usually comes on quickly, in a matter of seconds, though in more recent years he has developed an improved ability to gauge when an anxiety attack is going to happen.

**195**  The plaintiff has a current prescription for Clonazepam, prescribed to him for anxiety attacks. He testified that he takes his prescription every day. The plaintiff testified that the pills settle down the anxiety, but they also make him drowsy. Notwithstanding persistent suggestions to the plaintiff in cross-examination that the purpose of his Clonazepam prescription is to help him sleep, the plaintiff testified that the prescription is to assist his anxiety and to help him relax.

The Experts' Evidence

**196**  Several experts testified about the plaintiff's psychological problems. Dr. Riar first met with the plaintiff on January 26, 2000, and subsequently spoke with him on the phone on two occasions. Dr. Riar prepared a report based on these contacts, which stated, inter alia, as follows:

In my opinion, [E.B.] has serious problems including substance abuse which has been in remission for many years, sex-related difficulties, anxiety and symptoms strongly suggestive of Post-Traumatic Stress Disorder, episodes of depression, interpersonal difficulties, and various physical and cognitive problems. I feel that some of his difficulties including symptoms suggestive of PTSD, that is flashbacks, nightmares, intrusive thoughts, strange experiences etc., as well as his sex-related problems including acting out against young girls are most likely sequelae of the sexual abuse he suffered during his childhood. His other problems such as substance abuse could be a combination of a genetic predisposition, other social or emotional experiences, and sexual abuse. His interpersonal problems may also be due to a combination of lack of social skills and the sexual abuse. The reason for his anxiety and depression also may be a combination of various other factors including the sexual abuse. In other words, if he had not suffered the sexual abuse at the hands of the perpetrator from the school he would not have experienced the symptoms suggestive of Post-Traumatic Stress Disorder and most likely would not have suffered any sex-related problems.

Although it is difficult to determine whether he still would have had a severe substance abuse problem had he not been sexually abused, certainly the experience of abuse made his problem worse as he used various substances including drinking in order to cope with the sequelae of the abuse.

The symptoms of anxiety and depression also fluctuated in intensity whenever he had to deal with the sexual abuse directly or indirectly.

I also feel that his interpersonal relationships and social functioning were impacted by the effects of the sexual abuse in addition to other factors. His sex-related problems, sense of inadequacy in the company of women, and acting out against young girls are examples of his malfunctioning.

**197**  With regards to the plaintiff's alcohol abuse, Dr. Riar testified, in chief, that substance abuse problems are quite common in individuals that have been abused:

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|  | Q |  | I direct you to the bottom of page 10, please, doctor. That paragraph reads "Although it is difficult to determine whether he still would have had a severe substance abuse problems had he not been sexually abused, certainly the experience of abuse made his problem worse, as he used various substances including drinking in order to cope with the sequelae of the abuse." I would like to focus, doctor, on your words, "certainly the experience of abuse made his problem worse." What did you mean by that? |  |
|  | A |  | Can I expand a bit more, your honour? Substance abuse problem is as quite common in individuals who are abused, but that doesn't mean that the abuse is directly responsible for the substance abuse as such, and it is very hard retrospectively going and teazing out what caused what, but what I'm saying, that there has been anxiety and other associated symptoms related to his abuse which cause lots of fear and anxiety at times, and people self-medicate themselves with alcohol and other drugs to forget about those things. So -- and why I'm saying this, because there are family history of alcoholism very severe, so even if he had not had the sexual abuse, there were high chances of him having substance abuse. Having said that, I think the combination of sexual abuse and his genetic vulnerability made things worse for a period of time. |  |

**198**  In cross-examination, Dr. Riar testified, as follows:

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|  | Q |  | Doctor, do you agree with me that a child that's born in a family that is, well, the whole family there's not one child except Raymond who died a infant, they're all alcoholic, so the chances of him being an alcoholic were almost sure, isn't that correct? |  |
|  | A |  | Oh, yeah. I mean looking at what kind of family he came from and genetic and environmental and social, I mean he is at high risk for having that kind of problem. |  |
|  | Q |  | It's more than high risk, he would have been an alcoholic; isn't that correct? |  |
|  | A |  | I would say so, but I mean I have known families where everybody is an alcoholic, but a single person is not. |  |

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|  | Q | Chances are rare? |  |

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|  | A |  | Chances are very high, but a hundred percent, (you) can't say 100 percent. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | No. Nothing in life is 100 percent. |  |
|  | A | That's right. |  |
|  | Q | But a good possibility? |  |
|  | A | Yeah. There's a high chance. |  |

**199**  Dr. Riar told the court that the plaintiff does not suffer from full-fledged PTSD, but rather that he exhibits symptoms characteristic of the disorder. In describing the relationship generally between PTSD and sexual abuse, Dr. Riar told the court that the symptoms may manifest close in temporal proximity to the triggering event and decrease over time. He also told the court that another event in a person's life unrelated to the initial traumatic experience, such as "hearing about the abuse or they abuse, their children get abused" can trigger symptoms that may have lain dormant.

**200**  Dr. Riar told the court that the plaintiff exhibited symptoms of PTSD while at Christie, such as his nightmares, feelings of horror and visions of Saxey's face. He also told the court that these symptoms re-appeared with some intensity following the plaintiff seeing a newspaper article about sexual abuse at Christie.

**201**  Dr. Riar was also questioned, in cross-examination, about the effects of the plaintiff's traumatic life experiences on his other psychological problems. In particular, Dr. Riar was asked about the plaintiff's marital problems, the abuse of his grandchildren and the 1995 Accident, all in the mid-1990s, and their contribution to his depression and anxiety. Dr. Riar agreed that these factors contributed to the plaintiff's anxiety and depression, but, on re-direct, stated that there are many causes of these illnesses, and ultimately that the plaintiff is "a very insecure person who was abused."

**202**  The plaintiff also called Dr. L. Krywaniuk, a neuropsychologist, to testify, inter alia, about the plaintiff's psychological problems. Dr. Krywaniuk first saw the plaintiff in 1996 at the request of Human Resources Canada. He saw the plaintiff several times after that initial meeting, most recently in January of 2000 at the request of plaintiff's counsel. Dr. Krywaniuk prepared a report, dated June 19, 2000, updating his initial neuropsychological assessment of the plaintiff.

**203**  Dr. Krywaniuk's report states, inter alia, as follows:

The professional literature in the area of sexual abuse indicates that there are long-term implications from childhood sexual abuse. This includes such factors as increased psychiatric difficulties, increased level of substance abuse, reduced levels of employment, higher divorce rates, poorer interpersonal relationships, reduced educational levels and a variety of other effects. [E.B.] shows a number of these features, even when socio-cultural and other factors are accounted for. He shows the typical levels of anxiety and interpersonal distrust associated with psychological abuse and I understand that he has had difficulties in relationships and sexual functioning. He also went through a period of alcohol abuse although he subsequently was able to quit drinking. His work record has been relatively good, despite his difficulties, although he has not worked since about 1995, after his most recent head injury. He also showed features of post-traumatic stress disorder and there is concern that he is compensating for some of is memory deficits through confabulation. His abuse probably has had the effect of reducing his level of academic achievement and possible affecting cognitive functions as well, at least to a mild degree. It may be that some of his substance abuse was of the "self-medication" type, where alcohol is used to reduce levels of anxiety or distress...

In a general sense, the effects of the abuse are likely to have made [E.B.] more vulnerable to other factors in our society which result in dysfunction and that has ultimately created difficulties in the area of personal and emotional adjustment. This, in turn, has reduced his level of achievement, affected personal relationships and resulted in a less satisfactory life than he might otherwise have had...

...In a general sense, however, it appears clear to me that [E.B.'s] life was compromised significantly by the sexual abuse he experienced during the stay at the residential school.

**204**  In chief, Dr. Krywaniuk testified that he had been retained to assist in determining the interplay between the effects of the plaintiff's head injuries on his neurocognitive deficits and the effects of the plaintiff's past psychological injuries stemming from the sexual assaults. On this point, he testified that the plaintiff's neuropsychological impairments as a result of his head injuries, and the resulting emotional consequences, combined with the pre-existing emotional consequences of the sexual assaults. This interaction ultimately made it more difficult for the plaintiff to adjust to his various difficulties. He explained, in chief, as follows:

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|  | Q |  | In the second paragraph you then refer to the pre-existing emotional difficulties and cause the maladjustment to be more severe. Now, in light of the term that you used in the previous sentence emotional consequences can you expand what you're referring to here? |  |
|  | A |  | Well, if there is already an existing difficulty or existing maladjustment then an additional stressor in the form of an injury or emotional consequences will build on top of that and they will interact to form probably something that is more than just the simple addition of the two things. |  |

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|  | Q | What do you mean by the maladjustment? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Well, the effects we were talking about or that I mentioned earlier as potentially the result of the sexual abuse to do with the anxiety perhaps the suspiciousness the difficulty forming relationships or trusting people, and those kind of things would represent a level of emotional maladjustment. They are in response to some trauma that he had experienced. So that provides a certain vulnerability in his personality or his character or is an adjustment. Then when you -- when he sustained other injuries, for example, neuropsychological injury or a brain injury then he is less capable of dealing with them so there is that cumulative factor the addition of one thing and another thing about but the two things are not simply additive that tend to interact with each other to form something that is a bit more serious than any one of them on its own. I think perhaps to illustrate that a little bit, using a rather graphic example perhaps that's not completely appropriate, but if you lose one arm in an accident that will give you a certain level of difficulty, but if you lose both of them the problems that you have are not simply the addition of each single event, so that the interactive effect causes a problem that is bigger than simply the addition of the two individual conditions. |  |

**205**  As noted, Dr. Janke, for the defence, first met with the plaintiff in 1996, after which he prepared what he described as "a preliminary report" on November 4th of that year. He again met with the plaintiff in 1997, and prepared a report dated November 27, 1997.

**206**  Dr. Janke's 1996 report concluded, as follows:

At the present time I think it would be appropriate to consider the sexual abuse as contributing somewhat to [E.B.'s] alcoholism and possibly somewhat to his difficulties in intimate personal relationships. I am not prepared at this time, though, to attribute even the majority of his problems to the sexual abuse as there were clearly other factors that need to be considered and I would like to view other documentation relating to his early childhood experiences and possibly other records before providing a definitive opinion as to the extent of the effect of the sexual abuse on his functioning.

**207**  Dr. Janke's 1997 report concluded that his opinion remained largely unchanged. The report states:

Much of [E.B.'s] disruption in his personal life can be related to the substance abuse of his wife and the subsequent effect on the functioning of his children....It is clear that the abuse that [E.B.] experienced has had an affect on his functioning and his sense of self-esteem....It is not clear how the abuse experience has affected [E.B.'s] work history as this appears to have been more influenced by his various injuries and illnesses rather than psychological factors...

**208**  Much of Dr. Janke's testimony concerning the plaintiff's injuries focused on the possible contribution of the sexual assaults to the plaintiff's substance abuse. On this issue, Dr. Janke testified as follows, in chief:

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|  | Q |  | May I please ask you to turn to page seven of your report and in that report you have said that at the present time I think it would be appropriate to consider the sexual abuse as contributing somewhat to [E.B.'s] alcoholism. And has that opinion of yours changed now or is it the same? |  |
|  | A |  | I don't know that -- I wouldn't say that it's changed. I think that I'm not prepared and I don't know of any of my colleagues who would be prepared to say that sexual abuse has no influence on substance abuse. But I think what I would say is my -- in my mind the contribution of sexual abuse to later substance abuse is lessened and this is a general sense and it would apply to [E.B.] as well, the other factors may play at least or a more important role. |  |

**209**  In cross-examination, Dr. Janke testified, as follows:

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| --- | --- | --- | --- | --- |
|  | Q |  | Doctor, just to touch on this point you were just testifying about, would you agree that factors in [E.B.'s] life, genetics, environment other than the sexual abuse have at least an equal and possibly a greater effect upon causing his alcoholism? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, yes. That's what I was trying to say, yes. |  |

**210**  In my view, on the whole of the evidence, the plaintiff has proven to the requisite standard that he suffers, or has suffered from a number of specific psychological problems, including: bedwetting; interpersonal difficulties; anxiety; symptoms of PTSD, including flashbacks, nightmares and intrusive thoughts; depression, including suicidal thoughts, loss of appetite and lack of sleep; and alcohol abuse.

**211**  The plaintiff testified at length about these problems, testimony which I have no doubt is truthful. The plaintiff's testimony about his problems is largely consistent with what he told the experts. Based on these reports, as well as the plaintiff's behaviour during the various interviews, the experts were indeed satisfied that, for the most part, the plaintiff suffered, or continues to suffer, from these problems.

**212**  In addition, counsel for the Oblates did not submit that the plaintiff has failed to prove that he indeed suffers from the various psychological problems outlined. For example, counsel for the Oblates did not dispute that the plaintiff suffers from alcohol abuse, that he wet the bed, and that he has symptoms of PTSD. Counsel for the Oblates also submitted, in argument, that "the evidence supports that the Plaintiff has had ongoing problems with depression". Counsel for the Oblates, of course, disputes that these psychological problems are the result of the sexual assaults.

**213**  With regard to proven psychological problems suffered by the plaintiff, there is one exception, however. Counsel for the Oblates submitted that the plaintiff has failed to establish that he indeed suffers from sex-related difficulties. Counsel submitted that the only expert the plaintiff complained to was Dr. Riar, and that there is nothing in the clinical records to indicate that he complained of his sex-related difficulties to his family physician. Counsel for the Oblates also points to the portion of Dr. Janke's 1997 report which states:

His sexual functioning may have been somewhat affected by the sexual abuse but typically one sees a failure to engage in adult heterosexual relationships when an individual has been abused by a male at a young age. This has not been the case with [E.B.] and certainly at the time of my most recent contact with him he indicated that his sexual functioning was quite good despite his reported high level of symptomatology that would appear to be related to the abuse.

**214**  In my view, the fact that the plaintiff did not complain to his family physician or to Dr. Janke does not inexorably lead to the conclusion that he has failed to prove that he suffers from sex-related difficulties. In addition, the fact that Dr. Janke believed that the plaintiff's sexual functioning was quite good at the time of their meeting does not mean that the plaintiff did not at one time, or in fact may still, suffer from sex-related difficulties. The qualification in Dr. Janke's 1997 report simply lays out certain common sexual dysfunction features resulting from male-perpetrated sexual abuse on young boys. It does not, however, definitively state that the plaintiff's particular manifestation of sex-related difficulties are impossible, nor can I draw such a conclusion based on the evidence before me.

**215**  However, on the whole of the evidence, I am not satisfied that the plaintiff has proven, on a balance of probabilities, that he indeed suffers from sex-related difficulties. While the plaintiff testified that sex evokes within him "a lot of hurt, a lot of shame, anxiety, a lot of worry", as well as about his belief that he was unable to satisfy S.B. sexually, he had difficulty discussing the specifics of his sex-related difficulties at trial. The plaintiff testified that he had difficulty speaking of the matter outside of a one-on-one relationship, but that he did discuss the effects of the sexual abuse on his sexual functioning with Dr. Riar and Dr. Krywaniuk. However, in my view, the plaintiff's very scant evidence on this issue at trial is insufficient to prove, to the requisite standard, that he indeed suffers, or has suffered from sex-related difficulties.

**216**  Of course, my finding that the plaintiff has proven that he suffers from the various psychological problems, save sex-related difficulties, does not necessarily mean that the Oblates are liable for these problems, or for any damages suffered as a result of them. Having accepted that the sexual assaults occurred and that the Oblates are liable for the assaults, and that the plaintiff suffers from a number of psychological problems, I now must determine which, if any, of the problems have been suffered by the plaintiff as a result of the sexual abuse inflicted upon him by Saxey.

**217**  The general test for causation is the "but for" test, which requires a plaintiff to demonstrate that but for the defendant's wrongdoing he or she would not have suffered from the injury. However, historical sexual assault cases pose particular causation challenges. As Brenner C.J. noted in W.R.B. v. Plint, supra, at para. 365:

In cases of historical sexual assault, the plaintiff is likely to be claiming for chronic injuries, often psychological in nature. It is not uncommon for the life history of a victim of a historical sexual assault to include numerous stressful, unpleasant experiences unrelated to the sexual assault. Individuals, such as the plaintiffs in these matters, come before the courts with diagnoses of post-traumatic stress disorder, depression, substance abuse and other psychological conditions. Unravelling the question of causation in these cases arising as they do from torts committed so long ago is a daunting task.

**218**  In cases such as these it is very difficult, if not impossible, to separate the psychological problems attributable to sexual assault from other traumatic life experiences experienced by the plaintiff. This is particularly relevant in determining what a plaintiff's position would have been, both before and after the sexual assaults occurred, irrespective of a defendant's wrongdoing.

**219**  However, a defendant is not excused from liability merely because other causal factors for which he or she is not responsible also helped produce the harm. In the Supreme Court of Canada's leading case on causation, 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=), Major J. noted at para. 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***.

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| [emphasis in original] |  |

The Court held that a defendant is liable not only for injuries caused, but also for injuries materially contributed to, provided that the contribution is more than de minimus, by his or her wrongdoing.

**220**  Brenner C.J. was faced with issues of causation similar to this case in W.R.B. v. Plint, supra. In assessing the liability of the defendants Canada and the United Church for sexual assaults in a historical, residential school context, and with a view to the presence of other psychologically traumatic circumstances in the plaintiffs' lives, Brenner C.J. stated at paras. 370-372, as follows:

In Athey, after he set out the "General Principles" at paragraphs 13-20 of his reasons, Major J. applied them to the facts of that case. His formulation at para 41 of the ramifications of these "General Principles" can be adapted here where the plaintiffs allege psychological injury arising from sexual assaults in the presence of other psychologically traumatic circumstances in their lives:

1. If the psychological injury would have occurred at the same time, without the injuries sustained in the sexual assault, then causation is not proven;
2. If it was necessary to have both the sexual assaults and the other life circumstances for the psychological injury to occur, then causation is proven since the psychological injury would not have occurred but for the sexual assaults;
3. If the sexual assaults alone could have been a sufficient cause, and the other life circumstances alone could have been a sufficient cause, then it is unclear which was the cause in fact of the psychological injury. The trial judge must determine, on a balance of probabilities, whether the defendant's sexual assault(s) materially contributed to the psychological injury.

How are the Athey principles to be applied in the case at bar? The desired approach would be to first identify the separate psychological injuries proven by the plaintiff. Then, for each one, the three questions set out above could be posed to determine whether the plaintiff has proven on the balance of probabilities that each particular psychological injury was caused by the proven sexual assault; i.e. that liability for that injury has been established.

This approach is seen in V.(J.L.) v. H.(P.) [*(1997), 31 B.C.L.R. (3d) 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21JV-00000-00&context=) (S.C.) where Stromberg-Stein J. found separate and distinct psychological injuries in a sexual assault case: borderline personality disorder and post-traumatic stress disorder. She found the former to have been caused by the sexual assault but the latter to have been a distinct injury caused by a different event. She assessed damages accordingly.

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| [emphasis in original] |  |

**221**  Phrased slightly differently, and applied to this case, the three principles are as follows: first, if the plaintiff's psychological injuries would have existed regardless of the sexual assaults, the Oblates are not liable; second, if both the sexual assaults and other traumatic life circumstances in combination were necessary for the injuries to occur, the Oblates are liable; third, if either the sexual assaults or life circumstances alone could have caused the injuries, then I must determine on a balance of probabilities whether the sexual assaults materially contributed, beyond de minimus, to the psychological injuries. If the sexual assaults did materially contribute to the injuries then the Oblates are liable.

**222**  Therefore, in determining whether the Oblates caused, and are therefore liable for, the various psychological problems suffered by the plaintiff, the correct approach is to evaluate each individual problem that I have determined the plaintiff has proven in accordance with the above principles.

**223**  Before turning to the evidence, however, counsel for the Oblates made submissions concerning the weight that I should attribute to the various experts' opinions in determining whether the sexual assaults caused or materially contributed to the various psychological injuries. In particular, counsel pointed to differences between what the plaintiff told Dr. Riar and Dr. Janke about the manner of the sexual assaults, as well as about his life circumstances, upon which they made their determinations concerning causation, and the evidence he gave at trial. Counsel also submitted that Dr. Krywaniuk focused on the relationship between the plaintiff's neuropsychological problems and his head injuries rather than on his psychological problems, and that he was an advocate for the plaintiff rather than an impartial assessor. Accordingly, counsel submitted that some weight can be given to Dr. Riar and Dr. Janke's evidence, provided that the facts they relied upon have been proven, but that no weight should be accorded to Dr. Krywaniuk's evidence.

**224**  Dealing briefly with this issue, I have already concluded that the plaintiff's evidence is reliable concerning the manner and frequency of the assaults. Therefore, in my view, there is no reason for me to reduce the weight of Dr. Riar and Dr. Janke's evidence.

**225**  With regard to Dr. Krywaniuk, I do not accept counsel for the Oblates' submission that I should accord his evidence no weight on this issue. However, because Dr. Krywaniuk's focus was on the effects of the plaintiff's head injuries on his neuropsychological deficits, it is my view that his evidence should be accorded less weight than the evidence of Dr. Riar and Dr. Janke. Though Dr. Krywaniuk explored the plaintiff's psychological problems and their relationship to the sexual assaults to some extent, I accept counsel for the Oblates' submission that he largely left the task of a detailed psychological assessment of the plaintiff to Dr. Riar and Dr. Janke. I am also concerned that Dr. Krywaniuk was being something less than an impartial assessor, as argued by counsel for the Oblates, discussed in detail later in these reasons.

**226**  I now turn to an assessment of the Oblates' liability for each injury suffered by the plaintiff as a result of the sexual assaults.

Bedwetting

**227**  Although the plaintiff originally seemed to say that he had started to wet the bed only after the sexual assaults, the following questions were put to him, in chief:

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|  | Q |  | Sorry, [E.B.], you wet the bed prior to the abuse, you said that in your evidence? |  |

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| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | Did you stop bed-wetting prior to the abuse? |  |
|  | A | No, I didn't, no. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So you wet the bed prior to the abuse right up to the time of the abuse? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. |  |
|  | Q | For how many years did you continue to wet the bed? |  |
|  | A | Right up until I was turning 15. |  |

**228**  In plaintiff's counsel's own submission, the plaintiff's evidence on the commencement and continuation of his bedwetting problem is "confusing". As a result, plaintiff's counsel submitted that, although the plaintiff's testimony lacks clarity on this point, the sexual abuse brought about a change in the regularity and frequency of the plaintiff's bedwetting problem.

**229**  However, the plaintiff's evidence does not, in counsel for the Oblates' submission, support the argument that what the plaintiff was trying to say, but did not say, was that he had a problem with bedwetting prior to the sexual assaults, which was then made worse by the fact of the assaults. Rather, the plaintiff's evidence simply establishes that he wet the bed before attending Christie, and he continued to do so while at Christie until the problem resolved itself when he was 15 years old.

**230**  I accept counsel for the Oblates' submission on this point. In my view, the evidence does not establish that the plaintiff's bedwetting increased in regularity or frequency with the commencement of the assaults. All that can be gleaned from the plaintiff's testimony is that he wet the bed prior to being sexually abused, and that he continued to wet the bed until approximately age 15. In these circumstances, and particularly because the plaintiff wet the bed prior to attending Christie, I find that the plaintiff has not proven that he would not have wet the bed regardless of the sexual assaults, or that the sexual assaults materially contributed to his bedwetting problem. Accordingly, I find that the Oblates are not liable for the plaintiff's bedwetting.

Interpersonal Difficulties

**231**  The plaintiff alleges that the sexual abuse he experienced has compromised his ability to sustain relationships, including his marriage. He testified that the abuse caused him to withdraw as a child, and that he was not interested in playing with other children. He also testified that he has difficulty trusting people because of the abuse.

**232**  In his report, Dr. Riar concluded that the plaintiff's "interpersonal problems" could be attributed to "a combination of lack of social skills and the sexual abuse." Similarly, Dr. Janke's 1996 report states that it would be appropriate to consider the sexual abuse as a contributing factor to the plaintiff's "difficulties in intimate personal relationships".

**233**  With regard to the plaintiff's interpersonal problems, counsel for the Oblates primarily focused on the plaintiff's marital problems. Counsel submitted that a myriad of other factors in fact caused the plaintiff's marriage breakdown, and that the plaintiff has failed to prove that absent the sexual assaults, his marriage would not have failed.

**234**  Counsel for the Oblates submitted that, though the plaintiff blamed his marriage breakdown on the sexual assaults during his direct examination, his evidence was different under cross-examination. Counsel submitted that during cross-examination, the plaintiff described multiple reasons for the failure of his marriage, including: communication problems; disagreements about their children; S.B.'s alcohol problem; his feelings that S.B. did not support his efforts to stabilise his life; and issues S.B. had relating to her own abuse. In addition, counsel for the Oblates submitted that, in Dr. Janke's opinion, much of the disruption in the plaintiff's personal life can be related to the substance abuse of S.B. and the subsequent affect on the functioning of his children.

**235**  With respect, I think that counsel for the Oblates' submission that the plaintiff has failed to prove that but for the sexual abuse his marriage would not have failed is misguided. Rather, as plaintiff's counsel submitted, a failed marriage, "is a perfect example of the type of circumstances in which the 'but for' test of causation is unworkable". As already noted, the appropriate test, as set out in W.R.B. v. Plint, supra, is not the simple but for test, but rather whether the sexual assaults either in combination with other life circumstances caused the plaintiff's interpersonal difficulties, or whether the sexual assaults materially contributed to the interpersonal difficulties. In my view, the fact that there are numerous other factors cited by the plaintiff with regard to his marriage breakdown does not relieve the Oblates of liability. In my opinion, the plaintiff has proven that the abuse has indeed materially contributed to his general difficulty forming and maintaining personal relationships, both intimate and otherwise, and specifically the breakdown of his marriage.

Anxiety

**236**  The plaintiff testified that he has experienced anxiety attacks commencing "right from the abuse". He takes medication to control his anxiety. In addition, Dr. Riar's report concludes that the plaintiff's anxiety might be caused by a combination of various factors, including the sexual abuse, and notes that the plaintiff's "symptoms of anxiety...also fluctuated in intensity whenever he had to deal with the sexual abuse directly or indirectly".

**237**  In cross-examination, Dr. Riar testified that the plaintiff's anxiety was worse around the mid-1990s and had settled somewhat by the time he saw him in the year 2000. He agreed that a number of possible stressful factors which could have contributed to the plaintiff's anxiety in the 1990s were problems with S.B., problems with his Band, concerns about the abuse of his grandchildren, and the physical injuries he suffered in 1995.

**238**  Accordingly, counsel for the Oblates submitted that the plaintiff testified that a number of things trigger his feelings of anxiety, including his disabilities and inability to participate in activities. Counsel also emphasised Dr. Riar's evidence suggesting that a combination of factors caused the plaintiff's anxiety.

**239**  In my view, the evidence of the plaintiff and of Dr. Riar, as well as my own observations of the plaintiff's demeanour while testifying, establish that the sexual assaults caused, or at least materially contributed to the plaintiff's anxiety. I am particularly cognisant of the plaintiff's testimony that his anxiety attacks commenced right from the abuse. While there may have been other life factors which contributed to the plaintiff's anxiety, such as his marital problems and physical injuries, I do not think that I can conclude, on the evidence, that these factors alone have caused the plaintiff's anxiety.

Symptoms of PTSD

**240**  PTSD is a psychological disorder characterised by a specific set of symptoms which manifest following a traumatic life event. Such symptoms may include nightmares, flashbacks and intrusive thoughts. The plaintiff testified about various symptoms of PTSD, both immediately after the abuse began and in the following years.

**241**  As noted, the plaintiff testified that immediately after the first episode of sexual abuse, he had a recurring nightmare involving a big, slimy ball. The plaintiff testified further that the abuse immediately effected his sleep as a child:

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|  | Q |  | Did the abuse have any effect upon your sleeping quite apart from the rolling ball nightmare? |  |

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|  | A | Yeah, yes. |  |
|  | Q | What is that? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | It was, I don't know, it was hard to go to sleep, it was like flashbacks and along with the nightmares that were coming to me and you were sleeping in the dark would even make it worse for me. But yet at the same time you know, you would be so scared I used to put my head under the pillow and cry myself to sleep. |  |

**242**  The plaintiff also testified that he continues to experience sleep disturbances, that thoughts of the abuse plague him every day and that at times he visualises the assaults.

**243**  Dr. Riar's report expresses his opinion that the plaintiff's PTSD symptoms are, "likely sequelae of the sexual abuse he suffered during childhood". Dr. Riar's report stated further that:

In other words, if he had not suffered from the sexual abuse at the hands of the perpetrator at the school he would not have experienced the symptoms suggestive of Post-Traumatic Stress Disorder...

In Dr. Riar's opinion, the plaintiff had symptoms suggestive of PTSD both during his attendance at Christie, and in the years prior to his 1969 accident.

**244**  Counsel for the Oblates submitted that the plaintiff has not proven that he suffers from PTSD as a result of the sexual abuse. Counsel emphasised that although the plaintiff's experts agreed that the plaintiff has some symptoms suggestive of PTSD, he did not satisfy the criteria for a diagnosis for PTSD in relation to the sexual assaults. Counsel also submitted that the plaintiff has undergone numerous traumatic experiences in his lifetime that could cause PTSD. These include, inter alia, being sent off to school without any explanation, and the 1969 landslide accident. Counsel submitted that, given only these incidents, any PTSD symptoms can be accounted for notwithstanding the abuse by Saxey.

**245**  With respect to counsel's submission that the plaintiff does not fit the diagnostic criteria for PTSD, and instead at most can be said to have symptoms, I think that Williamson J.'s comments in T.W.N.A. v. Clarke, [*[2001] B.C.J. No. 1621*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23X7-00000-00&context=), a historical sexual assault residential school case decided in August of this year, and discussed below, provides a full answer at para. 277-278:

... I venture to suggest it would be commonplace for any reasonably informed trier of fact, having heard the evidence in this trial, to conclude that there would be significant psychological problems resulting from repeated sexual assaults upon children over a lengthy period of time by figures of authority in circumstances where the children are in effect held captive away from their families or extended families. I venture further to suggest that whether the psychological status of a particular plaintiff meets the precise criteria for a particular diagnosis as set out in the DSM-IV usually will have little impact upon an assessment of damages.

The question, rather, is has the psychological impact of the sexual assaults upon these plaintiffs significantly interfered with the quality of their lives? If the answer be yes, they are entitled to be compensated. This is so whether they suffer from rigidly described medically defined post-traumatic stress syndrome, a personality disorder, depression, or none of the above.

|  |  |
| --- | --- |
| [emphasis mine] |  |

**246**  In any event, I cannot accept counsel for the Oblates' submission that the plaintiff has experienced numerous traumatic life experiences that may have caused the symptoms of PTSD independent of the sexual assault. In my view, on the evidence, the plaintiff began exhibiting symptoms of PTSD almost immediately after the sexual assaults began. I consider that this fact alone is sufficient to hold the Oblates liable for this injury. In addition, I am satisfied that the plaintiff continued to exhibit symptoms of PTSD long after the assaults. While the 1969 landslide in particular may have contributed to these symptoms, I cannot conclude, particularly given my finding that the plaintiff suffered from symptoms of PTSD prior to 1969, that the accident alone caused the PTSD symptoms. Instead, I am satisfied that the plaintiff would not have suffered from symptoms of PTSD in the absence of the sexual assaults.

Depression

**247**  The plaintiff gave extensive evidence concerning his depression, and the relationship of his depression to the sexual assaults. He testified that throughout his adult life he was "always depressed", though his depression intensified during certain periods of his life. The plaintiff testified that on days when he was depressed he did not eat, did not sleep, and he tended to drink alcohol. He also testified about suicidal thoughts, and one suicide attempt.

**248**  Dr. Riar's report notes that the plaintiff's "symptoms of...depression also fluctuated in intensity whenever he had to deal with the sexual abuse directly or indirectly". Though Dr. Riar testified that, "it's never one thing in depression", his report concludes that the plaintiff's depression may be caused by a combination of various factors, including the sexual abuse.

**249**  Counsel for the Oblates submitted that the plaintiff was depressed due to a number of other factors in his life. Counsel submitted that while the evidence supports that the plaintiff has had ongoing problems with depression, the most serious incidents were after 1991. Accordingly, counsel submitted that, "there are no causal connections between any depression or suicide attempts after 1991" and the sexual assaults.

**250**  Interestingly, counsel for the Oblates did not submit that the plaintiff's pre-1991 depression was not caused by the sexual assaults. Rather, counsel focused on the relationship between the post-1991 incidents of depression and the other traumatic life events of the plaintiff. It must be recalled, however, that in order to demonstrate causation the plaintiff need not prove that the sexual assaults alone caused his depression. Instead, on the principles above, he need only prove that the sexual assaults materially contributed to his depression beyond de minimus. Regardless of the numerous life circumstances of the plaintiff both pre and post-1991, I am satisfied, on the evidence, that the sexual assaults did indeed materially contribute to the plaintiff's depression.

Alcohol Abuse

**251**  The plaintiff testified that he has struggled with alcohol abuse from a very early age. As noted, each member of the plaintiff's family suffered from, or continues to suffer from an alcohol abuse problem. Notwithstanding this background, the plaintiff maintains that his alcohol abuse was caused or materially contributed to by the sexual assaults he suffered at the hands of Saxey.

**252**  As also noted, Dr. Riar gave evidence that due to the plaintiff's genetics and his environment, the plaintiff was at a high risk to become an alcoholic. Dr. Janke also testified that the sexual abuse alone did not cause the plaintiff's alcohol problem. Counsel for the Oblates therefore submitted that the sexual abuse was, "only a minor factor, not causative of the Plaintiff's alcoholism." Counsel did not maintain, however, that the contribution of the sexual assaults to the plaintiff's alcohol abuse was de minimus.

**253**  At this stage, the Oblates can only escape liability if they can demonstrate that the plaintiff would have become an alcoholic regardless of the sexual assaults. I am not prepared to make such a finding. High risk is insufficient to prove that the plaintiff would indeed have inevitably become an alcoholic. Instead, I rely on the evidence of Dr. Riar and Dr. Janke, who concluded that, though the sexual assaults may not, in and of themselves, have caused the plaintiff's alcohol abuse, they did indeed contribute.

**254**  In addition, the evidence demonstrates that the plaintiff used alcohol at least partly as a form of self-medication in an attempt to forget about the sexual abuse. Thus, I am certain that that even though it was highly likely that the plaintiff would have become an alcoholic, the sexual assaults materially contributed to the plaintiff's alcohol abuse.

**255**  Therefore, I find that the psychological injuries suffered by the plaintiff as a result of the sexual assaults upon him by Saxey are interpersonal difficulties, anxiety, symptoms of PTSD, depression and alcohol abuse.

Issue 2(iv)

What compensation is the plaintiff entitled to?

Answer: $150,000 in general damages, which includes $25,000 for aggravated damages; $80,000 for loss of past earning capacity; and $3,400 for future care costs.

**256**  Being satisfied that the Oblates are liable for a number of specific psychological injuries, I must now determine the quantum of damages the plaintiff is entitled to.

The Parties' Positions

**257**  The plaintiff claims compensation under a number of heads of damage, including general damages. In addition, counsel for the plaintiff submitted that the damages suffered as a result of the sexual assaults, particularly the material contribution of the assaults to the plaintiff's alcohol abuse, resulted in a significant amount of lost past earning capacity. Counsel also submitted that the psychological effects of the sexual assaults render the plaintiff unemployable in the future.

**258**  Counsel for the Oblates submitted that in assessing damages, the court must not place the plaintiff in a position better than he would have been in had the sexual assaults not occurred. Counsel submitted that a number of factors must be taken into account which warrant a reduction under the various heads of damage. These factors include the traumatic life experiences suffered by the plaintiff following the sexual assaults, the plaintiff's non-tortious physical injuries, as well as the plaintiff's predisposition to alcohol abuse.

Decision

**259**  In W.R.B. v. Plint, supra, Brenner C.J. addressed the problem of pre-existing conditions in questions of causation, and their treatment via the "thin skull" and "crumbling skull" doctrines, at paras. 381-385:

Athey also addresses the relevance of pre-existing conditions. In British Columbia the "thin skull" and "crumbling skull" principles have traditionally addressed the issue of a pre-existing condition. Although the two principles are related, they differ in terms of the assessment of damages.

In a thin skull case, a plaintiff will recover full damages for the injuries suffered. In a crumbling skull case, a reduction in the quantum of damages will be made to account for the plaintiff's pre-existing condition...

...

Significantly, the discussion in Athey avoids this "thin skull/crumbling skull" terminology. Major J. outlined the principles at paras. 34-35:

The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage. ... Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence***, then this can be taken into account in reducing the overall award. ... This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

**260**  These principles were also applied in Whitfield v. Calhoun [*(1999), 242 A.R. 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JP9P-G39R-00000-00&context=) (Q.B.), a case cited in W.R.B. v. Plint, supra. In Whitfield the plaintiff had been diagnosed with adjustment resistance to adolescence, a pre-existing personality condition, prior to a motor vehicle accident. The condition lay dormant until after the accident. In considering the affect of the plaintiff's pre-existing condition on damages, Paperny J. (as she then was) said at paras. 118-119:

I am satisfied that the facts of this case are beyond the application of the thin skull rule. Mr. Whitfield suffers from more than an emotional thin skull. His personality suggests that, at some point in the future, the daily stresses of life would have caused him to suffer some of the emotional and psychological problems similar to those suffered following the accident. It must be recognized that Mr. Whitfield's pre-existing personality traits are inherent to his "original position". There was always a measurable risk that Mr. Whitfield would have suffered emotional and psychological manifestations in the future.

In awarding damages to Mr. Whitfield, there must be a recognition that his pre-existing, inherent personality traits created measurable risk and shortcomings which are inherent to his original position. ... The manifestations of his behaviour are related to the accident, however they are also a result of his personality traits. Therefore, although his current problems are causally related to the accident, a reduction in damages is appropriate.

**261**  Unlike in W.R.B. v. Plint, supra, the Oblates did not allege that the plaintiff's life experiences, either with his family in Queens Cove, or at Christie prior to the assaults created measurable risks and shortcomings inherent to his original position. Nor did they submit, as in Whitfield v. Calhoun, supra, that the plaintiff suffered from a pre-existing condition prior to his attendance at Christie. They did submit, however, that the plaintiff's original position was compromised by his predisposition to alcohol abuse. Therefore, in light of the principles set out in Athey v. Leonati, supra, I must determine if the plaintiff had a measurable risk that his predisposition to alcohol abuse would have detrimentally effected him in the future, regardless of the Oblates wrongdoing. If I do find this, I must reduce the overall awards under the various heads of damage accordingly.

**262**  I must also be cognisant of the other factors submitted by counsel for the Oblates as warranting a reduction in damages. These include the numerous traumatic life circumstances of the plaintiff, as well as the various physical injuries suffered throughout his life.

General Damages

**263**  Counsel for the plaintiff submitted that the plaintiff is entitled to damages in a range between $165,00 and $185,000. He submitted a number of authorities in support of this claim.

**264**  Y.(S.) v. C. (F.G.) [*(1997), 26 B.C.L.R. (3d) 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61BF-00000-00&context=) (C.A.) is a leading British Columbia case on damages in sexual assault cases. In this case a stepfather inflicted numerous incidents of sexual abuse over a seven year period on his stepdaughter. Overturning a jury award of $350,000, Macfarlane J.A. awarded the plaintiff $250,000 for general and aggravated damages.

**265**  Macfarlane J.A. also discussed the role of aggravated damages in sexual assault cases. He held, at para. 36, that aggravated damages are not a separate head of damages. Rather, aggravating factors are to be considered in assessing general damages. Aggravating factors, set out in paragraphs 57 to 59, may include: the nature, duration, number and frequency of the assaults; the age of the plaintiff; the degree of violence and coercion; the relationship between the plaintiff and the defendant, particularly where the defendant is in a position of trust and authority; the defendant's lack of remorse; and the physical pain and mental suffering associated with the sexual abuse.

**266**  In A.B. v. T.S., [*[2000] B.C.J. No. 1271*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2296-00000-00&context=), Cole J. held at para. 40 that, "[a]lthough cases that pre-date Y.(S.) v. C.(F.G.) are of some interest, the goal post, in my view, has clearly been shifted and the Court of Appeal has indicated that higher awards are required in these type of cases".

**267**  In A.B. v. T.S., supra, the nature of the abuse, perpetrated on a young girl by a family friend, was summarised by Cole J., at para. 28:

Here there was no violence. There was, however, a very close relationship between the defendant and the plaintiff, as the defendant was the closest male figure in A.B.'s life. The abuse in this case took place over a period of approximately nine years-from infancy to early adolescence. Finally, the specific nature of the abuse, although it did not include intercourse, it did involve fondling of her genitals and digital penetration of her vagina and anus, along with oral sex. This conduct, albeit not the most severe, is serious.

At paragraph 41, Cole J. held:

I am satisfied that the plaintiff has suffered significant harm and, as a result, has difficulties in maintaining long-term relationships with men and engaging in certain activities without having flashbacks. The conduct of the defendant was predatory, prolonged and serious. I am satisfied that an award of $165,000, including aggravated damages, is appropriate.

**268**  In W.M.Y. v. Scott, [*[2000] B.C.J. No. 1939*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B175-00000-00&context=), the plaintiff was sexually assaulted by his soccer coach about 15 times over three years, beginning when he was 9 years old. The nature of the abuse on each occasion involved the defendant placing his penis in the area of the plaintiff's anus and moving slowing. The defendant never ejaculated. A psychologist gave his expert opinion that the plaintiff did not, "meet the full criteria for a Post-Traumatic Stress Disorder, but he is still left with some personality difficulties that have yet to be fully improved", such as self-esteem and relationship problems. The expert also concluded that the plaintiff's substance abuse difficulties were partly related to the sexual abuse. Hutchinson J. awarded $110,000 in general and aggravated damages.

**269**  In T.S. v. J.W.P., [*[1999] B.C.J. No. 709*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1G2-00000-00&context=) (S.C.) the plaintiff was sexually assaulted by a neighbour between thirty and fifty times when he was eleven and twelve years old. The factual context of the assaults was described by Quijano J., at para. 5, as follows:

The sexual assaults took place over a period of about 1-1/2 years, during 1982 and 1983, at the defendant's home, on his boat and, on one occasion, at the plaintiff's home. There were between thirty and fifty sexual assaults on the plaintiff during that period. Generally, the plaintiff would be undressed by the defendant, the defendant would take the plaintiff's penis into his mouth for as much as ten minutes at a time and then would use his tongue on or in the anus of the plaintiff for another five to ten minutes at a time. There was no penetration. The defendant also, during the same period of time, kissed the plaintiff on the lips and fondled his genitals inside his clothing on numerous occasions. The incidents of kissing and fondling are in addition to the thirty to fifty sexual assaults which took place while the plaintiff was naked.

**270**  Quijano J. found that the sexual assaults caused psychological damages, including effecting the plaintiff's self-esteem and self-worth. In awarding general damages, including aggravated damages, at para. 29, Quijano J. stated:

This is a claim that is neither at the higher nor the lower end of the range, but rather is one somewhere towards the upper middle of the range of damages, given the nature of the assaults and the impact on the plaintiff. I conclude that an award of general damages, which includes aggravated damages, in the amount of $130,000 is appropriate.

**271**  In T.(K.A.) v. B.(J.H.) [*(1999), 51 B.C.L.R. (3d) 259*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-22H0-00000-00&context=) (S.C.), two plaintiffs were sexually abused by their stepfather between 1965 and 1974, commencing when they were aged 5 and 8 years respectively. At paras. 50-52, Brenner J. found both plaintiffs to be suffering from a lengthy list of serious effects from the abuse, including, inter alia, depression, substance abuse, sexual problems and contemplation of suicide. He assessed non-pecuniary and aggravated damages for each plaintiff at $185,000.

**272**  Returning to Y.(S.) v. C.(F.G.), supra, in determining the usefulness of other decisions in awards for sexual assault, Macfarlane J.A. stated, at para. 56:

Comparison with the awards made in similar cases is helpful in maintaining consistency, and therefore giving fair and equivalent treatment to all victims. But the impact on individuals in particular circumstances of sexual abuse is so difficult to measure that other cases can only provide a rough guide for assessment in this case.

**273**  In my view, the authorities establish that the plaintiff's claim for general damages, including aggravated damages, in a range between $165,000 and $185,000, is generally appropriate. However, as counsel for the Oblates submitted, this case is complicated by the evidence of the plaintiff's predisposition to alcohol abuse, as well as by the numerous physical injuries the plaintiff sustained unrelated to the defendant's liability. It is at this stage that I must determine whether, in the words of Whitfield v. Calhoun, supra, the plaintiff's genetic and environmental factors created, "measurable risks and shortcomings which are inherent to his original position", and, if so, reduce the plaintiff's damages accordingly.

**274**  At the first phase of the trial in W.R.B. v. Plint, supra, Brenner C.J. found the defendants the United Church of Canada and Canada vicariously liable for the sexual assaults of several students by a dormitory supervisor: see W.R.B. v. Plint, supra. In the second phase of the trial, his Lordship went on to make damage assessments. Assessment of quantum was complicated by pre and post-residential school traumas suffered by the various plaintiffs, as well as by evidence suggesting that several of the plaintiffs were pre-disposed to alcohol abuse. A number of the plaintiffs who attended the Alberni Indian residential school ("AIRS") were sexually assaulted by their dormitory supervisor.

**275**  Plaintiff F.L. Barney's assaults included multiple instances of violent anal rape and forced oral sex. He suffered from a number of psychological problems caused by the abuse, including, inter alia, a personality disorder which caused him to have problems maintaining interpersonal relationships, difficulties in managing his anger and impulses, coupled with an impaired self-esteem and difficulties in formulating an identity. Brenner C.J. concluded, at para. 507, that the sexual assaults were, "at least a material contributing cause" of the plaintiff's personality disorder.

**276**  However, F.L. Barney's life was also plagued by a number of pre and post-assault traumatic life experiences, including a violent household prior to attending AIRS, as well as the ordeal of attending AIRS in itself. Brenner C.J. also found that a number of factors would have likely been present in the plaintiff's life had he not been sexually assaulted, including, inter alia, the plaintiff's abuse of marijuana and alcohol, and his tendency to use violence. However, regardless of these factors, Brenner C.J. held the following, at paras. 532 and 533:

The assaults Mr. Barney suffered at the hands of Plint did represent an egregious breach of trust by a person who occupied the role of a parent. The anal and oral rapes were extremely violent and brutal and were accompanied by threats. Not surprisingly they caused Mr. Barney physical and emotional pain. They occurred after he had been removed from his home community and transported to AIRS.

I would award Mr. Barney $125,000 in non-pecuniary and $20,000 in aggravated damages. Because aggravated damages are compensatory in nature, both will be assessed against the Church and Canada.

**277**  The sexual assaults of another plaintiff, R.F., numbering approximately 16, included forced oral sex, mutual masturbation and the defendant placing his penis between the plaintiff's legs and simulating intercourse. Though R.F. abused alcohol, he did not link this abuse to the sexual assaults. R.F. did not suffer from any major forms of psychiatric disorder, such as PTSD or anxiety, at the time of trial. Brenner C.J. also found that if R.F. was at any time properly diagnosable with a psychiatric condition, it was relatively mild. However, he found, at para. 599, that it was "likely that these assaults were a material contributor to the periodic bouts of depression that Mr. R.F. has grappled with in his life", and awarded R.F. non-pecuniary and aggravated damages in the amount of $85,000.

**278**  Plaintiff M.W.(1) was sexually assaulted numerous times while at AIRS. The assaults included forced masturbation, oral sex and anal rape. M.W.(1) experienced a number of early traumatic life experiences, including physical abuse by his mother before attending AIRS. He also had a family history of alcohol abuse. M.W.(1) was found to suffer from a number of psychological problems, including a tendency to use violence and abuse alcohol.

**279**  Brenner C.J. found that M.W.(1)'s life circumstances, both before and after the assaults, were significant in assessing whether M.W.(1)'s later psychological problems would have occurred in any event. In light of these circumstances, he held that M.W.(1)'s abuse of alcohol and tendency to resort to violence were unrelated to the sexual assaults. However, he held, at paras. 854-855:

While I cannot accept that all of Mr. M.W.(1)'s life difficulties were caused by his attendance at AIRS, it is nonetheless the fact that as a vulnerable child he was forced by Plint to engage in oral sex and was anally raped likely more than the two occasions he described. The severity of that abuse and the circumstances in which it occurred are to be taken into account in assessing an appropriate damage award.

I conclude that an appropriate award for non-pecuniary and aggravated damages in Mr. M.W. (1)'s case would be $125,000.00.

**280**  Williamson J. was also faced with questions of quantum for the injuries suffered by the plaintiffs as a result of historical sexual assault at St. George's, an Indian residential school, in T.W.N.A. v. Clarke, supra. Prior to trial, the defendants, the Anglican Church and Canada, and the plaintiffs, four former students of St. George's, agreed on the issues of liability for the acts of Derek Clarke, a dormitory supervisor. Williamson J. reviewed the evidence on the plaintiffs' psychological problems and pre and post-St. George's circumstances, and made quantum determinations for each of the plaintiffs.

**281**  Williamson J. found that prior to his attendance at St. George's, plaintiff E.A.J. had a reasonably good childhood. However, upon attending St. George's he was sexually assaulted over a number of years. The assaults included forced mutual masturbation and anal rape. E.A.J suffered from interpersonal and sexual problems, as well as emotional problems, including an inability to control anger. He was also diagnosed as suffering from PTSD, and abused drugs and alcohol in an attempt to distance himself from his problems. Williamson J. found, at para. 309, the sexual assaults to be, "a significant factor in E.A.J.'s later abuse of alcohol", particularly because E.A.J. used alcohol in a self-medicative fashion to forget about the assaults. Williamson J. also found, at para. 314, the sexual assaults to be, "the major cause of [E.A.J.'s] current psychological problems." He awarded E.A.J. $150,000 in non-pecuniary damages.

**282**  The plaintiff T.W.N.A. was repeatedly sexually assaulted for 4 years, starting at age 9. The assaults consisted of forced mutual masturbation, anal rape, and occasional instances of oral sex. Though Mr. T.W.N.A.'s family life was found by Williamson J. to be overall happy, his Lordship found, at para. 319, that there, "was a chaotic aspect to his pre-St. George's life which put him at risk." Both of Mr. T.W.N.A.'s parents had alcohol problems. Following the sexual assaults, Mr. T.W.N.A. also abused alcohol. Mr. T.W.N.A. suffered from a number of psychological injuries, including problems with sexual relationships and with his family. He was diagnosed, inter alia, with a major depressive disorder in remission and symptoms of PTSD. Williamson J. found, at para. 327, the sexual assaults to be, "the primary cause of [Mr. T.W.N.A.'s] problems", and awarded him $140,000 in non-pecuniary damages.

**283**  The sexual abuse of plaintiff E.R.M. began when he was around nine years old and continued two or three times weekly for four years. The assaults included fondling, forced oral sex and anal rape. Though prior to attending St. George's E.R.M. had a stable family life, members of his family had problems with alcohol, and E.R.M. himself developed a serious drinking problem while at St. George's. E.R.M. suffered from a number of other psychological problems, including problems relating to his children and his wife, erosion of his self-esteem and depression, including suicide attempts.

**284**  Williamson J. found, at para. 336, the sexual assaults to be, "the prime cause of [E.R.M.'s] difficulties." Williamson J. also emphasised E.R.M.'s psychologist's findings, at para. 333, that though E.R.M. was at an increased risk for alcohol abuse, his drinking problem began, "at the height of the sexual assaults" and he used alcohol to distance himself from painful feelings. In awarding E.R.M. $140,000 in non-pecuniary damages, Williamson J. stated that he was "satisfied that it is the sexual assaults, including their nature, frequency, duration and circumstances, that are the prime cause of [E.R.M.]'s difficulties."

**285**  The assaults started on the plaintiff G.B.S. when he was in grade four, and continued for one and a half years. While Clarke began by fondling G.B.S., the assaults progressed to anal rape, and continued approximately 1 or 2 times monthly. While G.B.S. had little memory of his pre-St. George's life, he did recall that his mother drank excessively on some occasions. G.B.S. himself began drinking in grade 8, and testified that he did so to "blank out the assaults". G.B.S. suffered from a number of psychological problems, including damage to his self-esteem and self-respect. Williamson J. awarded G.B.S. $130,000 in non-pecuniary damages.

**286**  Williamson J. also augmented each plaintiff's compensatory damages award by $25,000 to account for aggravating factors. He noted, at paras. 344 and 347, as follows:

All of the plaintiffs in this case were under the control of the defendants or their agents at the time of the assaults. The defendants were in a position of authority and trust over the plaintiffs. The plaintiffs were children. They were, in effect, helpless at the time, cut off from their extended families and even from siblings also resident in the school.

...

I conclude the sheer horror of what happened to these children, and in particular the fact that for all of them the assaults continued over a period of time that must of seemed exceedingly long to children, warrants an award of aggravated damages.

**287**  The appropriate measure of damages is the difference between the plaintiff's original position, namely the position the plaintiff would have been in had the sexual assaults never occurred, and the position he is currently in. Counsel for the Oblates submitted that the plaintiff's alcohol abuse, interpersonal difficulties and "emotional problems", which I take to mean the plaintiff's depression and anxiety, "have not been proven to be causally linked" to the sexual assaults. On this basis, counsel submitted that the evidence concerning these various factors establishes that there is very little, if any, difference between the plaintiff's original and current positions.

**288**  With respect, I disagree. While it is clear that the plaintiff suffered from numerous traumatic life experiences after leaving Christie, in my view, these experiences are inextricably tied to the sexual assaults he suffered at Christie.

**289**  First, with regard to the plaintiff's alcohol abuse, the evidence does indeed suggest that the plaintiff had measurable risks and shortcomings which were inherent to his original position, significantly increasing the likelihood that he would have been an alcohol abuser had the sexual assaults never happened. Regrettably, the plaintiff's family members have all suffered from alcohol addiction. Dr. Riar was almost sure, though not 100%, that the plaintiff would have become an alcoholic in any event.

**290**  However, regarding the relationship between the plaintiff's interpersonal difficulties, anxiety, symptoms of PTSD and depression and his predisposition to alcohol abuse, there is no evidence before me to establish that the plaintiff would not have suffered from these psychological injuries had he not developed an alcohol problem. In addition, the plaintiff connected his alcohol abuse to the sexual assaults, and it is clear that he developed a pattern of alcohol abuse at least in part to cope with his memories of the sexual abuse he suffered while at Christie. I find therefore, that there is no basis for me to reduce the quantum of general damages due to the plaintiff's predisposition to alcohol abuse.

**291**  Counsel for the Oblates also submitted that the various physical injuries suffered by the plaintiff between 1969 and 1995, including, inter alia, the injuries he sustained from the 1969 landslide and from the 1995 Accident, warrant a reduction in damages. Again, with respect, I do not agree. In my view, the evidence establishes that even had he not suffered from his various physical injuries, the plaintiff would still have suffered from the various psychological injuries outlined above. Accordingly, I find that the quantum of general damages need not be reduced on this basis.

**292**  In addition, counsel for the Oblates submitted that the plaintiff should not be entitled to aggravated damages. However, I am satisfied, on the basis of W.R.B. and T.W.N.A., supra, that the plaintiff is entitled to aggravated damages from the Oblates as a part of overall general damages, and in accordance with the aggravating factors set by the Court of Appeal in Y.(S.) v. C.(F.G.), supra.

**293**  In particular, a number of the aggravating factors enunciated in Y.(S.) v. C.(F.G.), supra, are present in this case. The plaintiff was sexually assaulted approximately twice weekly, starting when he was seven years old, for four years while at Christie. The assaults consisted of fondling, simulated intercourse with incidental partial anal penetration and masturbation. Saxey ejaculated on the plaintiff, who then had to clean himself. Like the factors Williamson J. emphasised in his discussion of aggravated damages in T.W.N.A., supra, the plaintiff in the instant case was also separated from his family, and even from his siblings at Christie.

**294**  It is clear that the plaintiff has suffered immensely as a result of the sexual assaults. Virtually every aspect of his life has been effected. He suffers, or has suffered from numerous psychological injuries as a result of the sexual assaults. The plaintiff also used alcohol in his attempt to forget about the assaults. Accordingly, even cognisant of the plaintiff's genetic and environmental factors and their relationship to his alcohol abuse, as well as the non-tortious injuries he suffered subsequent to the sexual abuse, I assess his general damages at $150,000, $25,000 of which is awarded to him as aggravated damages.

**295**  Before leaving this issue, the plaintiff testified that he was sexually abused once by an older student, the defendant Williams, during his time at Christie. He was approximately eight years old when the assault occurred. At trial the defendant Williams conceded that he had sexually assaulted the plaintiff. The plaintiff described that incident as follows:

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|  | Q |  | Earlier in your evidence you mentioned that you were also abused by Matthew Williams. |  |

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|  | A | Yes. |  |
|  | Q | Can you tell us about that? |  |

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|  | A |  | I was standing in the -- on the road just before -- between just about between Martin Saxey's place and the gym where the gym is and there is a road going down. I was standing there and then all of a sudden Matthew Williams came from behind me and he picked me up on his shoulders and he started packing me down the road. And as we were going down the road there was somebody standing on the porch and he yelled out to him, "at it again, eh," he said and they both started laughing. I didn't know what they were talking about: And he carried me down, went down in the bushes. And I know there was some rocks there where we were and he laid me down and he pretty well did the same thing what Martin did to me. Took my pants off, my shorts, and he stuck his penis between my legs and when he ejaculated, he finished with me, he left me there. He ran off and I was left there by myself. |  |

**296**  Plaintiff's counsel submitted that there should be no apportionment. After reviewing the authorities on the subject, he argued that the difficulty with apportionment in this case is that it is practically impossible to distinguish (a) the amount of a "global award" for all of the plaintiff's sexual assault injuries from (b) the amount of the plaintiff's sexual assault injuries arising from the assaults upon him by Saxey.

**297**  Counsel contended that the best alternative is to reject the apportionment approach altogether by applying the "common sense" inference of material contribution which, he said, is justified by the temporal connection.

**298**  The assault on the plaintiff by the defendant Williams took place in the context of the frequent sexual assaults by Saxey. Counsel said that ordinary common sense dictates that the psychological impact of the defendant Williams' assault upon the plaintiff would be shaped and contributed to by the context of the assaults by Saxey, both before and after.

**299**  I agree with counsel's submission and find that no reduction of damages is warranted.

Loss of Past Earning Capacity

**300**  Counsel for the plaintiff submitted that the sexual abuse had an effect on the plaintiff's academic achievement, due to his inability to concentrate. Counsel further argued that the plaintiff's claim for loss of past earning capacity, "depends largely on the nexus between the plaintiff's alcohol abuse and the sexual assaults by Martin Saxey". Counsel emphasised, and I have accepted, that the plaintiff's alcohol abuse was materially contributed to by the sexual assaults, and that had he not drank so heavily the plaintiff's work history would have been much more stable.

**301**  Counsel for the Oblates, however, emphasised various factors effecting the plaintiff's original position in relation to his past earning capacity, including his predisposition to alcohol abuse, his various head injuries and his personal problems. Accordingly, counsel submitted that the Oblates should not be made to compensate the plaintiff for loss of past earning capacity, and that to do so would be to place the plaintiff in a position better then he would have been had the Oblates not been held vicariously liable.

**302**  Counsel for the plaintiff submitted a report by Mr. R. Carson, an economist, dated December 21, 2000 to assist the court in evaluating the plaintiff's lost past and future earning capacity. Mr. Carson prepared three statistical lifetime earning profiles: British Columbia males with high school diplomas; British Columbia forest workers; and British Columbia males with less than grade 9 education.

**303**  In my view, the most appropriate statistical profile is that of British Columbia forest industry workers. Indeed, this is most consistent with the plaintiff's actual career trajectory, as between 1966 and 1995 he was primarily employed as a logger. While I recognise that the sexual abuse may have indeed effected the plaintiff's concentration at school, on the evidence, I cannot conclude that he would not have become a logger had he not experienced the sexual assaults while at Christie. In particular, the plaintiff testified, in cross-examination, that he came from a family of loggers and that it was natural that he too ended up working in the industry. He also testified that there was always a job to be found in logging.

**304**  Based on the appropriate statistical profile chosen, counsel for the plaintiff submitted, in argument, that the court must, "roughly assess the percentage of the Plaintiff's earning capacity that was impaired by the sexual assaults for each five-year period." Accordingly, based on each profile, counsel for the plaintiff calculated percentage deductions to account for the effects of the sexual assaults on his earning capacity for each period.

**305**  However, in my view, the plaintiff's past earning capacity from the time he entered the work force until the date of trial must be broken down and assessed in three distinct periods: 1966 to 1983; 1984 until the 1995 Accident; and from the 1995 Accident to the date of trial.

**306**  Turning first to the 1966-1983 period, with regard to the causal nexus between the sexual abuse, the plaintiff's abuse of alcohol and his past earning capacity, it is abundantly clear, on the evidence, that the plaintiff's work history during that period was plagued by interruptions due to his alcohol abuse. I am satisfied that had the plaintiff not abused alcohol, he would have had a much more stable work history.

**307**  I have also found, above, that the sexual abuse materially contributed to the plaintiff's use of alcohol, particularly in a self-medicative fashion. In turn, on the evidence, the plaintiff's alcohol abuse had a detrimental effect on his earning capacity. Dr. Riar's report states, as follows:

Lastly, in spite of various problems he was able to maintain some kind of employment until the mid-1990s but there were various interruptions due to his substance abuse. I feel if his substance abuse was less severe he could have functioned better. One of the factors which made his substance abuse severe is the after-effects of the sexual abuse.

**308**  I have also found, however, that it was highly likely that the plaintiff would have developed an alcohol problem in any event. Accordingly, while the plaintiff's predisposition to alcohol abuse does not warrant a reduction in general damages, I think that it is most relevant to the plaintiff's claim for loss of past earning capacity.

**309**  Counsel for the plaintiff submitted that the Oblates are liable for all reasonably foreseeable damages flowing from the plaintiff's alcohol abuse, including the consequences to his past and future earning capacity. However, as noted, the Oblates need not place the plaintiff in a position better than he would have been had they not been held vicariously liable. Given my finding that the plaintiff had measurable risks and shortcomings which were inherent to his original position, significantly increasing the likelihood that he would have abused alcohol had the sexual assaults never happened, the Oblates are not liable for the whole of the plaintiff's loss of past earning capacity during this period. However, the plaintiff is entitled to an award for loss of past earning capacity to recognise that though he would have likely had an alcohol abuse problem in any event, the sexual assaults materially contributed to his alcohol problem, which in turn effected his employment.

**310**  In all of the circumstances, I assess the plaintiff's loss of past earning capacity for the period between 1965 and 1983 at $80,000.

**311**  With regard to the period from 1983 to the 1995 Accident, the plaintiff testified that he has maintained sobriety since late 1983. Given this fact, the linkage between the sexual assaults and the plaintiff's loss of past earning capacity from 1983 to the 1995 Accident is much less clear. While he suffered from psychological injuries caused, or materially contributed to by the sexual assaults during this period, there is no evidence to suggest that the plaintiff was not able to work. Indeed, he was employed as a taxi driver in Campbell River for a period of time. While in Campbell River the plaintiff attended to his duties as a Band councillor in his spare time, though the evidence is unclear as to whether he received any remuneration. He also returned to the logging industry briefly in 1995.

**312**  To his credit, the plaintiff also took a number of upgrading classes, including a welder training program, which ultimately resulted in a short-term disability. However, as the plaintiff was apparently employable during this period, I make no award for loss of past earning capacity.

**313**  Regarding the period from the 1995 Accident to the date of trial, after a very brief return to the logging industry, the plaintiff suffered his most recent head injury. His medical records indicate that he suffered scalp and facial lacerations, a concussion, soft tissue damage, and that he briefly lost consciousness. He has not worked since sustaining that injury.

**314**  A number of experts saw the plaintiff following the 1995 Accident. Mr. D. Nordin, a vocational consultant for the plaintiff, saw the plaintiff in January of 2000. In a report dated July 27, 2000 Mr. Nordin concluded that it was unlikely that the plaintiff will successfully return to competitive employment due to his limited education, his physical, cognitive and emotional difficulties, and the fact that the plaintiff has had little work in the past 18 years. Mr. Nordin states in his report that he found it extremely difficult to determine the contribution, and the extent of that contribution, of the sexual assaults, the plaintiff's alcohol abuse, his limited education and his history of multiple head injuries to his employment history. However, when asked to explain this statement, he testified, in chief, as follows:

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|  | Q |  | Mr Nordin, in your opinion is it necessary to reconcile this statement that I first read to you that is in the first full paragraph like others who assessed Mr. Billy I find it extremely difficult to determine which of these factors and to what extent contributed to his employment history. How do we reconcile that with your final statement that it's possible that with the alleviation of his emotional difficulties he could consider returning to the type of work he did in the 1990s? |  |
|  | A |  | I'm not sure how to explain how I reconcile it. I guess what I'm saying that his -- all of those factors, the physical difficulties, the cognitive and the emotional all play a role in his inability to work right now. And in different ways. The physical restrictions or limitations preclude him from a certain array of jobs such as the heavy sort of logging work he would have done in the past. His cognitive limitations I think preclude him from work that's data oriented or people oriented and I think right now his emotional difficulties sort of cuts across all of those and basically precludes him from holding down any competitive job. |  |

**315**  Dr. C. Cooke, a vocational consultant for the defence, prepared a report dated September 4, 2000. Dr. Cooke was of the opinion that the plaintiff suffered from physical, cognitive and emotional dysfunction preventing his re-entry into the work force in all but a few occupations. His report states that the plaintiff's limitations can be attributed to his work-related injuries, as well as to his long-time alcohol abuse, and concluded that, "there is no evidence at this time to suggest that the allegations of sexual assault contributed to his work record." However, Dr. Cooke testified that he was ultimately unable to distinguish the relative contribution of the sexual assaults and the head injuries to the plaintiff's disabilities.

**316**  Following their 1996 meeting, Dr. Krywaniuk concluded in his psychological and vocational report to Human Resources Development Canada that the plaintiff had suffered, "a significant level of neuropsychological damage" attributable to a number of factors, including the cumulative effect of his various head injuries. He considered the plaintiff to be, "cognitively and emotionally disabled", and found that there was strong suggestion that his disabilities also extended to the physical domain. Dr. Krywaniuk recommended that the plaintiff focus on his "emotional factors" rather than vocational upgrading, particularly if upgrading would cause the plaintiff stress. He did, however, suggest that upgrading would be appropriate if it would provide the plaintiff with feelings of satisfaction and feelings of progress.

**317**  Upon receiving a request for clarification from Ms. D. Barrie, a lawyer appealing the plaintiff's denial of benefits by the Worker's Compensation Board, Dr. Krywaniuk reviewed the plaintiff's psycho-social history. He concluded in a letter dated May 20, 1997, as follows:

...it would be my opinion that most or all of [E.B.'s] neuropsychological problems are related to his head injuries. While the background experiences noted above can produce psychological effects, the impact on his neuropsychological status would be relatively minimal.

**318**  Dr. Krywaniuk again saw the plaintiff, at the request of his counsel, in June of 2000. Dr. Krywaniuk administered a battery of tests, which indicated that the plaintiff showed weak verbal skills, non-verbal skills in the lower half of the average range, memory problems and a level of emotional maladjustment. His report also states that the plaintiff's potential was "subsequently reduced through his various head injuries."

**319**  As outlined above, the thrust of Dr. Krywaniuk's testimony at trial, however, was that the plaintiff's head injuries, and resultant neurocognitive deficits, interacted with his fragile emotional state in a synergistic fashion. He concluded that the plaintiff's pre-existing emotional difficulties caused his maladjustment to the effects of his head injury to be more severe, making it more difficult for him to adjust to his problems.

**320**  On the basis of Dr. Krywaniuk's evidence, counsel for the plaintiff submitted that the plaintiff was entitled to 100% compensation for loss of past earning capacity from the date of the 1995 Accident to trial. Counsel submitted that the plaintiff's sexual assault injuries interacted with the secondary effects of his 1995 head injury in a synergistic manner, which has resulted in his current state of total disability. On this point, counsel stressed the following passage from Dr. Krywaniuk's 1997 letter:

Quite often, the individual is able to cope, at successively reduced levels, until the "final straw" after which coping abilities are significantly compromised. It may be that [E.B.] has reached this point.

Counsel explained, in argument, that:

...the Plaintiff was functioning up to 1995 with a proverbial "thin skull" caused by the emotional sequelae of childhood sexual abuse. However, the 1995 brain injury was the straw that caused the Plaintiff's "thin skull" to collapse, resulting in a permanent loss of all income earning capacity.

**321**  Counsel for the Oblates, however, submitted that the Oblates need not compensate the plaintiff for loss of past earning capacity during this period. Counsel stressed, inter alia, that the various head injuries suffered by the plaintiff have effected his work history independently of the sexual assaults. Counsel also submitted that Dr. Krywaniuk was of the opinion that the plaintiff's neuropsychological problems were largely caused by his head injuries, and that Dr. Krywaniuk was an impartial advocate for the plaintiff.

**322**  The evidence of Dr. Cooke and Mr. Nordin is ultimately unhelpful in determining the effect of the interaction between the head injuries and sexual abuse on the plaintiff's employability, as they could not isolate the contribution of the plaintiff's various life factors on his employability.

**323**  Dr. Krywaniuk was the only expert who gave evidence concerning this interaction. However, I am cognisant that Dr. Krywaniuk's evidence changed over time. For example, the May 20, 1997 letter written to assist the plaintiff in his Worker's Compensation Board claim attributed the plaintiff's neuropsychological problems to his head injuries, and largely downplayed the effects of the plaintiff's other life circumstances. At trial, however, Dr. Krywaniuk emphasised the effects of the sexual assaults.

**324**  When asked to explain this inconsistency in cross-examination, Dr. Krywaniuk testified, as follows:

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|  | Q |  | Doctor in your 1997 report you put the emphasis on the head injuries because it was the head injury that was being looked at as the compensable injury and in 2000 you shifted that emphasis to the sexual use abuse because you knew that was what was the compensable injury was, that's the only reason for that change in wording, isn't it? |  |
|  | A |  | It's -- how should I explain it to be more clear -- I don't think one precludes the other and that's basically what I'm saying, is I think that both of those statements are true. |  |

**325**  The variations in Dr. Krywaniuk's reports suggest to me that perhaps he was being something less than an impartial assessor. After consideration, I cannot conclude that Dr. Krywaniuk's evidence on the synergistic effects of the plaintiff's 1995 head injury and the pre-existing effects of the sexual abuse is sufficient to hold the Oblates liable for the plaintiff's loss of past earning capacity from the 1995 Accident to the date of trial. Put another way, on Dr. Krywaniuk's evidence, I cannot conclude that the plaintiff has proven on a balance of probabilities that the effects of his head injury interacted with the effects of the sexual abuse, ultimately rendering him unemployable for this period.

**326**  It is my view that the 1995 head injury constituted an intervening act, independent of the Oblates' wrongdoing. The Supreme Court of Canada considered the effect of intervening factors in Athey v. Leonati, supra. Major J. stated at paras. 31 and 32, as follows:

The respondents also sought to draw an analogy with cases where an unrelated event, such as a disease or non-tortious accident occurs after the plaintiff is injured. One such case was Jobling v. Associated Dairies Ltd., [1981] 2 All E.R. 752 (H.L.), in which the defendant negligently caused the plaintiff to suffer a back injury. Before the trial took place, it was discovered that the plaintiff had a condition, completely unrelated to the accident, which would have proved totally disabling in a few years. Damages were reduces accordingly. In Penner v. Mitchell [*(1978), 89 D.L.R. (3d) 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-92W1-F27X-6097-00000-00&context=) (Alta. C.A.), damages for loss of income for 13 months were reduced because the plaintiff had a heart condition, unrelated to the accident, which would have caused her to miss three months of work in any event.

To understand these cases, and to see why they are not applicable to the present situation, one need only consider first principles. 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 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. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

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| [emphasis mine] |  |

**327**  In my view, the injuries resulting from the 1995 Accident are unrelated to the Oblates' wrongdoing. I am satisfied that the plaintiff was employable prior to the 1995 Accident, and that the neuropsychological injuries he suffered from the 1995 Accident rendered him unemployable.

**328**  Accordingly, I make no award for loss of past earning capacity from the 1995 Accident to the date of trial.

Loss of Future Earning Capacity

**329**  I also make no award for loss of future earning capacity. In my view, on the evidence, the plaintiff has failed to prove, on a balance of probabilities, that his future unemployability can be attributed to anything other than the neuropsychological injuries resulting from the 1995 Accident.

Future Care Costs

**330**  On this issue, Dr. Riar's report states, as follows:

Regarding the issue of treatment, I feel that [E.B.] can benefit from a supportive and cognitive-behavioural counselling approach by an experienced therapist who has dealt with these kinds of issues. This can be done either by a psychologist or a psychiatrist but psychiatrists are covered by M.S.P. and psychologists charge from $80 to $120 per hour. He needs to attend treatment for at least 15 to 20 sessions.

**331**  It was also Dr. Riar's evidence, which I accept, that there are few psychiatrists who do this type of therapy for sexual abuse victims, and that psychologists mostly do it. He further stated that there is typically a long waiting list for a psychiatrist and it was his understanding that no psychiatrist in Nanaimo, where the plaintiff currently resides, provides such therapy.

**332**  Counsel for the plaintiff submitted that the out-of-pocket costs estimated in Dr. Riar's report range between $1,200 (15 sessions at $80) and $2,400 (20 sessions at $120). Counsel also submitted that the Oblates should bear the costs of travel to Vancouver for the 15 to 20 sessions, at $150 per trip, totalling between $2,250 and $3,000.

**333**  Counsel for the Oblates conceded, in argument, that the future care component of damage awards in sexual abuse cases is, "extremely important so as to enable the Plaintiff to be rehabilitated and made better." Counsel submitted that travel costs may be included, but only to the extent they represent a real cost and are reasonable, and accepted the recommendations for future care that Dr. Riar set out to a maximum amount of $2,400.

**334**  In the result, I award the plaintiff $2,400 for future counselling. However, in my view, the plaintiff's claim for $150 per trip from Nanaimo to Vancouver is excessive and therefore unreasonable. I instead award the plaintiff a total of $1,000 to cover his travel expenses to Vancouver.

Conclusion

**335**  The plaintiff is entitled to a judgment for the following damages: $150,000 in general damages, $25,000 of which is awarded as aggravated damages; $80,000 for loss of past earning capacity; and $3,400 for future care costs. In the event that counsel are unable to agree on costs, they are at liberty to seek directions.

COHEN J.

**End of Document**

[***Esau v. Myles, [2010] B.C.J. No. 55***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-2530-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Fort St. John, British Columbia

C.J. Ross J.

Heard: September 21-24 and November 20, 2009.

Judgment: January 14, 2010.

Docket: 06-5117

Registry: Victoria

**[2010] B.C.J. No. 55** | [*2010 BCSC 43*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23VT-00000-00&context=) | [*2010 CarswellBC 70*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23VT-00000-00&context=) | [*184 A.C.W.S. (3d) 702*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23VT-00000-00&context=)

Between Brendan Colt Esau, Plaintiff, and Dustin Timothy Myles, Defendant

(71 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Body injuries — Back and spine — Plaintiff awarded non-pecuniary damages of $70,000, $150,000 for loss of earning capacity and gross past wage loss was assessed at $49,391 — Plaintiff suffered mechanical/musculoligamentous strain to his lower back which, because of his anatomical anomalies, left him with permanent pain in his lower back — Plaintiff, 24, worked in physically demanding work which he could no longer perform after the accident — Plaintiff's employment prospects had been reduced as a result of his injury since physically demanding occupations were no longer open to him — Plaintiff unable to enjoy recreational activities at the pre-accident level.**

**Damages — Types of damages — General damages — For personal injuries — Loss of earning capacity — Special damages — Past loss of income — Non-pecuniary loss — Pain and suffering — Plaintiff awarded non-pecuniary damages of $70,000, $150,000 for loss of earning capacity and gross past wage loss was assessed at $49,391 — Plaintiff suffered mechanical/ musculoligamentous strain to his lower back which, because of his anatomical anomalies, left him with permanent pain in his lower back — Plaintiff, 24, worked in physically demanding work which he could no longer perform after the accident — Plaintiff's employment prospects had been reduced as a result of his injury since physically demanding occupations were no longer open to him — Plaintiff unable to enjoy recreational activities at the pre-accident level.**

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| --- |
| Assessment of damages for injuries suffered in a 2005 motor vehicle accident. The plaintiff suffered soft tissue injuries to his neck which resolved within a few weeks of the accident and a mechanical/musculoligamentous strain to his lower back which, because of his anatomical anomalies, left him with permanent pain in his lower back. The plaintiff, 24, always worked in physically demanding jobs. He had no post-high school academic training. In 2005 he obtained work as a field technician. He was unable to work for almost one year after the accident and was experiencing constant pain in his low back. The plaintiff still continued to suffer low back pain and had to seek new employment that was not physically demanding. The plaintiff had pre-existing spondylolisthesis and spondylolysis, as well as spinal bifida occulta in his lower back. Although these conditions were asymptomatic prior to the accident, they rendered him more vulnerable to injury to his lower back and predisposed to developing chronic symptoms when injured.  HELD: Plaintiff awarded non-pecuniary damages of $70,000, $150,000 for loss of earning capacity and gross past wage loss was assessed at $49,391.  There was no measurable risk that, absent the accident, the anatomical anomalies would have detrimentally affected the plaintiff in the future. As a result of the back injury, the plaintiff was no longer able to participate in jobs requiring heavy labour. He was able to take part in leisure and sporting activities that he enjoyed, but not at the level he previously enjoyed and with pain. It was most likely the plaintiff would have continued with his job as a field technician. But for the accident, his gross earnings for 2005 to 2008 would have been $157,000. His actual earnings were $107,609. The plaintiff's employment prospects had been reduced as a result of his injury since physically demanding occupations were no longer open to him. |

**Counsel**

Counsel for the Plaintiff: Barbara J. Flewelling.

Counsel for the Defendant: Stephen J. Oliver.

**Reasons for Judgment**

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| **C.J. ROSS J.** |

**Introduction**

**1**  The plaintiff, Brendan Esau, seeks damages for injuries sustained as a result of a motor vehicle accident that occurred on June 20, 2005 when the vehicle Mr. Esau was driving was struck from behind by the vehicle driven by the defendant, Dustin Myles.

**2**  Liability is not at issue. In addition, counsel for Mr. Myles concedes that Mr. Esau was injured in the accident and that as a result he is entitled to non-pecuniary damages, an award for past wage loss and for loss of future earning capacity. The issues are the extent of the injuries that he suffered, the quantum of the damages and the effect, if any, of a pre-existing condition or the damages awarded.

**Facts**

**3**  Mr. Esau is 24 years old. He was born and has lived his entire life in Fort St. John. He demonstrated a very strong work ethic early in life, starting part-time work at age 12 and continuing with part-time employment until he graduated from High School. His parents emphasized that this work resulted from his initiative, not their urging. He was working up to 30 hours a week during High School in addition to his studies. His first job was doing cleanup work. He then worked in food preparation and eventually at Canadian Wholesale where he was employed in the produce department. The work involved considerable heavy lifting and was quite physically demanding.

**4**  Mr. Esau graduated from High School in June 2003. However, he was frank to say that he did not particularly enjoy school and struggled academically, particularly in math and science. He worked with a tutor and sought extra help, both at school and from his mother, and with this help, was able to graduate. Like many young people, he was not certain of his career goals during High School. He had some interest in taking the Power Engineer course at Northern Lights College.

**5**  Mr. Esau's parents were both strongly supportive of Mr. Esau learning a trade and had set aside some money to help him. However, immediately after graduation Mr. Esau wanted to earn more money to support himself while at college. He worked full-time at Canadian Wholesale, receiving a promotion to assistant supervisor of produce. In March 2004, he wrote the Canadian Adult Achievement Test ("CAAT") and the Math Entrance Exam in support of an application to the Power Engineering and Gas Processing Program at Northern Lights College. He failed both tests and recognised that he would require further tutoring and assistance if he hoped to enter that program. However, he did not pursue that support at the time.

**6**  He left his position at Canadian Wholesale in August 2004 and started with Cascade Steaming Inc. as a swamper. He moved away from home at this time. Mr. Esau stated that his plan was to save money, upgrade his skills, and then go back to school eventually.

**7**  The position with Cascade offered higher wages and the possibility for substantial overtime. It was a position requiring heavy labour and was very physically demanding. In addition, the hours were often very long. Mr. Esau had no difficulty carrying out his duties and experienced no problems with his back.

**8**  In early 2005, Mr. Esau left his position and started working with Redneck Oilfield Service as a swamper. Then in May 2005, he started to work with Alpine Environmental ("Alpine") as a field technician. Mr. Esau's father was employed by Alpine at the time and recommended it to his son as a good opportunity. Mr. Esau was trained on the job. He started on an on call basis and was later taken on full-time. The work at Alpine was also very physically demanding with long hours. There were some opportunities for advancement within the company to the positions of foreman and supervisor. Mr. Esau stated that he enjoyed the work very much and had no difficulty performing his duties.

**9**  Mr. Esau's health prior to the motor vehicle accident was generally good. He suffered a grand mal seizure at age 15 and was treated with medication. Eventually he was taken off the medication, but suffered seizures about a year later. He was placed back on medication and thereafter, has had no further seizures. It is common ground that his epilepsy is not germane to any of the issues to be determined in this litigation. Mr. Esau experienced no problems with his back prior to the motor vehicle accident.

**10**  Prior to the accident Mr. Esau enjoyed a very active lifestyle. In addition to the physical demand of his employment, he participated in many sports and enjoyed hunting and fishing.

**11**  The motor vehicle accident occurred on June 20, 2005. Mr. Esau was stopped at an intersection waiting for the vehicle in front of him to complete a turn when his vehicle was struck from behind by the vehicle driven by the defendant. He was wearing his seat belt. The collision created a significant impact. Mr. Esau's car was pushed about 3/4 of the way into the intersection. There was considerable damage to Mr. Esau's vehicle, which was eventually written off. The front seat broke and Mr. Esau hit his head on the steering wheel. The rear of the vehicle was pushed in.

**12**  Mr. Esau drove his vehicle to Alpine to speak with his father, who reported the accident. He was feeling very shaken up. His forehead was swollen. He had pain in his neck and lower back. The next morning his neck and back were very sore and he went to emergency at Fort St. John Hospital. He was given an x-ray, neck brace and a prescription for pain and inflammation and told to stay off work for a couple of weeks. Mr. Esau found that the medication made him very groggy.

**13**  Mr. Esau followed up with his family doctor, Dr. Hattingh, about two weeks later. By that time, his neck pain had mostly resolved. However, the pain in his back was still very problematic. Dr. Hattingh gave him another prescription and told Mr. Esau that he could return to light duties at work.

**14**  Mr. Esau tried to return to his employment in early July 2005. He found that he could not perform his tasks without assistance and his back pain was very aggravated. He stated that his back was very sore; he could hardly move and could hardly even bend. Part of the difficulty was that Alpine did not really have any truly light duties that it could assign to Mr. Esau.

**15**  Mr. Esau returned to Dr. Hattingh who advised him not to return to work. He was referred to physiotherapy between July 15 and October 7, 2005 and acupuncture and massage therapy between November 8 and December 12, 2005. Mr. Esau stated that his back did not improve during that period. He was unable to return to work. Dr. Hattingh referred Mr. Esau to Dr. Lavoie, an orthopaedic surgeon in Edmonton.

**16**  Mr. Esau was also referred to Dawson Creek Physiotherapy where he was assessed by Gareth Lowe, a physiotherapist. Mr. Lowe referred Mr. Esau to Eunice McCaffrey, a personal trainer for a core strengthening program. He attended this program between January 12, 2006 and April 18, 2006. Mr. Esau found that he experienced some improvement with this program. Mr. Esau continued to do the exercises he was taught after the program concluded. He reported that by March 2006 his back had improved, but that he had not completely recovered.

**17**  Mr. Esau returned to Mr. Lowe for a functional assessment in March 2006. Mr. Lowe testified that on March 10, 2006 he reported that Mr. Esau's:

"... ability to perform consistently at this level for prolonged periods remains questionable, as an increase in lumbar spine symptoms (discomfort and muscle spasm) was noted the day following testing. These symptoms lasted the remainder of the following day and into the morning of the next."

**18**  Mr. Lowe advised Mr. Esau to continue with four more weeks of the conditioning program following which he may be able to attempt to return to work.

**19**  On May 29, 2006, Mr. Esau saw Dr. Lavoie. Mr. Esau testified that Dr. Lavoie advised him to find a trade that was lighter duty and to lose weight. At that time he was 200 pounds and was told to lose another 20 to 30 pounds. Over the course of the next year, he lost 40 pounds.

**20**  Mr. Esau testified that at this time, almost one year after the accident, he was experiencing constant pain in his low back. On a good day, it would be about four or five out of ten. On a bad day, it would be ten out of ten. He was getting about two bad days per week.

**21**  Mr. Esau stated that the weight loss was also beneficial to his back, however, he continued to have pain that was constant and flare ups of severe pain about twice a week.

**22**  After seeing Dr. Lavoie, Mr. Esau began to look for employment that was lighter than what he had done previously and something that would not aggravate his low back. He applied for a number of jobs. In one instance, Choice Lumber, he testified that he felt he was not hired because he advised them that he could not do any heavy lifting. His father suggested that he apply for a position that he had heard was available at Fort Motors and would not involve heavy physical work and Mr. Esau did so. He was hired to begin work at Fort Motors on June 26, 2006 and testified that he understood that the job he was hired to do would be light duty and would involve running for parts and driving the customer shuttle. His evidence was that this did not happen and that he was asked to hold automotive parts, such as transmissions, in place while the mechanics were bolting it to the vehicle. These activities aggravated his back pain. He tried to be moved to the "counter" but he understood that it would be a year before he would be able to move into such a position.

**23**  Due to his worsening low back pain, he looked for other employment which would be less aggravating. His father, Mr. Brent Esau, testified as to his observations of the plaintiff when he came home from work at Fort Motors. Mr. Esau was living at home again during this time and his father had a good opportunity to observe his son. Mr. Esau Sr. testified that when his son was working at Fort Motors, he was in extreme pain some days after work particularly after having to do heavy lifting to help the mechanics.

**24**  Mr. Esau Ieft Fort Motors on September 23, 2006 and applied for a position at AAA Safety. He was hired as an SCBA technician, commenced employment with them on October 10, 2006, and remains employed there. Mr. Esau received on the job training with respect to this position which he was able to complete. This position did not have the physical demands of his previous jobs and Mr. Esau and his father testified that it did not aggravate his back to the extent that his previous job at Alpine and Fort Motors did.

**25**  Mr. Esau stated that his low back pain is essentially unchanged over the past three and a half years. He always has low back pain. On a good day he rates it as a four or five out of ten. If he is doing a lot of manoeuvring or bending at work, it can go up to eight, nine or ten out of ten.

**26**  Mr. Esau felt he was not earning enough money and held a second job at Cosmic Grounds Coffee Shop between January 2007 and May 2007. He ended that employment as a result of his epilepsy following a few seizures. After this, he was placed back on his anti-seizure medication and has been seizure free since then.

**27**  Mr. Esau was not happy with the level of his income and in September 2007 took a second job again, this time at the Aurora Theatre. He remains employed at the theatre in a part-time capacity selling hot foods to customers.

**28**  Mr. Esau testified that he still suffers from low back pain and that his employment at AAA Safety still causes an increase in his pain, particularly if he is doing more manoeuvring and bending. He stated that after an evening working at his second job at the Aurora Theatre, his low back pain can go up to an eight or nine out of ten. He states that going for long walks will cause his back pain to worsen. He tried running on occasion but was unable to continue as the impact from the running was hard on his back. Sitting and standing for a long time will cause his back pain to worsen.

**29**  Mr. Esau's evidence was that before the accident, he enjoyed fishing, ice hockey and hunting. He testified that there are still some activities that he participates in, such as hockey, but that it aggravates his low back. His father testified that he has played golf with his son and observed that this sport causes low back pain. Ms. Sipes, the plaintiff's girlfriend testified that the plaintiff's back pain affects their ability to enjoy intimacy in their relationship.

**30**  Mr. Esau's mother and father also testified that they have observed that their son is in pain after performing tasks that he was able to do before the accident. Mrs. Esau gave evidence that she and her husband helped Mr. Esau move in August 2009 and she observed that moving a loveseat and heavy boxes over a two hour period was painful for him.

**31**  Mr. Esau reports that he is still doing the exercises he was taught. His back remains problematic. Many of the activities of daily living cause an increase in his pain including long walks, running, sitting, standing, and lifting. He is able to do his job, but with considerable pain.

**Expert Evidence**

**32**  Dr. James Filbey, who is a specialist in Physical Medicine and Rehabilitation, examined Mr. Esau and prepared two expert reports, dated April 15 and August 16, 2009.

**33**  X-ray and CT scans together with physical examination revealed that Mr. Esau had certain anatomical anomalies; namely, spondylolisthesis and spondylolysis, as well as spinal bifida occulta, in his lower back at the L4/L5 area. These were congenital or developmental conditions that predated the motor vehicle accident, but were asymptomatic prior to the accident. These conditions, however, rendered Mr. Esau more vulnerable to injury to his lower back and predisposed to developing chronic symptoms when injured. With respect to causation, Dr. Filbey's report read as follows:

Diagnosis:

It is my opinion, based on the available information including the history, physical examination and review of records that Mr. Esau has the following diagnoses:

1. Low back pain -- mechanical/musculoligamentous strain with underlying spondylolisthesis, spondylolysis and spina bifida occulta;
2. Cervical spine pain -- resolved.

Causation:

It is my opinion that the symptoms related to the above diagnoses are a direct result of the motor vehicle accident. The spondylolisthesis and spondylolysis, as well as the spina bifida occufta, predated the MVA but were not symptomatic. It is my opinion that had the MVA not occurred, there is no indication that he would have, or would have ever, developed symptoms in the low back. It is evident that he did report low back pain at the ER the day following the accident. It is noted that his return to regular work resulted in an aggravation of these symptoms. There is no indication that he would have developed low back pain had the pain following the MVA not occurred.

**34**  Dr. Filbey recommended that Mr. Esau undergo a bone scan with SPECT imaging to clarify the situation with respect to the anatomical anomalies, and in particular, whether there was further deterioration. That test was conducted and in his subsequent report Dr. Filbey concluded:

Discussion:

The bone scan suggests that at this stage, there is no indication that he is experiencing any bone remodelling or damage in the lower lumbar region. It also indicates that the grade I spondylolisthesis is stable and not causing progressive disc/joint deterioration at this time.

The CT and MRI images confirm that he has an anatomical anomaly in the form of a spondylolysis with spondylolisthesis.

These anatomical variants pre-dated the MVA but are consistent with an abnormal bony and ligamentous structure which has led to his spine being more vulnerable to the forces of injury and in addition, less able to rehabilitate following such an injury.

In this instance, he remains symptomatic at more than 4-years post accident. It is very unlikely that he will have symptomatic resolution over time. The fact that the bone scan is normal is consistent with the opinion that the MVA related injury has not put him at significant risk of pre-mature or accelerated degenerative bone change in the spinal regions.

It is my opinion that it is more likely than not that his symptoms are likely to remain very similar to their current level over the long term. He may get some symptomatic improvement if he is able to avoid activities that strain the lumbar region, however, he will remain symptomatic and very vulnerable to exacerbations of pain with such tasks.

Tasks that are likely to aggravate his symptoms and place increased forces on the abnormal spinal segments (spondylolysis and spondylolisthesis) include heavy lifting, twisting, bending and turning. Labourous tasks are more likely to place increased strain (shovelling, lifting etc.).

Less strenuous tasks may aggravate his pain but are unlikely to significantly increase symptoms over the long-term (ie. Will result in increased symptoms for short periods of time) include prolonged stationary postures including sitting/standing while performing tasks.

Mr. Esau is, in my opinion, less able to take full advantage of gainful employment that requires moderate to heavy tasks/labour. He is best suited for employment that allows him to be more sedentary with light tasks and frequent position change and task variation.

**35**  A vocational assessment was prepared by Derek Nordin. Mr. Nordin administered a number of tests to measure academic achievement, aptitudes and vocational interests. Mr. Esau performed very poorly on the tests in virtually every category. Mr. Nordin was not of the view that Mr. Esau's effort was deficient. However, the results were anomalous in that they were inconsistent with Mr. Esau's achievements both at school and in his employment. In other words, according to these test results, Mr. Esau should not have been able to graduate from High School and perform in the jobs he has held, including his current position. Mr. Esau showed interest in doing jobs with tangible results, operating heavy equipment, using tools, operating precision machinery, fixing, building, repairing. He had a high interest in food service, mechanical/fixing, electronics and protective service occupations.

**36**  Mr. Nordin concluded that it is more likely that had Mr. Esau not been injured, he would have pursued a career path that involved practical training applications with a heavier reliance on physical prowess. With respect to Mr. Esau's interest in training as a power engineer, Mr. Nordin was of the view that the cognitive demands of this field were likely beyond Mr. Esau, while he would not rule it out as a possibility.

**Causation**

**37**  The principles to be applied were 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=), at pp. 466-468 [*Athey*]. I summarize those principles as follows:

1. causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury;
2. the "but for" test is the general test for causation. Where this test is unworkable, causation is established where the defendant's ***negligence*** "materially contributed" to the occurrence of the injury;
3. the defendant's ***negligence*** need not be the sole cause of injury; so long as it is a material cause, the defendant will be liable. There is no apportionment between tortious and non-tortious causes;
4. the plaintiff is to be restored to the position he would have been in absent the defendant's ***negligence***. Therefore the defendant need not compensate the plaintiff for the debilitating effects of pre-existing conditions, nor for subsequent events which are completely unrelated to the defendant's ***negligence***.

**38**  In the present case it is conceded that the motor vehicle accident caused injury to Mr. Esau's lower back. The issue is whether there should be a reduction to reflect the debilitating effects of Mr. Esau's pre-existing condition. In that regard the approach to be taken is summarized in *Athey* at para. 35 as follows:

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: *Cooper-Stephenson*, *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence***, then this can be taken into account in reducing the overall award: *Graham v. Rourke* [ [*(1990), 74 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5T5-M3YH-00000-00&context=)]; *Malec v. J. C. Hutton Proprietary Ltd.* [(1990), 169 C.L.R. 638 (Aust. H.C.)]; *Cooper-Stephenson*, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis in original.]

**39**  The position of the plaintiff is that there is no measureable risk that the pre-existing condition would have detrimentally affected Mr. Esau in the future and accordingly there should be no reduction in the award. Counsel for the defendant submits that there is a measureable risk that Mr. Esau's anatomical anomalies would have resulted in injury in the future, absent the accident, and that accordingly a reduction in the award is appropriate to reflect that risk. Both counsel rely upon the evidence of Dr. Filbey to support their positions.

**40**  I have reviewed Dr. Filbey's reports and his testimony and have concluded that there is no measurable risk in Mr. Esau's case that, absent the accident, the anatomical anomalies would have detrimentally affected him in the future. Thus, it is not appropriate to discount the award to reflect the contingency. In particular, I note that Mr. Esau did not have any back pain prior to the accident. It was determined that he did not suffer from degenerative spondylolisthesis. The bone scan determined that his condition was stable, there was no inflammatory process.

**41**  It was Dr. Filbey's opinion that had the accident not occurred there is no indication that Mr. Esau would have ever developed symptoms in the low back. Dr. Filbey noted that in the research, and in his experience, spondylolisthesis that is of a non-degenerative type is not associated with an increased incidence of back pain above the general population. It was his opinion that if an individual who had this condition engaged in activities that stressed the back, there was a greater likelihood that they would experience pain, but that the pain was not likely to be disabling pain.

**Non-Pecuniary Damages**

**42**  Counsel for Mr. Esau submits that the appropriate award for non-pecuniary loss is $95,000. Counsel emphasizes in particular Mr. Esau's youth and the prognosis that the chronic pain will be lifelong. The injury has had an impact upon every area of Mr. Esau's life, his work, his leisure activities, his ability to do work at his home, and his intimacy with his partner. Counsel cites the following authorities: *Cipriano v. Cipriano* [*(1996), 74 B.C.A.C. 19*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2JP-00000-00&context=), [*22 B.C.L.R. (3d) 148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2JP-00000-00&context=); *Slocombe v. Wowchuk*, [*2009 BCSC 967*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0H8-00000-00&context=); *Pett v. Pett*, [*2008 BCSC 602*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-62GF-00000-00&context=) (varied [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=)) 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=).

**43**  Counsel for Mr. Myles accepts that Mr. Esau suffers from continuing low back symptoms that have persisted since the accident. Counsel notes that the intensity and frequency of the symptoms has diminished over time, particularly since Mr. Esau completed the physical conditioning program. Counsel submits that the appropriate award for non-pecuniary loss in the circumstances is $30,000 to $40,000 citing *Haines v. Shewaga*, [*2009 BCSC 340*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3Y4-00000-00&context=) [*Haines*]; *Lubke (Litigation guardian of) v. Mattin*, [*2009 BCSC 709*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2H8-00000-00&context=) [*Lubke*]; *Stone v. Kirkwood*, [*2008 BCSC 1295*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3B1-00000-00&context=) [*Stone*]; *Chen v. Beeler*, [*2004 BCSC 584*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B2GK-00000-00&context=) and *Lowen v. Kovacevic*, [*2005 BCSC 1520*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2DG-00000-00&context=), [*30 C.C.L.I. (4th) 156*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2DG-00000-00&context=) [*Lowen*].

**44**  It is clear that Mr. Esau suffered soft tissue injuries to his neck which resolved within a few weeks of the accident and a mechanical/musculoligamentous strain to his lower back, which because of his anatomical anomalies has left him with permanent pain in his lower back. Mr. Esau has done everything suggested to recover. He followed all medical recommendations. He works through his pain. He has a very strong work ethic and consequently works at both a full-time and part-time job. He has taken very little time off work since October 2006. However, he continues to have chronic pain with flare ups of severe pain. He is no longer able to participate in jobs requiring heavy labour. He is able to take part in leisure and sporting activities that he enjoys, but not at the level he previously enjoyed and with pain. His ability to work around the home is affected as is his intimacy with his partner.

**45**  I have considered all of the authorities provided by counsel. Considering the authorities and Mr. Esau's circumstances, I award $70,000 for non-pecuniary damages.

**Past Wage Loss**

**46**  Mr. Esau's counsel submits that but for the injuries he sustained in the accident, he would have moved up into a foreman's position and continued working at Alpine Environmental until it went into receivership in June 2008 and that following the closure of Alpine he would have found other employment within a short time.

**47**  In 2005, Mr. Esau only worked on a full-time basis at Alpine for a short time. His actual earnings in 2005 were $18,646.00 (gross). He only worked half that year and it is submitted that but for the accident, he could have earned at least $36,000.00 that year.

**48**  Mr. Esau's actual pre-accident earnings history was:

|  |  |  |
| --- | --- | --- |
| 2001 | $2,440.00 |  |
| 2002 | $9,692.00 |  |
| 2003 | $16,057.00 |  |
| 2004 | $26,986.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 2005 |  | $18,646.00 (MVA was June 20, 2005) |  |

**49**  Counsel submits that based on the evidence, there is a substantial possibility that Mr. Esau would have been able to take a foreman's position at Alpine, and that his earnings would have been expressed as gross income:

Hypothetical Earnings but for Accident:

|  |  |  |
| --- | --- | --- |
| 2005 | $36,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 2006 |  | $45,000.00 - $50,000.00 (foreman position) |  |

|  |  |  |
| --- | --- | --- |
| 2007 | $45,000.00 - $50,000.00 |  |
| 2008 | $45,000.00 - $50,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total: | $171,000.00 - $186,000.00 |  |

**50**  Mr. Esau's actual earnings were:

|  |  |  |
| --- | --- | --- |
| 2005 | $18,646.00 |  |
| 2006 | $12,357.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 2007 |  | $34,984.00 (two jobs) |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 2008 |  | $41,622.00 ($38,154.96 at AAA Safety; $3,468.01 at Aurora Theatre) |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total: | $107,609.00 |  |

**51**  Counsel submits that Mr. Esau's loss of earnings is the difference between what he would have earned but for the accident, less his actual earnings ($171,000.00 to $186,000.00 less $107,609.00 = $63,391.00 to $78,391.00).

**52**  Counsel submits that his (gross) past income loss is $63,000.00 to $78,000.00.

**53**  Counsel for Mr. Myles notes that during the 16 weeks of his employment with Alpine, Mr. Esau's earnings (gross) were $8,357.70, which is equivalent to $522.35 per week or $27,144.00 on an annual basis.

**54**  Evidence from witness, Trevor Roste, former supervisor with Alpine, estimated the annual earnings of a field labourer at between $40,000.00 and $45,000.00 and that of a foreman at between $45,000.00 and $50,000.00 (gross). Mr. Roste also agreed that Mr. Esau's job was "seasonal" and that work was dependent on a number of factors including the availability of work as well as road and weather conditions. In the final two weeks prior to the accident, Mr. Esau was only paid for five hours of work.

**55**  As a result of his injuries, Mr. Esau was off work from June 20th, 2005 to June 26th, 2006. Counsel for Mr. Myles submits that but for the accident, Mr. Esau would have earned gross income of $30,000.00 during the work loss period. Reducing for income tax and E.I. premiums payable on the gross amount reduces the loss to approximately $24,000.00. Since June 26th, 2006, counsel for the defendant submits that Mr. Esau has not lost income as a result of the motor vehicle accident.

**56**  The approach to be taken by the court in dealing with hypothetical events, such as how Mr. Esau's life would have proceeded without the accident, was clarified by the Supreme Court of Canada in *Athey* at para. 27 as follows:

Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J.C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=). For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* [*(1977), 18 O.R. (2d) 337*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0SJ-00000-00&context=) (C.A.); *Graham v. Rourke* [*(1990), 74 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5T5-M3YH-00000-00&context=) (Ont. C.A.).

**57**  I conclude that it is most likely that Mr. Esau would have continued with Alpine until it went into receivership. He enjoyed the work and by all accounts was performing well. However, Mr. Esau had not worked with Alpine for long before the accident. While there were possibilities for promotion within the company, I find it too speculative to conclude that promotion was likely and to calculate past wage loss on the basis of foreman's wages. There was a possibility of such a promotion, but I cannot say that it was a substantial possibility on the evidence. There is also a possibility of reduced earnings due to lack of availability of work.

**58**  I find that Mr. Esau's gross earnings but for the accident would have been:

|  |  |  |
| --- | --- | --- |
| 2005 | $36,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 2006 |  | $42,500 -- mid-point for field technician |  |

|  |  |  |
| --- | --- | --- |
| 2007 | $42,500 |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 2008 |  | $36,000 -- reduced to reflect a period to obtain similar paying work after Alpine went in receivership |  |

**Total** **$157,000**

**59**  Mr. Esau's actual earnings were $107,609. I find the past gross wage loss to be $49,391. I leave it to counsel to express that loss as a net loss figure with liberty to apply if necessary.

**Loss of Earning Capacity**

**60**  It is common ground that despite the fact that he currently earns approximately the same amount he was likely to earn at Alpine before the injury, Mr. Esau's future employment prospects have been reduced as a result of his injury. He was unable to continue with his employment at Alpine and is no longer able to work in physically demanding occupations that require heavy lifting, bending, twisting. Occupations requiring prolonged sedentary positions will increase his level of pain. Dr. Filbey stated that he is best suited for employment that allows him to be more sedentary with light tasks and frequent changes of position. Further, Dr. Filbey notes that as a result of the accident, Mr. Esau is at greater risk of progressive changes in his spine if he performs activities that repetitively and frequently aggravate his back.

**61**  The defendant concedes that an award for loss of future earning capacity is appropriate. The disagreement is with respect to the quantum of the award under this head of damage. Counsel for Mr. Esau seeks an award in the range of $250,000 to $300,000 citing *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=); *Morris v. Rose Estate* [*(1996), 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=), [*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=); *Heartt v. Royal*, [*2000 BCSC 1122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22T1-00000-00&context=); and *Heyes v. Lanphier*, [*2003 BCSC 1126*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20BM-00000-00&context=). It is the position of the defendant that a more modest award in the range of $30,000 to $40,000 is appropriate to reflect Mr. Easu's circumstances, citing *Haines*, *Lubke*, *Stone*, and *Lowen*.

**62**  The principles to be applied in assessing loss of earning capacity were summarized by the Court of Appeal 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=) as follows:

The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis*, [*[1994] B.C.J. No. 2128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F016-S3D3-00000-00&context=) (S.C.) at para. 121, aff'd [*[1997] B.C.J. No. 2178*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JCJ5-24CV-00000-00&context=) (C.A.). Guidance as to what factors may be relevant can be found in *Parypa v. Wickware*, [*[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=),*supra*, at para. 31; *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.); and *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.) per Finch J. They include:

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| --- | --- | --- | --- | --- | --- |
|  |  | \* |  | 1. whether the plaintiff has been rendered less |  |
| para62 |  |  |  | capable overall from earning income from all types of employment; |  |

1. 2. whether the plaintiff is less marketable or attractive as an employee to potential employers;
2. 3. whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
3. 4. whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [*[1995] B.C.J. No. 644*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2HD-00000-00&context=) (C.A.); *Parypa v. Wickware*, *supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

The capital asset Mr. Rosvold has lost is his ability to perform physically demanding work. Before the accident he had earned a reasonable income without any periods of physical disability. His ability to earn income has been impaired because those occupations in which Mr. Rosvold has always earned a living were closed to him by the accident. Even if Mr. Rosvold were able to earn the same amount of income from alternative employment, he would still be entitled to compensation for that loss: *Palmer v. Goodall* [*(1991), 53 B.C.L.R. (2d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) at 59 (C.A.).

**63**  Mr. Esau suffered this injury at a very young age. He has lost the capital asset of performing physically demanding work. It is noteworthy that Mr. Esau's employment prior to the accident was physically demanding work. He does not have post-secondary training and even without the injury faced some challenges in achieving his goal of attending college and achieving certification in a trade. Now those challenges are much greater as a result of the physical limitations consequent upon his injury.

**64**  Absent completion of further training, the range of occupations open to Mr. Esau by virtue of his interests and aptitudes before the accident was relatively limited. Now the physically demanding occupations are no longer open to him. He has been able to secure employment that requires a moderate level of physical activity and he is able to do that work. However, there is no doubt that he will be at a competitive disadvantage in the workplace should he lose that job for any reason. I think that it is clear that as a consequence of his injury he is less marketable to an employer. While he is presently earning roughly what he would have likely earned at Alpine, I think that it is likely that he will suffer some income loss in the future as a consequence of his injury. However, even if that were not the case, he is entitled to compensation as a result of the damage to his capital asset.

**65**  In all of the circumstances, I assess Mr. Easu's loss of future learning capacity at $150,000.

**Special Damages**

**66**  The special damages claimed in the amount of $138 in relation to John Basco Massage Therapy, are conceded. I make an award in that amount.

**Cost of Future Care**

**67**  Mr. Esau seeks an award of $19,500 under this head of damage. Counsel submits that it would be reasonable for Mr. Esau to have funding to allow him to access six to twelve therapeutic treatments per year for exacerbations of back pain. The current cost is $80.00 to $100.00 per session for an annual cost of $480.00 to $1,200.00. The cost of these treatments until Mr. Esau reaches the age of 74 (50 years) is $11,258.69 to $28,146.72 ($480.00 to $1,200.00 x present value factor 23.4556 @ 3.5% discount rate = $11,258.69 to $28,146.72. Counsel for the defendant submits that Mr. Esau has not shown that future costs of care will be incurred by him as a result of his accident. He has not incurred costs of care to date and there is no evidence to support a conclusion that he would incur those costs in the future.

**68**  Dr. Filbey was of the view that it was reasonable for Mr. Esau in the future to have access to a few sessions a year for physiotherapy and massage therapy to deal with flare ups. He emphasized that it was what worked for the individual patient. He stated that Mr. Esau did not require gym membership to continue his core strengthening.

**69**  Mr. Esau's evidence was that neither the physiotherapy nor massage therapy helped his back. He attended in 2005 and apparently not thereafter. What did provide assistance was losing weight and following the exercises he was taught. I find that it is not likely that Mr. Esau will incur these costs in the future as he has not found physiotherapy or massage therapy helpful in the past. I make no award for cost of future care.

**Summary**

**70**  In summary:

1. Non-pecuniary Damages: $70,000;
2. Past Wage Loss: counsel to calculate net loss based upon gross past wage loss of $49,391;
3. Loss of Earning Capacity: $150,000; and
4. Special Damages: $138.

**71**  Costs will follow the event, unless counsel indicate that they wish to make submissions on costs.

C.J. ROSS J.

**End of Document**

[***Fazeli v. British Columbia, [2009] B.C.J. No. 1856***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62FT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.A. Griffin J. (In Chambers)

Heard: June 25, 2009.

Oral judgment: June 26, 2009.

Docket: S051690

Registry: Vancouver

**[2009] B.C.J. No. 1856** | 2009 BCSC 1273 | 180 A.C.W.S. (3d) 611

Between Hootan Fazeli, Plaintiff, and Her Majesty the Queen in the Right of the Province of British Columbia, Joye Morris Health Services Inc., Brendan Russell, Ian Garth Mciver, Nader Sharifi, Fiona Smith, Kelly Dhot, Winnie Basso, Paula Gomes, Krista Walker, Lisa Feist, Kerene Scarlett, Jane Does 1 through 5, John Does 1 through 5 and B.C. Biomedical Laboratories Ltd., Defendants, and B.C. Biomedical Laboratories Ltd., Her Majesty the Queen in the Right of the Province of British Columbia and Joye Morris Health Services Inc., Third Parties

(79 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Adding or substituting — After expiry of limitation period — Appeal by plaintiff from Master's decision dismissing application to add defendant allowed — The plaintiff claimed damages for medical malpractice in relation to certain blood tests and laboratory work requisitioned in 2004 — In 2008, the plaintiff learned that the proposed defendant was responsible for the tests — Master refused to add defendant due to expiration of the limitation period — The court found that it was just and convenient to add the proposed defendant regardless of the limitation period due to the substantial connection between the existing claims and the proposed claim — Limitation Act, ss. 6, 6(4).**

**Civil litigation — Limitation of actions — Time — Discoverability — Appeal by plaintiff from Master's decision dismissing application to add defendant allowed — The plaintiff claimed damages for medical malpractice in relation to certain blood tests and laboratory work requisitioned in 2004 — In 2008, the plaintiff learned that the proposed defendant was responsible for the tests — Master refused to add defendant due to expiration of the limitation period — The court found that it was just and convenient to add the proposed defendant regardless of the limitation period due to the substantial connection between the existing claims and the proposed claim — Limitation Act, ss. 6, 6(4).**

**Health law — Health care professionals — Liability (malpractice) — *Negligence* — Practice and procedure — Parties — Limitation periods — Appeal by plaintiff from Master's decision dismissing application to add defendant allowed — The plaintiff claimed damages for medical malpractice in relation to certain blood tests and laboratory work requisitioned in 2004 — In 2008, the plaintiff learned that the proposed defendant was responsible for the tests — Master refused to add defendant due to expiration of the limitation period — The court found that it was just and convenient to add the proposed defendant regardless of the limitation period due to the substantial connection between the existing claims and the proposed claim — Limitation Act, ss. 6, 6(4).**

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| --- |
| Appeal by the plaintiff, Fazeli, from a Master's decision dismissing his application to add BC Biomedical Laboratories as a defendant and to amend his claim accordingly. In May 2004, the plaintiff was arrested by police and incarcerated. While in custody, the plaintiff complained of pain and numbness. He received medical treatment and was sent to hospital. The plaintiff was ultimately rendered quadriplegic. He alleged that his condition was caused by a progressing blood infection that would not have happened but for the negligent medial treatment he received at the jail and pre-trial centre. At an examination for discovery in 2007, a defendant physician testified that he examined the plaintiff, ordered a blood test, but never received the results. There was no record of the blood test and laboratory work being performed as ordered. At an examination for discovery in 2008, the plaintiff learned that the taking of the blood test was the responsibility of BC Bio. The plaintiff's claim alleged that the physician and nurses were negligent in failure to order blood and lab tests and to follow-up on such orders in a timely fashion. The proposed claim against BC Bio was advanced in the alternative. The Master refused to add BC Bio as a defendant due to the expiration of the limitation period and the inadequate explanation by the plaintiff for failing to add BC Bio within the limitation period.  HELD: Appeal allowed.  It was just and convenient to add BC Bio as a defendant, regardless of expiration of the limitation period. There was sufficient connection between the subject matter of the plaintiff's existing claims and the proposed new cause of action against BC Bio. The explanation for the delay in attempting to add BC Bio was reasonable. The uncontradicted evidence indicated that plaintiff's counsel did not learn of facts sufficient to know of a potential claim against BC Bio until February 2008. The motion to add was brought two months later. The plaintiff was diligent in prosecuting the action and did not delay the discovery process. If BC Bio was not a party, the plaintiff would be significantly prejudiced. It was not appropriate to summarily decide the limitation issue, as there was evidence to support application of postponement of the running of time. Had the limitation period expired, addition of BC Bio would still be justified given the extent of the connection between the proposed claims. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 15(5)(a)(iii)

Limitation Act, RSBC 1996, CHAPTER 266, s. 4(1)(d), s. 4(4), s. 6, s. 6(3)(a), s. 6(4)

**Counsel**

Counsel for Plaintiff: I. Giroday.

Counsel for HMTQ in the Right of the Province of B.C., Joye Morris Health Services Inc. and Defendants, Fiona Smith, Kelly Dhot, Winnie Basso, Paula Gomes, Krista Walker, Lisa Feist and Kerene Scarlett: L.A. Slater (by telephone).

Counsel for Defendants, Brendan Russell, Ian Garth Mciver and Nader Sharifi: J.K. Gibson.

Counsel for Defendant and Third Party, B.C. Biomedical Laboratories Ltd.: S.S. Kanji (by telephone).

**Oral Reasons for Judgment**

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| **S.A. GRIFFIN J. (orally)** |

**1**   By way of introduction this is an appeal by the plaintiff Mr. Fazeli from a decision of a Master dismissing the plaintiff's application to add B.C. Biomedical Laboratories Ltd., (which I will refer to as "BC Bio") as a defendant and to amend the statement of claim accordingly. The overall nature of the claim is a medical malpractice claim and the specific allegations proposed against BC Bio relate to the negligent failure to take a blood sample and perform laboratory tests on Mr. Fazeli's blood.

**2**  The background is that Mr. Fazeli was arrested by the Vancouver Police on charges on May 4, 2004 and incarcerated at the Vancouver jail until May 6. Mr. Fazeli was then transferred to the North Fraser Pre-Trial Centre on May 6 and held there until May 13, 2004.

**3**  While at the Vancouver jail and the Pre-Trial Centre, the plaintiff says he complained of certain symptoms relating to pain and numbness and he was seen by various medical personnel. He was sent to hospital on May 13, 2004. His symptoms ultimately led to him becoming a quadriplegic. He alleges that this was due to a severe and progressing blood infection, and would not have happened but for the negligent medical treatment he received while at the Vancouver jail and the Pre-Trial Centre. He says a number of medical personnel, doctors and nurses, were negligent in failing to adequately assess, diagnosis, and treat him.

**4**  On October 2, 2007 on examination for discovery, one of the defendant doctors, Dr. Sharifi, testified that he examined Mr. Fazeli on May 10, 2004 and ordered a blood test to be taken and analyzed. After discovery, efforts were made to find the blood test results. On February 1, 2008, counsel for the plaintiff was advised by counsel for the defendant Crown and nurses that there were no records of a blood test or lab work being performed as Dr. Sharifi had allegedly ordered.

**5**  Then, at the examination for discovery in February 2008 of the representative of the defendant nursing agency, Joye Morris gave evidence indicating that the taking of the blood test on May 10, 2004 was the responsibility of BC Bio.

**6**  Thus, the involvement of BC Bio relates to this one event in the course of the allegedly negligent medical treatment on May 10, 2004 while Mr. Fazeli was at the Pre-Trial Centre.

**7**  In the main body of the plaintiff's claim he alleges that the defendant doctor, Dr. Sharifi, and defendant nurses were negligent in relation to the failure to order the taking of blood and a lab test of his blood, and to follow-up on these orders in a timely way.

**8**  The proposed claim against BC Bio is advanced in the alternative. The allegations are set out at para. 18 of the proposed amended statement of claim as follows:

In the alternative, if Dr. Sharifi ordered the lab work for the Plaintiff on May 10, 2004, and communicated such order to one or more of the Nurses in a competent manner, and further, one or more of the Nurses ordered the taking of blood and lab work to be performed by BC Bio, BC Bio owed the Plaintiff a duty of care and was negligent and failed to use reasonable care and skill in failing to take the Plaintiff's blood as ordered, perform the lab work or report back the results of the lab work, or complete one or more of such steps.

**MASTER'S DECISION**

**9**  I turn now to the Master's decision.

**10**  Notice of the plaintiff's application to add BC Bio was served on BC Bio on April 2008, following the suggestion of another judge of this court with respect to applications to add other parties to the action. BC Bio responded in May 2008. A series of steps were then taken in the proceeding, and ultimately the application was heard by the Master on April 28, 2009, and the Master rendered his decision on May 4, 2009 (the "Master's Decision"). The Master's Decision can be found at [*2009 BCSC 607*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M28C-00000-00&context=). BC Bio appeared and opposed the application just as it has appeared on this appeal and opposed the appeal of the Master's Decision.

**11**  The Master held that "[i]t is clear that the times as set out in the *Limitation Act* have expired" for the plaintiff to bring a claim against BC Bio (at para. 11 of the Master's Decision). He reached this conclusion by considering that the incident in which BC Bio was involved took place on May 10, 2004. The Master suggested that if the writ was issued on the last applicable day of the limitation period, (which he assumed to be two years after the incident) and served on the last applicable day (pursuant to Rule 9 which allows up to one year to serve a writ before it expires), it would mean that the latest BC Bio might have known of the matter would have been early May of 2007 if the claim against it was brought within the limitation period. The Master considered this in the context of BC Bio not being served with the application to add it as a party until April 2008, one year later.

**12**  The Master found at para. 24 of the Master's Decision that the plaintiff had not given an adequate explanation for failing to add BC Bio as a defendant within the limitation period. This was a key factor in the Master's conclusion that it was not just and convenient to permit the addition of BC Bio as a defendant.

**13**  In reaching this conclusion, the Master also noted his view that there was a "tenuous connection (if any)" between the plaintiff and BC Bio. In the context of his Reasons for Judgment, the Master appeared to reach this conclusion on the basis that the plaintiff had no contract with BC Bio, and seemed to consider this to mean that the plaintiff had weak evidence in support of its cause of action in ***negligence*** as was argued by counsel for BC Bio before him: see paras. 22 to 23 of the Master's Decision. The Master did not refer to the connection between the plaintiff's claims against BC Bio and the plaintiff's claims against the other parties already in the litigation.

**14**  The Master also noted prejudice to BC Bio, because BC Bio filed evidence that it had destroyed some of the potentially relevant records under a record destruction policy in the ordinary course of its business; and because the employee of BC Bio who went to the Pre-Trial Centre on the relevant day to perform requested medical tests had no memory of the events of that day.

**15**  The Master's Decision indicates that he was informed by plaintiff's counsel that the defendants were intending to "add BC Bio as a third party." However, the Master did not consider this was a relevant factor, concluding that the likelihood of "an application being made" was not an appropriate or necessary consideration (see para. 26). He considered the issue of whether or not BC Bio should be added as a defendant based on the present pleadings and those proposed by the plaintiff only (see para. 24).

**16**  In fact, no applications are necessary for the issuance of third party notices against BC Bio and unbeknownst to the plaintiff and the Court on the hearing before the Master, a third party notice against BC Bio had been filed by one set of defendants on the day before the hearing. The other defendants have since filed their own third party claim against BC Bio.

**STANDARD OF REVIEW**

**17**  The decision by the Master is vital to a final issue in this case, as it precludes the plaintiff from advancing a claim against BC Bio in this proceeding. This means that this appeal is a re-hearing and I may consider the issue afresh and determine it based on my own view of the matter: *Abermin Corp. v. Granges Exploration Ltd.*, [*[1990] B.C.J. No. 1060*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4J3-00000-00&context=) (S.C.). The parties agree that this is the appropriate standard of review.

**18**  I also note that as case management judge, who is assigned to hear the trial of this matter, I may have a different perspective to bring to bear on the issues.

**LEGAL PRINCIPLES**

**19**  Rule 15 (5)(a)(iii) provides that the court may, at any stage of a proceeding, add a person as a party "where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected (A) with any relief claimed in the proceeding, or (B) with the subject matter of the proceeding, which in the opinion of the court it would be just and convenient to determine as between the person and that party."

**20**  This means that the first question for the court to determine is whether there is a question or an issue in the plaintiff's proposed claim against BC Bio which is related to the relief claimed or the subject matter of the existing proceeding.

**21**  The next overall question for the court to determine is whether this connection is such that in the opinion of this court, it would be just and convenient to determine those connected issues or questions in the present proceeding.

**22**  In considering whether it is just and convenient, the court may consider a number of factors, including whether or not the limitation period has expired for bringing a claim against the person. However, the expiration of a limitation period is not determinative. This is because s-s. 4(1)(d) of the *Limitation Act*, [*R.S.B.C. 1996, c. 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=) provides that the lapse of time limited for bringing an action is no bar to adding a new party as defendant, under any applicable law, with respect to any claims related to or connected with the subject matter of the original action.

**23**  Further, s-s. 4(4) of the *Limitation Act* permits a fresh cause of action to be pleaded by way of amendment even if the amendment would have become barred by the lapse of time, on terms as to costs or other terms, as the court considers just.

**24**  In *Teal Cedar Products (1997) Ltd. v. Dale Intermediaries Ltd.*, [*[1996] B.C.J. No. 234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=) (C.A.), the British Columbia Court of Appeal explained that a judge's discretion to permit amendments after the expiry of a limitation period is unfettered and subject only to the general rule that all such discretion is to be exercised judicially (at para. 45). The analysis of the BC Court of Appeal in that case applies equally to applications to add a defendant and consequential amendments. The Court suggested that the fact of an expiry of a limitation period is a factor to consider, but not in isolation, as it should be considered in combination with considering the length of delay and the explanation for the delay in advancing a new cause of action. Further, the Court indicated a willingness to show considerable respect for the difficult judgments that must be made by counsel in advancing a client's case and appreciation for the fact that the judgment of counsel may evolve over time. The Court held, at para. 67:

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.

**25**  In *KPMG Inc, Trustee of the Estate of Stone Venepal (Celgar) Pulp 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=) ("*Stone Venepal*"), our Court of Appeal considered similar issues in relation to an application by the plaintiff to amend that would add a new cause of action against a party where that party alleged that the limitation period had expired. There was an issue in that case as to whether the running of time for the limitation period had been postponed pursuant to s. 6 in the *Limitation Act* or had expired. The application judge had ruled on the application to amend that the new cause of action was barred by the expiration of the applicable limitation period.

**26**  Section 6 (3) (a) of the *Limitation Act* provides for postponement of the running of time for an action for personal injury as set out in s-s. 6(4):

6(4) Time does not begin to run against a plaintiff ... 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, will regard those facts as showing that

1. an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
2. the person whose means and 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.

**27**  In *Stone Venepal* the Court of Appeal held that the chambers judge was in error in deciding the question of whether or not the limitation period had expired or was postponed pursuant to s. 6 of the *Limitation Act*. The Court of Appeal considered a postponement of the running of the limitation period to be a triable issue on the facts and evidence in that case, and that it was an issue that ought not to have been decided summarily in Chambers on the application to amend. The Court of Appeal allowed the proposed amendment without prejudice to the right of the respondents to raise a limitation defence at trial.

**28**  The Court in *Stone Venepal* made it clear that if the court decides to exercise its discretion to allow an application to add a new cause of action after the expiry of the limitation period, it has discretion to simply allow the application with the result that the new party loses the benefit of the limitation period; or, it can allow the application while at the same time preserving the right of the new party to advance a limitation defence at trial.

**ISSUES**

**29**  Considering the relevant authorities and legal principles I will analyze the issues on this re-hearing as follows:

1. Is there a connection between the existing claims and the proposed new cause of action against BC Bio?
2. What was the delay and is there a reasonable explanation for the plaintiff's delay in seeking to add the proposed new defendant?
3. What prejudice is there to the plaintiff if I do not allow the addition of BC Bio as a defendant?
4. What prejudice is there to the proposed defendant if I do allow it to be added to the claim?
5. Is it clear that the limitation period has expired or should this issue not be decided summarily?
6. If I assume a limitation period has expired, would I nevertheless permit the addition of the party as being just and convenient? If so, on what terms?

**ANALYSIS**

**Is there a connection between the existing claims and the proposed new cause of action against BC Bio?**

**30**  I will now deal with the first issue: is there a connection between the existing claims and the proposed new cause of action against BC Bio?

**31**  Rule 15 (5) (a) (iii) allows the court to order that a person be added as a party where there may exist between that person and any party to the proceeding, a question or issue related to or connected with the relief claimed or subject matter of the proceeding.

**32**  The claim in this proceeding against the existing defendants is for damages for ***negligence*** which the plaintiff says caused him catastrophic personal injuries, leaving him a quadriplegic.

**33**  The claim against BC Bio is for the same relief: damages in relation to the same personal injuries. There is a strong connection between the relief claimed against the present defendants in this proceeding and the relief claimed by the plaintiff against BC Bio. As for the subject matter of the claim, there is also a very strong connection between the subject matter of the claim against the present defendants and the claim sought to be advanced against BC Bio. The subject matter of the claim is for practical purposes identical: it concerns the plaintiff's medical condition over a number of days in May 2004 and whether the medical treatment and tests he either received or did not receive may have contributed to or caused him to suffer personal injuries.

**34**  One way to appreciate the close connection between the claims is to consider what the situation would be if the plaintiff was to start a separate action against BC Bio, rather than to seek to have it added to the existing claim. If a separate action was commenced the court would be very concerned about the duplication of proceedings where many of the same factual issues involving the same parties will have to be decided by the court. One factual issue that presently appears to be in dispute in the existing claim and the proposed claim against BC Bio, is whether or not a defendant doctor and defendant nurses ordered a blood test. It would be a duplication to decide this issue in two separate proceedings. It would be a significant waste of resources if there were two separate trials, one dealing with the claims against the medical doctors and nurses and the other dealing with the claim against BC Bio, as well as the potential for embarrassment if the court was to reach different conclusions on the same factual issues in the two separate proceedings.

**35**  I conclude that the proposed claim against BC Bio is closely connected to the existing claims.

**What was the length of delay, and is there a reasonable explanation for the plaintiff's delay in adding the proposed new defendant?**

**36**  The second issue is: what was the length of delay and is there a reasonable explanation for the plaintiff's delay in adding it as a proposed new defendant?

**37**  The explanation for the delay in seeking to add BC Bio as a defendant is that the plaintiff did not learn of facts that gave rise to the possibility of the claim against BC Bio until examination for discovery of an existing party's representative, nurse Joye Morris, in February 2008.

**38**  On examination for discovery of Dr.Sharifi on October 2, 2007, the plaintiff learned that one of the allegedly negligent doctor defendants claimed to have ordered a blood test of the plaintiff on May 10, 2004 by way of requisition. The plaintiff's counsel then sought to find out what happened to the blood test, and only on February 1, 2008 did he learn that there was no record of any blood test having been done. The thought process of plaintiff's counsel at that point was that the nursing staff must not have processed the requisition.

**39**  Only on the subsequent examination for discovery of nurse Joye Morris in February 2008 did plaintiff's counsel learn the process for dealing with requisitions, which raised the possibility that the company that normally dealt with such requisitions, BC Bio, may not have processed it and that the ordered blood test was not done. Thus, the uncontradicted evidence indicates that plaintiff's counsel did not learn of facts sufficient to know that the plaintiff might have a claim against BC Bio until February 2008.

**40**  I note that the defendants also did not raise the possibility of BC Bio's actions or omissions being relevant until the parties learned of this on discovery.

**41**  Counsel for the plaintiff then brought a motion to add BC Bio as a defendant, serving this in April of 2008. Therefore, the plaintiff delayed only a few months from the time the plaintiff learned of the possibility of a claim against BC Bio in February 2008 and serving BC Bio with the application to add it as a party in April 2008.

**42**  Counsel for BC Bio suggests that plaintiff's counsel were not diligent in pursuing discovery rights and had they been more diligent than they were, they would have discovered earlier the information they now rely on to advance a claim against BC Bio. Counsel for BC Bio argues that the delay from the date of BC Bio's involvement in the facts at issue in the action, May 10, 2004, to April 2008 when the plaintiff served BC Bio with its application to join it as a defendant, is substantial, almost four years.

**43**  On the Master's analysis, the delay was one year if analyzed from the latest date that the defendant would have learned of the action if it was brought in May 2006 at the end of what the Master assumed was a two-year limitation period from the date of the incident, May 2004, and served just under one year later in May 2007.

**44**  I do not accept the argument of BC Bio that plaintiff's counsel were not diligent and should have taken steps to discover the information about BC Bio's involvement earlier.

**45**  The plaintiff has filed evidence to illustrate that the plaintiff's counsel was diligent in prosecuting the action against the existing defendants. The discovery stage was not unduly delayed, but followed piecemeal production of documents, transcription of illegible medical records, identification of treating medical personnel, and consultation with experts as to the medical issues involved. I have reviewed the extensive chronology of events provided by counsel for the plaintiff and will not repeat that chronology in this ruling. However, in reviewing that extensive chronology I see no undue delay in steps taken by plaintiff's counsel in the action including in proceeding with the discovery process.

**46**  It has to be kept in mind that this is an extremely complicated case. The plaintiff's medical situation is not something the plaintiff or his lawyers will readily understand without careful study and expert assistance. The parties have had considerable difficulty in reading illegible medical records and identifying the medical personnel involved, and all of this took time. This court should not be quick to second-guess the judgment of legal counsel in analyzing and prosecuting a case and here there is nothing to suggest that the plaintiff was lackadaisical or unreasonable.

**47**  Furthermore, this case has been subject to case management and none of the existing defendants have pointed out any pre-trial incident where they have alleged that the plaintiff has not proceeded with reasonable diligence.

**48**  As noted, once the plaintiff's counsel learned of the possibility of an action against BC Bio it moved quickly to add it as a party. Subsequent delays in the hearing of the motion, which eventually proceeded in January 2009, have been adequately explained and do not appear to be contested as unreasonable.

**49**  In my view, there was a reasonable explanation for the delay in the plaintiff's application to add BC Bio as a defendant, which application was served in April 2008. The plaintiff simply did not know that BC Bio was involved in the factual matrix and that it was alleged by a defendant that BC Bio had been asked to perform blood work that it did not perform, until February 2008. I find no reason to criticize plaintiff's counsel for a lack of due diligence or delay in learning this information, given the complexities of the issues facing the plaintiff in this action.

**What prejudice is there to the plaintiff if I do not allow the addition of BC Bio as a defendant?**

**50**  The third issue is: what prejudice is there to the plaintiff if I do not allow the addition of BC Bio as a defendant?

**51**  The plaintiff is a quadriplegic, allegedly due to the ***negligence*** of a multiple of doctors and nurses who were involved in assessing him or treating him in May of 2004, and now also potentially and allegedly due to the ***negligence*** of BC Bio in not acting on an order to do blood work.

**52**  Some of the defendants have brought third party proceedings against BC Bio. The defendants also allege that the plaintiff was contributorily negligent.

**53**  If the other defendants advance evidence and argument at trial that BC Bio is at fault, the plaintiff will be prejudiced if BC Bio is not a defendant.

**54**  If the plaintiff succeeds at trial in establishing ***negligence*** on the part of the defendants, there will likely be joint and several liability unless the defendants establish contributory ***negligence***. If the defendants do establish contributory ***negligence*** on the part of the plaintiff, then liability will likely be several. If BC Bio is not a defendant, this would create the possibility that the court could find responsibility on the part of BC Bio at trial, but that the plaintiff would be precluded from recovering the damages caused by BC Bio.

**What prejudice is there to the proposed defendant if I do allow it to be added to the claim?**

**55**  The fourth issue is: what prejudice is there to the proposed defendant if I do allow it to be added to the claim?

**56**  The plaintiff has the right to bring a separate action against BC Bio without leave of the court. BC Bio would of course have the right to defend, including the right to assert that the limitation period for bringing such a claim has expired.

**57**  Leaving aside the limitation defence, BC Bio is not any more prejudiced by adding it to this action than it would be if a separate action was started against it. If a separate action is brought against it, BC Bio would not avoid the length of trial and the complicated issues that are facing the other parties in this action. As I have already noted, the factual matrix of the claims against BC Bio are so intertwined with the claims against the other parties, that it could not be tried separately without extensive duplication and the risk of embarrassing contradictory findings in the two actions.

**58**  BC Bio has identified that it will have difficulty producing evidence due to the passage of time. It says that as part of the normal course of business it destroyed paper records of requisitions for lab tests relating to the May 2004 time period in approximately June 2007. BC Bio argues that if the action was brought against it and served within two years of the incident giving rise to the claim, the assumed limitation period for the plaintiff to bring a claim for personal injuries, it may have stopped the destruction of those records.

**59**  The plaintiff says that the fact that BC Bio will be able to say it does not have a requisition in its records will be favourable to BC Bio in its defence. Other existing records of BC Bio showed that it undertook no lab test with respect to the plaintiff. If BC Bio still had records of its requisitions, and it turned out that it received the requisition at issue and did not do the lab test, then the case of the other parties against BC Bio would be much stronger. In short, the plaintiff says that because of the passage of time, BC Bio has been given a break and that it is not faced with the possibility of having to explain a potentially incriminating requisition in its possession that it did not act upon.

**60**  BC Bio says that analysis by the plaintiff is not the only way the requisitions would have been relevant. One of the issues in the case is whether or not the BC Bio employee worked her full shift at the Pre-Trial Centre that day, or left early, or was taken up with processing other requisitions and so simply did not have time to do the requisition regarding the plaintiff's blood work during her normal shift. If BC Bio still had its paper records, other requisitions could shed light on what that employee did that day and potentially exculpate BC Bio from any alleged claims of ***negligence***.

**61**  I am not persuaded that the consequence of BC Bio's records destruction program after three years of it providing services should be that it can escape potential liability for those services. It was risky for BC Bio to destroy records so quickly, as a six-year limitation for a breach of contract claim would not have expired and limitation periods for postponed personal injury claims may not have begun to run. BC Bio took the risks of its own record destruction policies and I am not convinced it would be just to visit those risks on the plaintiff. I conclude that the loss of some of the potentially relevant records is an issue for all the parties to grapple with and will not necessarily prejudice BC Bio more than it would prejudice the other parties.

**62**  The other concern expressed by BC Bio as related to the late application to add it as a party, is that the employee of BC Bio who went to the Pre-Trial Centre on the day in question, May 10, 2004, has no recollection of events. However, the routine nature of the actions of the employee of BC Bio at issue, and the fact that the theory of the claim is that there was a negligent omission by that employee as opposed to a positive negligent step, may mean that she would not have remembered that day even if a claim against BC Bio had been brought earlier. There was nothing significant about her tasks that day to cause the event to stand out in her memory. There is no suggestion that her lack of memory is due to an illness that has affected her since the expiry of the assumed limitation period.

**63**  In my view, it is relevant to note that any evidence problems claimed by BC Bio are not unique to this action, and would exist if it was a defendant in a separate action. In my assessment of the circumstances of this case, these evidentiary concerns do not override the other factors which make it just and convenient to add BC Bio as a party.

**Is it clear that a limitation period has expired or should this issue not be decided summarily?**

**64**  The fifth issue is: is it clear that the limitation period has expired or should this issue not be decided summarily?

**65**  The plaintiff's evidence on this application raises the applicability of s. 6 of the *Limitation Act*. That provision postpones the running of time for a limitation period for an action for personal injury.

**66**  I am advised that on the hearing before the Master, the plaintiff took the position that even if the court was to assume the limitation period had expired, that it was just and convenient to add BC Bio as a named defendant. This was not a concession that the limitation period had expired but an argument that BC Bio should be added as a new defendant regardless. However, BC Bio's written argument before the Master stated as an absolute conclusion that the limitation period had expired without any analysis of that issue. The Master may have been misled or misunderstood the parties' submissions, as he concluded summarily that the limitation period had expired without any consideration of the postponement provision set out in s. 6 of the *Limitation Act*.

**67**  The uncontradicted evidence before me supports a conclusion that a reasonable person in the plaintiff's shoes would not have known the identity of BC Bio or that an action against it would have a reasonable prospect of success until some time within two years before the plaintiff served BC Bio with its motion to add it as a party and certainly not until the examination for discovery of Joye Morris in February of 2008. The evidence before me would support the application of s. 6 of the *Limitation Act* and would mean that the limitation period for bringing a claim against BC Bio has not expired.

**68**  I conclude it would not be appropriate to summarily decide the limitation period defence against the plaintiff on the application to add BC Bio as a party.

**If I assume a limitation period has expired, would I nevertheless permit the addition of the party as being just and convenient, and if so, on what terms?**

**69**  The sixth issue is: if I assume a limitation period has expired, would I nevertheless permit the addition of the new party as just and convenient? If so, on what terms?

**70**  One of the key factors in this case is the extent of the connection between the proposed new claim and the existing claims. One would be hard pressed to find a more substantial connection than exists here.

**71**  The claim against BC Bio is substantially intertwined with the factual matrix of the claims against the other defendants. Given the one defendant doctor's evidence that he did requisition a blood sample and the position of the nurses that they would have processed the request and left it for BC Bio to do, it would be very difficult for the court to determine, at trial, the liability of the existing defendants without also considering the potential role and liability of BC Bio.

**72**  Further, as I have noted, BC Bio's role and the realization that it might be a necessary party was only revealed gradually on discovery of a defendant in February of 2008. The plaintiff's application to add BC Bio was brought soon after this.

**73**  I have found the explanation for the delay to be reasonable and understandable. This case is complicated and it appears that plaintiff's counsel have been reasonably diligent in prosecuting the claim.

**74**  I have also concluded that if BC Bio was not a party the plaintiff would be significantly prejudiced. On the other hand, the prejudice to BC Bio resulting from the delay in adding BC Bio as a party is not as significant. Certain evidentiary problems facing BC Bio cut both ways and affect all the parties.

**75**  As well, the uncontradicted evidence supports the conclusion that the running of time for bringing a claim against BC Bio was postponed and did not begin to run until some time well within the two years prior to the application to add BC Bio as a defendant. I note, however, that if the limitation issue was preserved for trial, it is likely that BC Bio would challenge the position of counsel for the plaintiff as to how they conducted the case to date, and thus would seek to delve into matters that would otherwise be subject to solicitor-client privilege, to try to show that the plaintiff's counsel should have known to pursue a claim against BC Bio earlier. This would be extremely disruptive and prejudicial to the plaintiff in advancing its claim.

**76**  If this was a case where there was evidence contradicting the evidence before me respecting postponement of the running of the limitation period, or where I felt that there was a real question as to the diligence of the plaintiff in prosecuting the action, this might tip the balance against the determination that it would be just and convenient to add BC Bio without preserving the limitation period defence. The problems associated with exploration of that issue and solicitor-client privilege could be managed and overcome, if necessary. For example, an order could be made that the question of postponement of the running of the limitation period would be severed and dealt with after the trial of the main action, so that the plaintiff's solicitor-client privilege is not lost before liability and damage issues are determined.

**77**  But in this case, I conclude that measures to preserve the limitation defence are not necessary. Here, based on my analysis of the issues and all the circumstances, I conclude that it is just and convenient to add BC Bio as a party regardless of the expiry of the limitation period.

**CONCLUSION**

**78**  In conclusion, I find that it is just and convenient to add BC Bio as a defendant and to allow the plaintiff to amend its claim accordingly. I reach this conclusion even if the limitation period for advancing the claim has expired and without preserving BC Bio's right to advance a limitation defence.

**79**  Costs will be in the cause.

S.A. GRIFFIN J.

**End of Document**

[***Ghani v. Umran, [2008] B.C.J. No. 851***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3DP-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N.H. Smith J.

Heard: March 10-14, 17-18, 20, 25 and 26, 2008.

Judgment: May 9, 2008.

Dockets: M041948 and M054125

Registry: Vancouver

**[2008] B.C.J. No. 851** | [*166 A.C.W.S. (3d) 689*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2D7-00000-00&context=) | [*2008 BCSC 585*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2D7-00000-00&context=)

Between Farzana Ghani and Iftikhar Ghani, Plaintiffs, and Tamim Umran, Defendant And between Iftikhar Ghani, Plaintiff, and Marco A. Madonna, Defendant

(71 paras.)

**Case Summary**

**Damages — General damages — For personal injuries - Considerations — Pre-existing medial conditions — Cost for future care — Loss of earning capacity — Non-pecuniary damages, including pain and suffering — Retroactive loss of income — Assessment of damages in two motor vehicle accidents — Plaintiff, 46, was equipment operator for CP Rail — Plaintiff retrained as auto mechanic — After second accident in 2005, plaintiff diagnosed with significant spondylosis — Plaintiff suffered whiplash and low back pain in accidents — Plaintiff awarded non-pecuniary damages of $30,000 for 2002 accident and wage loss of $5,939 — Total income loss attributable to 2005 accident was $62,499 — Non-pecuniary damages of $52,500 awarded for 2005 accident after reduction of 15 per cent due to spondylosis — Award for lost earning capacity and cost of future care reduced by 30 per cent due to spondylosis.**

**Damages — Physical injuries — Body injuries — Back — Neck — Whiplash — Age of claimant — 46 to 55 — Non-pecuniary award — $40,001 to $60,000 — Considerations impacting on award — Pre-existing injury — Assessment of damages in two motor vehicle accidents — Plaintiff, 46, was equipment operator for CP Rail — Plaintiff retrained as auto mechanic — After second accident in 2005, plaintiff diagnosed with significant spondylosis — Plaintiff suffered whiplash and low back pain in accidents — Plaintiff awarded non-pecuniary damages of $30,000 for 2002 accident — Non-pecuniary damages of $52,500 awarded for 2005 accident after reduction of 15 per cent due to spondylosis.**

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| Assessment of damages in a personal injury action arising from 2002 and 2005 motor vehicle accidents. Plaintiff was involved in three motor vehicle accidents. Plaintiff, 46, worked as an equipment operator for CP Rail. In the 2002 accident, plaintiff suffered a whiplash injury to the neck and upper back strain. Plaintiff was off work for about five weeks. Plaintiff continued to have back pain and occasional neck pain through the summer and fall of 2002. At another accident in 2002 plaintiff was not injured. Plaintiff was subject to a seasonal lay-off in 2003 and was accepted into an apprentice program with CP Rail after the lay-off. Plaintiff did not respond to the recall to work as he preferred to take a less physical job. Plaintiff then worked as an auto mechanic. In 2004, plaintiff was diagnosed with chronic low back pain. In the 2005 accident, plaintiff suffered another whiplash injury and back strain. A 2005 CT scan revealed significant spondylosis. After the 2005 accident, plaintiff did not work for six months and was mainly unemployed thereafter as he found the physical demands of a mechanics job too demanding.  HELD: Plaintiff awarded non-pecuniary damages, past and future loss of income and cost of future care, loss of future earning capacity and special damages.  The court did not accept that the plaintiff's back pain after the 2002 accident was as severe or as frequent as alleged. Plaintiff was awarded non-pecuniary damages of $30,000 for the 2002 accident and wage loss of $5,939. The plaintiff never attempted the heavy duty mechanic's position at CP Rail and had not proved that his back pain would have been any more of a limitation to him in that job than in the auto mechanic's job that he worked at until the time of third accident. The plaintiff failed to prove that the income reduction he experienced in 2004 and the first four months of 2005 was caused by the first accident. The plaintiff's spondylosis would not have become symptomatic when it did but for the third accident. The plaintiff was, however, more likely than not to develop symptoms before the end of his working life. A 25 per cent deduction from the non-pecuniary damages was appropriate. As the plaintiff would always experience bouts of pain and would always need to be cautious in his activities in order to avoid bringing on or worsening his pain, non-pecuniary damages of $52,500 were awarded for the third accident. As a result of the third accident, the plaintiff was unable to meet the full physical demands of his work as an automobile mechanic and reasonably explored other options, including self-employment. He would most likely have continued to work full time as a mechanic earning $16 an hour. Total income loss attributable to the third accident was $62,499. The plaintiff suffered a reduction in his capacity to earn income in the future after the third accident. The award for lost capacity was discounted by 30 per cent due to the spondylosis for a net award of $45,500. Cost of future care, also reduced by 30 per cent, was $15,300. |

**Counsel**

Counsel for Plaintiffs: D. Hobbs, U. Ghani and M. Brotchie.

Counsel for Defendants: S. Rowed and A. duPlessis.

**Reasons for Judgment**

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

**1**   The plaintiff was in three motor vehicle accidents within a three-year period. He seeks damages for injuries suffered in two of them. Liability is admitted, subject to an issue of contributory ***negligence*** based on the fact the plaintiff was not wearing a seat belt at the time of the third accident.

**2**  The Plaintiff is 46 years old. After completing high school, he worked for eight years for CN Rail as a track maintainer and machine operator. In 1989, he took a buy-out from CN Rail and returned to his native Pakistan to become involved in a business venture. The business was unsuccessful and he returned to Canada in 1991.

**3**  In 1992, the plaintiff obtained a job with CP Rail as a machine operator on track-welding crews. In 1996, he took a leave of absence in order to take training as an automobile mechanic. After obtaining his trade qualification as an auto mechanic and working for a time in that field, the plaintiff returned to his old job at CP Rail in 2001. He says his intention was to eventually become a heavy duty mechanic with the railway. He considered that a better, higher paying job than his work as an equipment operator.

**4**  The first accident at issue occurred on May 18, 2002. The car the plaintiff was driving was hit from the rear and pushed into the vehicle ahead of it. His family physician, Dr. Lau, diagnosed a whiplash injury to the neck and upper back strain. The plaintiff says his neck and back pain got worse as he tried to continue working at a job that involved heavy physical labour. On May 31, Dr. Lau advised the plaintiff to rest from work and the plaintiff was off work for short periods totalling approximately five weeks over the next five months.

**5**  On July 22, 2002 - approximately two months after the accident - the plaintiff reported to Dr. Lau that his neck was more than 50 per cent better but his back was still painful. During that period, he had been receiving physiotherapy treatments and taking muscle relaxants. The plaintiff continued to have back pain and occasional neck pain through the summer and fall of 2002. He says that by November, 2002, he was able to work, but with pain.

**6**  On November 18, 2002, the plaintiff was involved in a second rear-end collision, but that accident did not cause any significant injury or aggravation of existing injury.

**7**  The plaintiff says he continued to have pain, mostly in his back, through 2003 and his complaints are documented by Dr. Lau. However, the plaintiff did not miss any time at work in 2003. In fact, that was the plaintiff's highest income year at CP Rail because of the overtime work that was available and he admits that he took all the overtime that he was offered.

**8**  The plaintiff's job was subject to seasonal layoffs and one such layoff occurred in late 2003. By that time the plaintiff had applied for a position as an apprentice heavy duty mechanic with CP Rail. The apprenticeship is normally a four-year process, but the plaintiff was eligible to be credited for two years based on his training as an automotive mechanic. He was interviewed for the mechanic's position on January 15, 2004, and Mr. Bostan, who conducted the interview, decided that the plaintiff would start work as an apprentice mechanic after the seasonal layoff ended.

**9**  However, the plaintiff never responded to the notice calling him back to work in March. He testified that his back felt better during the time he was laid off and he decided he would not return and would instead seek a less physical job. He obtained work as an automobile mechanic in a small repair shop and never made inquiries to determine if he would be offered the mechanic's position at CP Rail.

**10**  Dr. Yorke, a rheumatologist, began treating the plaintiff in November, 2004. His diagnosis at that time was that the plaintiff had developed chronic low back pain as a result of the accident, with the nature of his work contributing to the persistence of symptoms.

**11**  While working in the automobile repair shop, the plaintiff found his back complaints to be manageable and improving. After about a year in that job, he decided to seek another, better-paying mechanic's job.

**12**  On May 5, 2005 the plaintiff was returning home from a job interview when he was involved in a third accident. His car was stopped in rush hour traffic on Highway One when he saw the defendant Madonna's vehicle in his rear view mirror. The plaintiff says he saw that vehicle change lanes and approach at a speed that made it obvious it was not going to stop. The plaintiff said he considered getting out of his vehicle and believes he had taken off his seat belt for that purpose, but he decided he could not safely leave the vehicle because traffic was moving in the high occupancy vehicle lane next to him. The plaintiff's vehicle was struck from behind with enough force to break the back of the driver's seat and to push the vehicle into the vehicle ahead. The plaintiff hit his head on the windshield.

**13**  Dr. Lau examined the plaintiff on May 7, 2005 and diagnosed a whiplash injury to the neck and back strain. In August 2005, the plaintiff had a CT scan of the lumbar spine, which showed mild disc bulging, and an MRI of his cervical spine that revealed significant spondylosis, or degenerative arthritis.

**14**  Following the third accident, the plaintiff did not work for six months. In December, 2005, he started a new job at an automotive shop, but left in March 2006. He said he found the work difficult physically and he was having back and neck pain, as well as headaches.

**15**  He bought his own small auto repair shop in the belief that would be easier physically because he would have more control over the pace of his work and the ability to rest during the work day if necessary. However, he sold the business after about a year. He says he found that his neck and back pain were not getting better, he was still having headaches, and he did not think he could continue on a long-term basis. During the time the plaintiff operated that business there was no significant operating profit, but he was able to sell the business for more than he had paid for it.

**16**  After selling his business, the plaintiff got a job as an automotive instructor at a high school, but he had no teaching qualifications or experience and found the job so stressful that he quit after only one term. Since then, the plaintiff has been unemployed. He has applied for some jobs but has found that jobs he thinks he can do generally require some computer skills. At the time of trial, he was planning to take a short community college computer course.

Medical Evidence

**17**  Dr. Yorke, says the plaintiff's major current symptoms are in the neck and some pain and restricted movement will likely continue "given the established nature of the osteoarthritis." He also attributes the plaintiff's headaches to his neck condition.

**18**  Dr. Yorke points out that there was no history of neck pain before these accidents and the ongoing neck pain "may be arising in part because of activation of the arthritis." He says asymptomatic arthritis often becomes symptomatic following a motor vehicle accident or other trauma and although the relationship is poorly understood and controversial, "it's something I often see in practice." He says the worsening of the arthritis is more likely in this case because, in the third accident, the plaintiff hit the windshield of the car, which could cause compression of the cervical spine.

**19**  Dr. Jaworski, a specialist in physical medicine and rehabilitation saw the plaintiff on January 4, 2008 at the request of the family physician. The plaintiff told Dr. Jaworski that his pain had not improved, but the only abnormal finding on Dr. Jaworski's physical examination was restricted mobility in the neck. Dr. Jaworski says the plaintiff's complaints could not be fully explained based upon the physical findings and he diagnosed a pain disorder.

**20**  The diagnosis of a chronic pain disorder was also made by Dr. Thillai, a psychiatrist who began treating the plaintiff in February 2007. Dr. Thillai says the plaintiff also has an "agitated depressive disorder" although he agreed on cross-examination that exact term is not a recognized psychiatric diagnosis.

**21**  Dr. Jaworski says the radiological findings indicating spondylosis are extremely common in persons of the plaintiff's age and that there is a poor correlation between the radiological findings and the presence or absence of symptoms. However, spondylosis is more likely to cause symptoms in person doing heavy physical labour. He cannot say if the degenerative process was the source of the plaintiff's pain, nor was he prepared to say that the injury aggravated the degenerative changes.

**22**  Dr. Froh, an orthopedic surgeon, examined the plaintiff at the request of the defendants. His opinion is that the plaintiff suffered two whiplash injuries, each of which would normally require six to twelve weeks off work, although that period might be lengthened by the presence of spondylosis. Dr. Froh says the plaintiff's neck injury in the third accident will not cause any long term problems and will not result in worsening of the degenerative condition. Although the plaintiff may have intermittent neck symptoms that progress over time, Dr. Yorke believes these will be due to the underlying spondylosis and not to any injury in the accidents.

**23**  Dr. Froh also says the plaintiff has some chronic mechanical lower back pain, but this will not restrict him from any physical labour or other activities. However, Dr. Froh agreed on cross-examination that although the plaintiff is capable of physical labour, he would not recommend that the plaintiff seek that kind of work.

**24**  The best evidence of the plaintiff's current capacity is, in my view, the report and evidence of Theresa Wong, an occupational therapist who conducted a lengthy functional capacity evaluation. She found that the plaintiff met most, but not all, of the accepted physical requirements for work either as a railway machine operator or an automotive mechanic. The limitations were in his tolerance for frequent stooping and some of the strength measurements. She recorded pain complaints by the plaintiff during the course of the testing, but this pain was not at a disabling level.

The First Accident-Non-pecuniary damages

**25**  Having considered the medical evidence and the plaintiff's testimony, I find that the plaintiff suffered soft tissue injuries in the first accident, with the most severe symptoms being in his lower back. Although there was substantial improvement within the first six to eight months, chronic but not disabling back pain continued for another two and a half years. By the time of the third accident, I find the plaintiff had almost, but not completely, recovered and would likely have gone on to complete recovery if he had not been involved in the third accident.

**26**  I do not accept that this back pain was as severe or as frequent as the plaintiff now recalls it. This is demonstrated by the fact that he was able to work substantial overtime and have his best income year in 2003. In saying that, I do not suggest the plaintiff is being dishonest or attempting to mislead the Court. However, he is recalling that period in the context of the continuing pain complaints that followed the much more severe impact in the third collision.

**27**  Plaintiff's counsel submits that $50,000 would be an appropriate award of non-pecuniary damages for the first accident. He relies upon ***Jackman v. All Season Labour Supplies Ltd.***, [*2006 BCSC 2053*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21V3-00000-00&context=), [*[2006] B.C.J. No. 3559*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21V3-00000-00&context=) (QL) and ***Sudbury v. Kohlen***, [*2007 BCSC 1369*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1B9-00000-00&context=), [*[2007] B.C.J. No. 2008*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1B9-00000-00&context=) (QL). I consider the injuries in those cases to be more serious than the plaintiff's injuries in the first accident. The ongoing nature of the plaintiff's symptoms as they existed just prior to the third accident was similar to that of the plaintiff in ***Jackman***, but that plaintiff had suffered a more severe period of initial disability. In ***Sudbury***, the Court found that, four years after the accident, there was a 50 per cent likelihood of ongoing pain for the indefinite future. As I have said, this plaintiff was nearing complete recovery by the time of the third accident.

**28**  Defence counsel suggests non-pecuniary damages in the $7,500 to $20,000 range. However, the two cases she has provided me that I have found to be most helpful awarded somewhat higher damages. In ***Khangura v. Zhang***, [*2007 BCSC 1289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X44X-00000-00&context=), [*[2007] B.C.J. No. 1938*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X44X-00000-00&context=) (QL), the plaintiff's neck, shoulder and low back pain healed substantially within a year except for lingering low back pain which remained present at the time of trial. The Court awarded $26,000 in non-pecuniary damages. In ***White v. Stonestreet***, [*2006 BCSC 801*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1CF-00000-00&context=), [*[2006] B.C.J. No. 1150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1CF-00000-00&context=) (QL), the plaintiff was found to have soft tissue injuries that significantly improved within six months and were largely resolved about a year and a half after the accident. He was awarded non-pecuniary damages of $35,000.

**29**  No previous case is exactly comparable but I conclude that, if the Court had been awarding damages for the first accident on May 4, 2005 - that is, the day before the third accident - an appropriate award would have been $30,000 and I award that amount as non-pecuniary damages for the first accident.

The first accident-income loss

**30**  Following the first accident, the plaintiff lost 26 days of work in 2002. I accept the plaintiff's calculation, based on his actual earnings that year and the daily rate derived from those earnings, that the plaintiff's wage loss as a result of those 26 days totalled $5,939.18.

**31**  The plaintiff seeks additional past income loss for 2004 and thereafter based upon an assumption that, if he had not been injured, the plaintiff would have worked as a heavy duty mechanic at CP Rail. I am not satisfied that the plaintiff's choice to not pursue that opportunity can be blamed on the defendants.

**32**  The plaintiff, until at least January 2004, believed that he could do the work of a heavy duty mechanic and he provided no good explanation of why he did not make inquiries about that job when he received his notice to return to work. The evidence indicates that, while the heavy duty mechanic job can sometimes be as physically demanding as the plaintiff's former job as an equipment operator, it also includes periods when the mechanic is simply on standby because no equipment is in need of repair. The plaintiff never attempted the heavy duty mechanic's position and has not proved that his back pain would have been any more of a limitation or hindrance to him in that job than it turned out to be in the auto mechanic's job that he worked at until the time of third accident. The plaintiff has therefore failed to prove, on a balance of probabilities, that income reduction he experienced in 2004 and the first four months of 2005 was caused by the first accident.

**33**  Damages for lost income arising from the first accident are therefore limited to the income lost in 2002, which I have found to be $5,939.18. That is a gross figure subject to deduction for the effect of income tax and counsel may speak to that point if they are unable to agree on an appropriate deduction.

The Third Accident-non-pecuniary damages

**34**  Following the third accident, the plaintiff has had some increase in back pain, but the most significant pain was in the neck, where he has the more significant spondylosis. This pain is likely to continue and worsen as he gets older. Again, the pain is not disabling and the plaintiff could, if necessary, return to either of his former occupations but, given the pain and discomfort he experiences, he is well-advised to seek lighter work. The ongoing pain has also caused to plaintiff to give up some recreational activities that he previously enjoyed.

**35**  The question is whether and to what extent these ongoing problems were caused or contributed to by the third accident. The direct cause of any current neck pain or discomfort and any future deterioration is the underlying degenerative condition that may have become symptomatic at some point in any event.

**36**  In ***Resurfice Corp. v. Hanke***, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=), [*[2007] 1 S.C.R. 333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=), the Supreme Court of Canada made clear that the burden is usually on the plaintiff to show that the injury would not have occurred "but for" the defendant's ***negligence***. Only in special circumstances can a plaintiff rely on the less-stringent test of whether the defendant's ***negligence*** materially contributed to the injury:

First, it must be impossible for the plaintiff to prove that the defendant's ***negligence*** caused the plaintiff's injury using the but for' test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the 'but for' test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a 'but for' approach. [para. 25]

**37**  The plaintiff in this case had a degenerative condition that was not symptomatic. He had no prior history of neck or back pain prior to these accidents. Temporal connection between an accident and the onset of symptoms does not, in and of itself, prove causation. As this Court said in ***White***, *supra*, at para. 75:

In searching for causes, a temporal connection is sometimes the only thing to go on. But if a mere temporal connection is going to form the basis for a conclusion about the cause of an event, then it is important to examine that temporal connection carefully. Just how close are the events in time? Were there other events happening around the same time, or even closer in time, that would provide an alternate, and more accurate, explanation of the true cause?

**38**  However, I note that in ***White***, the plaintiff was doing well a year after the accident and only experienced a worsening of his pain some months later. In this case, there was no such period of complete or near complete recovery following the third accident. At some point that is not possible to identify with any certainty, the symptoms of soft tissue injuries gradually resolved, while symptoms of arthritis continued. From the plaintiff's perspective, that change in the underlying medical cause made little if any difference to his day-to-day condition.

**39**  There are no other events that would explain the onset of arthritis symptoms other than the fact the plaintiff continued to do physical labour. But the plaintiff had done physical labour all his life without any onset of symptoms and, if anything, the mechanic's job that he did when he returned to work after the third accident was lighter than the work he had done for many years on the railways.

**40**  Dr. Yorke and Dr. Froh disagree on the role soft-tissue trauma plays in triggering symptoms of latent arthritis or spondylosis. If either position is supported by reliable studies in the medical literature, neither doctor referred to them in his evidence. Clearly, there is no certain scientific answer, but the law does not require such certainty. (***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=); ***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=), [*72 D.L.R. (4th) 289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=))

**41**  Dr. Yorke says that although the relationship is controversial and poorly understood, he frequently sees evidence of such a connection in his practice and believes it to be present in this case. On this point, I prefer the evidence of Dr. Yorke to that of Dr. Froh because the issue is more directly within Dr. Yorke's expertise as a rheumatologist.

**42**  In terms of the "but for" test of causation, it is not necessary for the plaintiff to prove that he would never have developed symptoms from his degenerative condition "but for" the third accident. He must only prove that, "but for" the accident, he would not have developed those symptoms when he did. Based on the temporal connection and the opinion of Dr. Yorke, I find that the plaintiff has proved, on a balance of probabilities, that his spondylosis would not have become symptomatic when it did but for the third accident.

**43**  However, the fact that the plaintiff has met the burden of proving a causative link does not necessarily mean the defendant is responsible for the full amount of his damages. In ***Blackwater v. Plint***, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=), [*[2005] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=), the Supreme Court of Canada said 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 consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway ...

**44**  In ***Athey***, *supra*, the Court said at para. 35 that "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".

**45**  An example of how that principle is applied in cases such as this can be found in the decision of this Court in ***Zaruk v. Simpson et al.***, [*2003 BCSC 1748*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-6115-00000-00&context=), [*22 B.C.L.R. (4th) 43*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-6115-00000-00&context=). The Court found that the plaintiff had suffered soft tissue injuries, but that some of her symptoms by the time of trial were consistent with degenerative changes. The Court was not satisfied that the degenerative condition would have become symptomatic between the date of the accident and the date of trial, but concluded at para. 40 that there was a measurable risk that it would have become symptomatic in the future:

However, application of the crumbling skull doctrine may not result in the same reduction for past losses as future losses. Past losses must be assessed on the basis of a balance of probabilities. "Once the burden of proof is met, causation must be accepted as a certainty," ***Athey*** [paragraph] 30). But for the assessment of future losses, "[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*** [paragraph] 27).

The Court recognized the risk of future problems in any event by reducing non-pecuniary damages by 15 per cent and future care damages by 20 per cent.

**46**  I find that a somewhat larger deduction is appropriate in this case. The medical evidence indicates that there is no reliable way to predict which people with degenerative changes will go on to develop symptoms, but those in physical occupations are at higher risk. In fact, the medical evidence supports a conclusion that the plaintiff was more likely than not to develop symptoms before the end of his working life and defence counsel relies on that evidence to argue for a 51 per cent deduction if any causative link is found. However, that submission ignores the fact that it is impossible to say when those symptoms would have developed, how serious they would have been or how rapidly they would have progressed. In the circumstances, I find that it is appropriate to deduct 25 per cent from the award of non-pecuniary damages for the third accident.

**47**  The plaintiff suffers from ongoing neck pain that is likely to continue and worsen over the years. However, the pain is manageable and causes only mild impairment in the plaintiff's functional capacity. Part of the plaintiff's problem is the chronic pain disorder diagnosed by Dr. Jaworski and I agree with Ms. Wong that the plaintiff would probably benefit from participation in a pain program where he could learn ways to manage his pain. The severity and worsening of the pain will also be mitigated by the plaintiff finding less physical employment. Having said that, however, I am satisfied that the plaintiff will always experience bouts of pain and will always need to be cautious in his activities in order to avoid bringing on or worsening his pain.

**48**  The plaintiff has also been treated by Dr. Thillai for emotional and psychological problems. These resulted primarily from the stress the plaintiff experienced first in operating a business that was not making very much money, then in attempting to take on the teaching job for which he was not qualified. In my view, the question of what label is given to these difficulties for the purpose of a psychiatric diagnosis is of little importance. They form part of the pain, suffering and loss of enjoyment of life the plaintiff has experienced as a result of his attempt to find work that is less physically demanding and that effort is, in turn, a result of the accident.

**49**  Plaintiff's counsel suggests that damages for the third accident should be in the range of $100,000, relying on cases such as ***Caldwell v. Ignas***, [*2007 BCSC 1816*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-222B-00000-00&context=), [*[2007] B.C.J. No. 2692*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-222B-00000-00&context=) (QL) and ***Jackson v. Lai***, [*2007 BCSC 1023*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3K8-00000-00&context=), [*[2007] B.C.J. No. 1535*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3K8-00000-00&context=) (QL). I do not find the plaintiff's injuries to be as serious as the injuries in those cases.

**50**  This case is more comparable to ***Zaruk v. Simpson***, referred to above, and ***Niitamo v. ICBC***, [*2003 BCSC 608*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S2KC-00000-00&context=), [*16 B.C.L.R. (4th) 276*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S2KC-00000-00&context=). In both those cases, plaintiffs were found to be suffering ongoing pain and impairment, but there was a material risk that pre-existing conditions would have caused pain and impairment at some point in any event. In ***Zaruk***, the Court awarded $50,000, less 15 per cent to recognize the material risk presented by the ongoing condition. In ***Niitamo***, the Court awarded $60,000, less a similar 15 per cent deduction.

**51**  Taking into account all of the factors involved, I find an appropriate award of non-pecuniary damages for the third accident to be $70,000, less a 25 per cent deduction for the material risk represented by the pre-existing condition. That results in a net award of $52,500.

**52**  The next question is whether there should be a further reduction because of the plaintiff's failure to wear a seatbelt in the third collision. Dr. Froh says the injuries would have been less serious if he had been wearing a seat belt, but agreed on cross-examination that he did not consider the fact that the plaintiff's seat back broke in the collision. Mr. Sdoutz, the engineering expert called by the plaintiff, said the broken seat back could reduce the effectiveness of the seat belt, particularly when the driver was thrown forward.

**53**  In any event, I accept the plaintiff's evidence that he removed the seat belt while he was considering getting out of the car to avoid the impact. That exit proved to be impossible and may not have been the most prudent course even if it had been possible, but, given that the plaintiff was acting in the heat of the moment and fearing an imminent collision, I cannot say that he was acting unreasonably or without proper regard to his own safety. There will therefore be no reduction of damages for the plaintiff's failure to be wearing a seatbelt at the moment of impact.

The Third Accident - Past Income loss

**54**  The plaintiff was off work for six months following the third accident. At the time of the third accident, he was earning $12 an hour as an auto mechanic, but had just been interviewed for another job that he says would have paid $19 an hour. Contrary to the plaintiff's understanding, he had not actually been offered that job. However, when he was able to return to work in late 2005, he found a job as a mechanic that paid $16 an hour and I find that, if he had not been injured in the third accident, the plaintiff likely would have found a job paying at least that much in or around May 2005. I therefore find that the plaintiff's gross loss for that period should be based on 26 weeks at 40 hours per week at $16 per hour, for a total of $16,640.

**55**  I am also satisfied that, as a result of the third accident, the plaintiff was unable to meet the full physical demands of his work as an automobile mechanic and reasonably explored other options, including self-employment. If he had not been injured in the third accident, he would most likely have continued to work full time as a mechanic earning $16 an hour as he gained experience in that field. Contrary to the plaintiff's submissions, he would not have been working as a heavy duty mechanic at CP Rail because, as I have found, he had abandoned that opportunity before the third accident and has not proved that decision was made necessary by his injuries in the first accident.

**56**  If the plaintiff had worked as an auto mechanic throughout the period from the beginning of 2005 to the date of trial - a period of three years and 10 weeks - his total income, at $33,394 a year, would have been $106,582. According to income tax returns and T4 slips filed at trial, his actual income during that period, including employment income, business income and employment insurance, was $60,723. I find that the difference between those two amounts - $45,859 - represents further past income loss as a result of the third accident.

**57**  Total income loss attributable to the third accident, on a gross basis, is therefore $62,499. Again, I will leave it to counsel to make submissions on the appropriate net-of-tax award if they are unable to agree.

The Third Accident-loss of earning capacity

**58**  The plaintiff also says he has suffered a reduction in his capacity to earn income in the future. The factors the Court must consider in arriving at an appropriate award under that head of damages were discussed by the Court of Appeal in ***Parypa v. Wickware***, [*1999 BCCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=), [*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=) at para. 67:

These cases demonstrate that the trier of fact, in determining the extent of future loss of earning capacity, must take into account all substantial possibilities and give them weight according to how likely they are to occur, in light of all the evidence. However, in calculating such likelihoods, the plaintiff is not entitled to compensation based solely on the type of work she was performing at the time of the accident. There is a duty on the plaintiff to mitigate her damages by seeking, if at all possible, a line of work that can be pursued in spite of her injuries. If the plaintiff is unqualified for such work, then she is required, within the limits of her abilities, to pursue education or training that would qualify her for such work.

**59**  More recently, in ***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=), the Court of Appeal stressed that the analysis must be based on a "substantial possibility," which the plaintiff has the burden of proving.

**60**  I accept that the plaintiff has been forced to seek work as something other than an automobile mechanic. However, the evidence of the plaintiff's own vocational consultant, Ms. Wilkinson, is that there are other, less physical, jobs in the automotive sector for which the plaintiff, with some training, would be suited. These include jobs such as service advisor and collision estimator. The average income levels for those jobs are roughly similar to that of a mechanic. I am satisfied that with some job-specific training, as well as some training in basic computer skills, the plaintiff will have access to those lighter jobs and that his ongoing pain, while it will be sometimes uncomfortable, will not limit his ability to work in those occupations.

**61**  The plaintiff will obviously need time for the necessary training and time to find a suitable job. In that search, his age and medical history may put him at a competitive disadvantage, with the result that it may take him longer than others to find a job. However, I am satisfied that, within two years, the plaintiff will be capable of earning as much as he would have been earning as an auto mechanic. Accordingly, I assess the plaintiff's lost earning capacity at $65,000, the approximate equivalent of two years' wages.

**62**  Because I have found there is a measurable risk that the plaintiff would at some point have had symptoms from his degenerative condition, there must be a deduction to reflect the risk the plaintiff would have experienced this loss in the future even if he had not been injured. In assessing non-pecuniary damages, I set that deduction at 25 per cent. However, non-pecuniary damages reflect both past and future loss. Because the award for lost capacity is entirely based on future losses, a higher deduction is necessary (***Zaruk***, *supra*). The award for lost capacity will therefore be discounted by 30 per cent, for a net award of $45,500.

**63**  Ms. Wilkinson says the cost of a training program in one of the alternate automotive jobs is approximately $3,900 and I award the plaintiff that amount, less the same 30 per cent reduction.

The Third Accident-Cost of Future Care

**64**  The plaintiff also seeks an award for cost of future care based on the recommendations of Ms. Wong. These include participation in a pain program to learn ways of managing his pain, vocational counselling to assist in pursing alternate employment and kinesiology assistance to develop an appropriate fitness program. I find all of these to be appropriate and within Ms. Wong's expertise as an occupational therapist.

**65**  However, I do not accept that Ms. Wong is qualified to recommend psychological counselling. I have found that the plaintiff has experienced a great deal of stress as a result of his reduced income and attempting to do alternate jobs that he was not qualified for, but he is already under the care of a psychiatrist for those matters.

**66**  Ms. Wong also recommends some relatively minor expenditures for pain management and fitness, which I find to be reasonable. However, her inclusion of medication in future care recommendations is based on the medication the plaintiff is now taking and there is no medical evidence of the future need for those medications.

**67**  Using the present values set out in the report of Mr. Carson and making the above deductions, I find that the present value of the cost of future care is $21,842. Because there is a measurable risk that these expenditures would have become necessary at some point in the future in any event, the award must be subject to the same 30 per cent discount that was applied to the future loss of earning capacity. The net award for cost of future care is therefore $15,300.

**68**  The plaintiff seeks a further award for loss of housekeeping capacity. The plaintiff has not proved that he is unable to perform basic household tasks, such as yard work. To the extent that such work may sometimes be uncomfortable or take longer to do, I consider that to be a matter included in non-pecuniary damages. (***Chumber v. Ford Credit Canada et al.***, [*2006 BCSC 1935*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61KS-00000-00&context=), [*[2006] B.C.J. No. 3310*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61KS-00000-00&context=) (QL).

**69**  I accept the plaintiff has incurred special damages in the amount $1,926.39. I will leave it to counsel to apportion them between the two accidents if necessary.

Summary

**70**  In summary, I award the plaintiff the following damages:

For the Accident of May 18, 2002:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages | $30,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past income loss (subject |  |  |
|  | to deduction for Income |  |  |
|  | tax) | $5,939.18. |  |

For the Accident of May 5, 2005

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages | $52,500.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past income loss (subject |  |  |
|  | to deduction for Income |  |  |
|  | tax) | $62,499.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Future Earning |  |  |
|  | Capacity | $45,500.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of Retraining | $2,730.00 |  |
|  | Cost of Future Care | $15,300.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages |  |  |
|  | (Not apportioned) | $1,926.39 |  |

**71**  Costs will follow the event, unless counsel have reason to make contrary submissions.

N.H. SMITH J.

**End of Document**

[***Glowinski v. Knowlton, [2008] B.C.J. No. 962***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2HC-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

R.W. Metzger J.

Heard: February 11-13, 2008.

Judgment: May 28, 2008.

Docket: 06/2874

Registry: Victoria

**[2008] B.C.J. No. 962** | 2008 BCSC 662 | 168 A.C.W.S. (3d) 98

Between Glen Nicholas Glowinski, Plaintiff, and Cameron Robert Knowlton, Dominic J. Rizzuto and Honda Canada Finance Inc., Defendants

(100 paras.)

**Case Summary**

**Damages — Physical and psychological injures — Physical injuries — Neck — Whiplash — Head injuries — Headaches — Leg injuries — Fractures — Considerations impacting on award — Mitigation — Assessment of damages in motor vehicle accident claim — Plaintiff, now 58, suffered soft tissue injuries in motor vehicle accident — Debilitating injuries for six weeks following accident with ongoing headache, neck and right shoulder pain continuing for over one year — Shortly after accident, plaintiff became unconscious during headache episode and broke leg — Action allowed in part — Total damages of $72,231 awarded — Fainting spell causally connected to accident — Failure to continue physiotherapy resulted in 15 per cent reduction of damages.**

**Damages — Types of damages — General damages — For personal injuries — Retroactive loss of income — Special damages — Non-pecuniary loss — Pain and suffering — Assessment of damages in motor vehicle accident claim — Plaintiff, now 58, suffered soft tissue injuries in motor vehicle accident — Debilitating injuries for six weeks following accident with ongoing headache, neck and right shoulder pain continuing for over one year — Shortly after accident, plaintiff became unconscious during headache episode and broke leg — Action allowed in part — Plaintiff awarded $27,200 in non-pecuniary damages, $41,000 for past wage loss, and $4,031 in special damages — Failure to mitigate reduced damages by 15 per cent.**

|  |
| --- |
| Assessment of damages in a motor vehicle accident claim. The plaintiff suffered soft tissue injuries in 2005 accident. He subsequently fell and broke his leg when he became unconscious. The plaintiff alleged the injuries suffered in the motor vehicle accident caused his loss of consciousness. The plaintiff, now 58, claimed he was in excellent health prior to the accident. The plaintiff was active in golf, fishing, skiing and competitive curling prior to the accident. At the time of the accident, the plaintiff worked as a realtor. Since the accident, the plaintiff allegedly suffered excruciatingly painful headaches which continued today, though with less severity. The plaintiff had ongoing neck, arm and shoulder pain following the motor vehicle accident. He said that for several months after the accident, he had difficulty sleeping because the pain would wake him up. The plaintiff alleged that his ongoing pain affected his personal life and limited his ability to work as a realtor.  HELD: Action allowed in part.  Total damages of $72,231 awarded. The evidence did not support the plaintiff's claims of ongoing and severe injuries. The plaintiff suffered debilitating injuries for six weeks following the motor vehicle accident with ongoing headache, neck and right shoulder pain continuing for over one year. The plaintiff demonstrated that his symptoms contributed to his collapse as he was overwhelmed with a motor vehicle accident-related headache and neck pain immediately prior to the fainting incident. The plaintiff's limited range of motion in his shoulder continued to limit his ability to golf. The plaintiff failed to pursue any physiotherapy to ameliorate his situation. He was awarded $12,000 in non-pecuniary damages, subject to a 15 per cent reduction for his failure to pursue treatment, $20,000 in non-pecuniary damages for the leg injury, less 15 per cent for his failure to mitigate. Due to the injuries, the plaintiff could not work at previous levels for a total of six weeks as a result of his initial motor vehicle accident injuries, and then six additional months as a result of his leg injury. $41,000 for past wage loss, and $4,031 in special damages were awarded. |

**Counsel**

Counsel for Plaintiff: J.A.S. Legh.

Counsel for the Defendants: M.J. Lawless.

**Reasons for Judgment**

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| --- |
| **R.W. METZGER J.** |

**1**   The plaintiff, Mr. Glowinski, was the seat-belted driver of a motor vehicle that was rear-ended on August 13, 2005. He suffered soft tissue injuries. On October 14, 2005, he lost consciousness, fell and broke his leg while watching his son play an arcade game on a British Columbia ferry. The plaintiff alleges the injuries suffered in the motor vehicle accident caused his loss of consciousness. He seeks costs and damages from both injuries as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages | $70,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Income loss | $60,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special damages | $6,211.88 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future expenses | $500.00 |  |
|  |  | ---------- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL | $136,711.88 |  |

**2**  The defendant admits liability and submits that the plaintiff was disabled as a result of the collision for a maximum of six weeks, with some ongoing minor discomfort. The defendant suggests that an appropriate award for the plaintiff's non-pecuniary damages would be $8,000 to $9,000, subject to a 25% reduction for failure to mitigate. The defendant submits that $5,000 would be more than adequate to compensate the plaintiff for past wage loss.

**ISSUES**

**3**  What damages has Mr. Glowinski suffered as a result of his motor vehicle accident of August 13, 2005? Was the plaintiff's loss of consciousness two months after the MVA a result of his collision-related injuries?

**BACKGROUND**

**4**  Mr. Glowinski testified that prior to his motor vehicle accident in August 2005, he was in "excellent" health, and never experienced headaches, nausea or balance problems. The plaintiff's medical history shows no complaints relevant to the case at bar. The plaintiff is now 58 years old.

**5**  Two reports of Dr. Colin Partridge, dated January 25, 2006 and December 21, 2007, contain the only medical evidence before the Court with respect to the injuries suffered by the plaintiff subsequent to the motor vehicle accident.

**6**  Mr. Glowinski is divorced. His ex-wife and young son live in Princeton, British Columbia. Since 2003 the plaintiff's practice, at least twice a month, has been to pick his son up in Princeton and drive him back to Victoria for the weekend. He then drives his son back home to Princeton. His one way driving time from Victoria to Princeton is approximately six hours including the time on the ferry.

**7**  Mr. Glowinski was an active participant in golf, fishing, skiing and competitive curling prior to August 13, 2005.

**8**  At the time of the MVA, the plaintiff was working as a real estate agent.

**9**  On August 13, 2005, the plaintiff was driving a Dodge van, and periodically stopping to set out signs for an open house in a strata condominium development. The defendant Knowlton believed that the plaintiff was blocking the semi-private roadway so honked his horn repeatedly and refused to drive around the plaintiff.

**10**  The accounts of this incident vary significantly as between the plaintiff's testimony and the defendant's statement to the police. After a period of what might be described as road rage between the plaintiff and the defendant, the defendant's vehicle hit the back of the plaintiff's van. The defendant significantly damaged the front end of his car and the back of the plaintiff's van.

**11**  Almost immediately after the collision, the plaintiff said he began to feel nauseous and his neck and shoulders started to be "sore". He went to the Royal Jubilee hospital for treatment and received a prescription for anti-inflammatory medication, which he filled.

**12**  Since the accident, the plaintiff has suffered what he described as excruciatingly painful headaches which he said continue today, though with less severity.

**13**  The plaintiff had ongoing neck, arm and shoulder pain following the MVA. He said that for several months after the accident, he had difficulty sleeping because the pain would wake him up. He said that moving his right arm generally resulted in a headache.

**14**  He went to physiotherapy, massage and chiropractic treatments on the advice of his doctor. He also exercised and swam to rehabilitate his injuries. He stopped attending treatments in November 2005, when I.C.B.C. informed him that they would no longer pay.

**15**  The plaintiff stated as a result of the pain he was unable to work at previous levels between August 2005 and October 2005. He stated his driving ability was diminished, and he spent less time with his son. He testified he was unable to golf, maintain his yard, clean his house, do laundry, or do most anything that required him to move his right arm.

**16**  The plaintiff visited his son in Princeton on August 14-15, 2005, with the help of an alternate driver because he did not feel able to drive on his own.

**17**  On September 9, the plaintiff drove alone to Princeton, and returned to Victoria with his son the same day.

**18**  On October 14, 2005, the plaintiff picked up his son in Princeton. On the way back to Victoria, the plaintiff testified he developed a severe headache and severe neck and shoulder pain. He took no medication for his pain. The doctor's notes record that the plaintiff reported he was very tired during the drive.

**19**  After getting on the ferry, the plaintiff took his son to the arcade room. He recalled that he was standing, watching his son and experiencing a severe headache. He said his next memory is of waking up on the floor with two ferry workers attending to him. The plaintiff said he did not drink any alcohol or take any medications that day.

**20**  As a result of the fall, the plaintiff suffered a spiral fracture of his fibula and a chip of the distal tibia in his ankle, as well as a wound, which he said is now a scar, on his forehead or scalp.

**21**  His cast was removed in mid-December 2005. By January 2006 he was walking normally again with some continuing soreness. Mr. Glowinski received some physiotherapy for his ankle injury, but reported to his doctor on January 11, 2006, that he "quit physiotherapy, as it was not helpful".

**22**  The plaintiff stated that walking with crutches aggravated his shoulder and neck pain, which in turn aggravated his headaches.

**23**  He was not able to drive until around Christmas of 2005.

**24**  The plaintiff said he was likely 80% recovered by the end of 2006.

**25**  Since then, he said he has "levelled out". He said he still experiences pain after extended yard work and that he has occasional headaches, though he said, "they're less and less frequent all the time."

**26**  He maintains he still has restricted mobility in his right shoulder.

**27**  The plaintiff testified that he continues to have problems with his ankle, and that he cannot run, ski or curl at his previous levels of participation, or at all. The plaintiff stated his difficulties with curling and skiing flow primarily from his leg injury. He testified that his shoulder and neck injuries have prevented him from golfing, though he has tried several times.

**28**  Dr. Partridge wrote that in his opinion, the plaintiff "is likely not suffering ongoing significant problems", though he felt it is "conceivable that Mr. Glowinski may develop late symptoms requiring treatment down the road."

**29**  The plaintiff said that the accident affected his personal life as his former fiancée, Ms. Cindy Story, had to take on a caregiver role. Mr. Glowinski stated that the pain made him irritable and affected his ability to be intimate. Ultimately, his relationship with his fiancée ended.

**30**  The plaintiff said he paid Ms. Story for some of her help, often in the form of paying her bills, in order to offset her out-of-pocket expenses and to compensate her for the time she took off work to attend to him.

**31**  The plaintiff stated he hired someone to do yard work due to the pain in his right arm, neck and shoulder.

**32**  The plaintiff said his injuries impacted his ability to work as a realtor. His mobility was restricted after he broke his leg. He "conservatively" estimated that during the "hot market" in 2006, he lost out on at least six sales as a result of the motor vehicle accident, representing approximately $60,000 over the 8.5 months during which he said he was limited in his ability to work.

**DISCUSSION AND ANALYSIS**

**MVA INJURIES TO OCTOBER 14, 2005**

**33**  There is no dispute that the defendant is liable for the plaintiff's injuries resulting from the August 13, 2005 motor vehicle accident.

**34**  I am satisfied that the plaintiff sustained injuries related to whiplash as a result of the collision, with symptoms of severe headache, neck and shoulder pain, limited right shoulder mobility, sleep disruption, nausea and some initial but brief dizziness.

**35**  Not all of the evidence at trial supported the plaintiff's claims of ongoing and severe injuries. The plaintiff's physiotherapist, Ms. Kathy Murdoch, recorded that he had a headache the day after the accident, but she recorded no further headaches. Ms. Murdoch noted that the plaintiff's neck movement improved by August 22, 2005, and by September 15, his muscle soreness was gone. By September 29, 2005, his shoulder was reported as much better.

**36**  The plaintiff reported to his chiropractor, Dr. Clark Konczak, on September 25, 2005, that he was 90% improved.

**37**  Mr. Glowinski reported to his doctor on October 6 that he had continuing tension headaches that were aggravated by housework and computer use. The doctor also noted that the plaintiff was gradually improving.

**38**  The plaintiff's last attendance on his physiotherapist for his neck and shoulder injuries was October 6, 2005.

**39**  He did not complete the course of physiotherapy prescribed by his doctor and by Ms. Murdoch, and therefore the physiotherapy discharge assessment was never completed. The defendants state that the plaintiff could have chosen to pay for ongoing physiotherapy, massage, and chiropractic treatments in order to mitigate his injury-related losses. Mr. Glowinski said he would have continued treatment if I.C.B.C. had continued to fund it.

**40**  I find that the plaintiff's symptoms were improving at the time of his fall and loss of consciousness on the ferry, and but for the continuing headaches, were mostly healed within six weeks of the MVA.

**COLLAPSE ON THE FERRY**

**41**  The plaintiff alleges that the headaches and other symptoms caused by the motor vehicle accident of August 13, 2005, were the cause of his loss of consciousness on the B.C. ferry on October 14, 2005.

**42**  The October 15, 2005 report of Dr. K. Minish, summarized by Dr. Partridge, indicated that the plaintiff felt his loss of consciousness "was related to exhaustion," and that during the drive, the plaintiff reported he "had been very tired." Dr. Minish did not testify at trial or provide any notes of her own. There was no evidence regarding the plaintiff's stress level or blood pressure.

**43**  Dr. Partridge, in his report of January 25, 2006, wrote the speculative statement that "[i]t is conceivable that the pain from the MVA contributed to the loss of consciousness."

**44**  I have considered whether the plaintiff's decision to drive to Princeton and back in one day was unreasonable such that it constituted an "intervening act" that broke the chain of causation regarding the defendant's ***negligence***. I find that his decision was not unreasonable.

**45**  Mr. Glowinski was acting reasonably when he drove to Princeton and back in order to exercise his access with his son. Mr. Glowinski was significantly recovered by October 13, as can be seen in his medical reports. In September, he drove the return trip alone in one day without mishap. It is reasonable that he would conclude that he was sufficiently recovered to drive to Princeton and back on October 14, without an alternate driver.

**CAUSATION**

**46**  Did the plaintiff demonstrate on a balance of probabilities that the MVA was a contributing factor in his collapse and subsequent injuries?

**47**  Major J. 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=) (S.C.C.) at para. 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 the 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***.

**48**  Major J. in ***Athey*** elaborated on the standard for causation, noting that the "but for" test is normally the standard in determining causation. He stated as follows at paras. 15-16:

The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's ***negligence*** "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education*, [*[1981] 2 S.C.R. 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M21F-00000-00&context=); *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board, supra*. A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings, Ltd. v. Wardlaw, supra;* see also *R. v. Pinske* [*(1988), 30 B.C.L.R. (2d) 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JNY7-X2P6-00000-00&context=) (B.C.C.A.), aff'd [*[1989] 2 S.C.R. 979*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6524-00000-00&context=).

In *Snell v. Farrell, supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

**49**  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=), McLachlin C.J.C., stated the "but for" test at paras. 21-23:

First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory ***negligence*** may be apportioned, as permitted by statute.

This fundamental rule has never been displaced and remains the primary test for causation in ***negligence*** actions. As stated in *Athey v. Leonati*, at para. 14, *per* Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the ***negligence*** of the defendant." Similarly, as I noted in *Blackwater v. Plint*, 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."

The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, *per* Sopinka J.

**50**  I am satisfied on a balance of probabilities that the plaintiff demonstrated that his MVA-related symptoms contributed to his collapse on the ferry on October 14, 2005. Although no expert opinion was produced to state that the MVA was a cause of the plaintiff's loss of consciousness, I accept the plaintiff's testimony that he was overwhelmed with an MVA-related headache and neck pain immediately prior to the fainting incident.

**51**  The evidence is that the plaintiff did not have a history of such symptoms, and "ordinary common sense" dictates that the collapse was in part a result of the defendant's ***negligence***. Although the plaintiff's MVA-related symptoms were aggravated by his decision to drive to Princeton and back, the fact remains that the defendant originally caused the symptoms. If the plaintiff was feeling exhausted as he reported to his doctor, then I am satisfied that a contributing factor was the plaintiff's poor sleeping patterns due to the pain from the motor vehicle accident. The defendant offered no plausible alternative explanation for the plaintiff's collapse.

**52**  I find that the plaintiff's general fatigue and headache were significant factors in his loss of consciousness. There was a "substantial connection between the injuries and the defendant's conduct" (***Resurfice Corp****.*). I am satisfied that but for the defendant's ***negligence*** which caused the initial injuries, the plaintiff would not have experienced headache, neck and shoulder pain on October 14, and he would not have passed out and further injured himself on the ferry.

**NON-PECUNIARY DAMAGES**

**Whiplash Injuries**

**53**  McEachern C.J.S.C. (as he then was), 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=) (B.C.S.C.), at p. 399, referred to his unreported 1981 decision of ***Butler v. Blaylock***, where he wrote:

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.

**54**  Mr. Glowinski said that he had "severe" whiplash as a result of the MVA. He testified that he had frequent and severe headaches for perhaps six weeks, and then suffered ongoing symptoms of headache pain, limited mobility in his shoulder, neck pain and mid-back pain. I accept that his neck and shoulder injuries, and likely his headaches, were aggravated by his use of crutches following his collapse on the ferry.

**55**  On December 22, 2005, Dr. Partridge assessed the plaintiff with regard to his neck, shoulder and arm pain and movement, and his ankle injury. Dr. Partridge wrote, "[m]y assessment was that he was generally better."

**56**  On March 9, 2006, Dr. Partridge noted that the plaintiff had upper back discomfort with over-use of the right arm, after sawing wood. Again, the doctor assessed the plaintiff as recovering normally.

**57**  On August 22, 2006, Dr. Partridge saw the plaintiff regarding the MVA injuries. The plaintiff reported feeling about 80% recovered, but also reported continuing intermittent headaches. The plaintiff was not receiving physiotherapy, as he said he could not afford it. Dr. Partridge wrote:

On examination, he was in no distress. He had no tenderness of his shoulders, occiput, or para-cervical muscles. ROM [range of motion] of his C-spine was normal. His right shoulder was not tender, though abduction was limited to about 110 degrees.

**58**  This was Dr. Partridge's last assessment of the plaintiff regarding the MVA-related symptoms.

**59**  Dr. Partridge wrote that the plaintiff's headaches and pain in his neck and right shoulder area improved with time, "but were still present a year later", and were reportedly aggravated at times by yard work and sports. The plaintiff also experienced "limitation in ROM of his neck and right shoulder" which continued after one year.

**60**  I am satisfied that the plaintiff suffered debilitating injuries for a period of about six weeks following the motor vehicle accident with ongoing headache, neck and right shoulder pain continuing for over one year. I accept that he was likely experiencing some pain while carrying on his normal behaviours such as travelling to Princeton and attending his work, which he did with the help of Ms. Story. I find that the plaintiff was unable to do many of the things he previously enjoyed, such as gardening and sports. I accept that in all of his endeavours he generally functioned at a reduced level as a result of his injuries.

**61**  The reports from his doctor and physiotherapist indicate that after six weeks, his headaches and neck and shoulder pain were clearly improving. After the plaintiff's collapse on the ferry, his MVA injuries were aggravated by the use of crutches, but continued to heal.

**62**  The plaintiff's last visit to his physiotherapist for his neck and shoulder injuries was on October 6, 2005. Despite his assertion that these injuries have continued until the present day and prevent him from participating in activities he previously enjoyed, the plaintiff did not pursue any further physical therapy to improve his symptoms.

**63**  Likewise, the plaintiff has not seen his doctor for over one year with regard to his MVA-related injuries. Dr. Partridge wrote: "Since he has not been seen for over a year re the MVA-related injuries, it is my interpretation that he is likely not suffering ongoing significant problems."

**64**  I find that by the end of August 2006, the plaintiff had largely recovered from the headaches and neck and shoulder injuries caused by the defendant. I accept his report that he still suffers from occasional headaches.

**65**  I accept that the plaintiff's limited range of motion in his shoulder continues to limit his ability to golf, though I note that he has not pursued any physiotherapy to ameliorate this situation. The plaintiff stated that he could not afford such therapy after I.C.B.C. refused to cover the treatment, but I find this to be unlikely, given his income.

**66**  The plaintiff submits that his non-pecuniary damages should be $35,000 in respect of his shoulder pain, neck pain and headaches. In support of this, he cites: ***Penno v. Stephanian***, [*2002 BCSC 287*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1JB-00000-00&context=); ***Tombe et al. v. Stefulj***, [*2002 BCSC 154*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1RW-00000-00&context=); ***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=); and ***Fiust v. Centis***, [*2005 BCSC 1067*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B118-00000-00&context=).

**67**  The defendant, on the other hand, cites: ***Rephin v. Alexander***, [*2000 BCSC 454*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61B5-00000-00&context=); ***Dymond v. Wilson***, [*2001 BCSC 244*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1FB-00000-00&context=); ***Amir v. I.C.B.C***., [*2002 BCSC 1121*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-2520-00000-00&context=); ***Zulj v. Findlay***, [*2005 BCPC 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0Y7-00000-00&context=); ***Gibson v. Saran***, [*2003 BCSC 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S200-00000-00&context=); ***Mohammed v. Frey***, [*2006 BCSC 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23G7-00000-00&context=); ***Gill v. Mansour***, [*2004 BCSC 1537*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0JS-00000-00&context=); and ***Wright v. Dierolf***, [*2001 BCPC 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-246H-00000-00&context=). These cases support the defendant's assertion that the plaintiff should be entitled to $8,000 to $9,000. The defendant points to ***E.M.E. v. Watts***, [*2005 BCCA 496*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B24J-00000-00&context=), as an example of the upper end of damages for injuries similar to the plaintiff's, where the award was $20,000.

**68**  I find that the plaintiff and Ms. Story were credible witnesses with regard to the plaintiff's ongoing symptoms.

**69**  In the circumstances, I would award the plaintiff $12,000 in non-pecuniary damages, subject to a 15% reduction for his failure to pursue treatment, which most likely would have mitigated his damages and hastened his recovery. Thus, the plaintiff is entitled to $10,200 in non-pecuniary damages for his headaches and neck and shoulder injuries.

**Collapse on the Ferry**

**70**  The defendant argued that the plaintiff's collapse and broken leg were not causally linked with the MVA, and therefore the defendant made no submissions regarding the quantum of non-pecuniary damages for the plaintiff's broken leg.

**71**  The plaintiff, citing ***Choromanski v. Malaspina University College***, [*2002 BCSC 771*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2KW-00000-00&context=), and ***McGrath v. Meise***, [*2005 BCSC 1333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1JD-00000-00&context=), argued that he is entitled to $30,000 in non-pecuniary damages for his fractured right fibula and tibia.

**72**  In ***McGrath***, the plaintiff, due to the defendant's ***negligence*** while driving a city bus, broke her leg, and used crutches and a wheel chair for several weeks. After five or six weeks, she was walking in a boot cast and attending a physiotherapist. Three months later, she was walking normally, but had some limited range of motion. One year and nine months after the accident, her doctor reported that she had made a complete recovery. Edwards J. accepted that the plaintiff still had pain, instability and swelling which prevented her from participating in some sports. Edwards J. awarded $30,000 "for pain, suffering, inconvenience and loss of enjoyment of life" (para. 36).

**73**  In this case, the plaintiff wore a cast for about two months. According to his doctor's notes, three months after the fall he was doing much better and attending a recreation centre for exercise. The plaintiff was unable to drive for at least two months because of his leg. Seven months after the faint, his ankle was still aggravated by extended walking. He has continued to have some ankle soreness. He testified, and I accept, that he has not been able to ski or curl, activities which he previously enjoyed, as a result of the ankle injury.

**74**  Despite being advised to see a physiotherapist by his doctor, the plaintiff did not do so after January 2006.

**75**  I award $20,000 in non-pecuniary damages for the plaintiff's leg injury, minus 15% for his failure to mitigate, for a total of $17,000.

**76**  I do not find that the plaintiff is entitled to any damages for the wound and subsequent scar on his forehead that he suffered as a result of his collapse. I did not hear sufficient evidence to determine that this injury was of any consequence.

**LOSS OF EMPLOYMENT INCOME**

**77**  I accept that the plaintiff's neck and shoulder injuries made it very difficult for him to work at previous levels for six weeks following the MVA. I accept that the plaintiff was in pain and limited in his mobility to such an extent that he could not reasonably have performed tasks such as driving, meeting prospective clients, listing properties, etc. on a full time basis during this period. The plaintiff did continue to work and go to house showings immediately following the MVA with the help of his fiancée, Ms. Story.

**78**  I am satisfied the plaintiff was unable to work at previous levels as a result of his injuries from the October 14 ferry incident for a period of six months.

**79**  However, the plaintiff did not provide the Court with opinion evidence, or other lay evidence of a similarly situated realtor, to assist in evaluating exactly how much his losses were as a result of his decreased work hours. The plaintiff himself did not provide a clear picture of how much work was missed as a result of the MVA. The plaintiff claimed that another realtor looked after his listings while he was incapacitated, but did not adduce evidence regarding what that realtor did, and what payments he received.

**80**  The plaintiff listed four properties for sale between August 13 and December 31, 2004. He completed 11 sales in 2005, in 2006 he completed eight sales, and he completed nine sales in 2007.

**81**  The plaintiff's tax returns show that his gross business income was $55,006 in 2001, $65,195 in 2002, $73,948 in 2003, $22,324 in 2004, $88,011 in 2005, and $32,494 in 2006.

**82**  The plaintiff claimed his income was lower than usual in the two years prior to the MVA because he was involved in a custody battle over his son and could not work full time. He claimed that after 2005, his income was lower than usual because of his injuries related to the MVA. Thus, it is difficult to determine an average amount of income he would have earned if he were not injured.

**83**  The plaintiff estimated his lost income at approximately $60,000 for the eight months he said he was unable to work at his normal, pain-free level.

**84**  Counsel for the plaintiff suggested determining the plaintiff's average income per month over five years, which was $6,243, and then multiplying that number by eight months to obtain $49,946 in lost gross income, and then subtracting $4,800 for business expenses.

**85**  Alternatively, counsel for the plaintiff suggested determining the value of six lost commissions, using the plaintiff's normal commission percentage and 2006 average prices, and subtracting sale expenses. This method of calculation leads to an estimate of $79,000 in lost income.

**86**  Plaintiff's counsel went on to submit that $60,000 is between the two calculation methods and is an appropriate number.

**87**  The plaintiff's gross versus net income on his income tax return for 2005 indicates that his business expenses in Victoria were considerably greater than those advanced by his counsel.

**88**  Ms. Story supported the plaintiff in his work by driving him around and assisting him at open houses. The plaintiff was clearly able to continue to work and earn income, despite his serious injuries.

**89**  The defendant suggested that an award of $5,000 would be "more than sufficient" to compensate the plaintiff for past wage loss. This amount was premised on the defendant's assumption that the plaintiff was incapacitated for a maximum of six weeks following the initial MVA, and that the loss of consciousness on October 13 was not caused by the defendant.

**90**  I have found that the plaintiff was injured to such an extent that he could not work at previous levels for a total of six weeks as a result of his initial MVA injuries, and then six additional months as a result of his injury on the ferry which was causally linked to the MVA.

**91**  I am satisfied that the plaintiff is entitled to an award for past wage loss in the amount of $41,000 based on his limited capacity to work for seven and a half months.

**92**  I am satisfied the plaintiff's leg pain would have interfered with his normal functioning at work for at least six months regardless of whether or not he attended a physiotherapist.

**SPECIAL EXPENSES**

**93**  The plaintiff claims expenses for:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Prescriptions | $98.33 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Physiotherapy appointments | $240.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Chiropractic | $104.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Massage therapy | $337.05 |  |
|  | Gym membership | $585.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cancelled doctor appointments | $100.00 |  |
|  | due to headaches |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Mileage for treatments | $1,000.00 |  |
|  | and rehabilitation |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Yard work | $387.50 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Home care and | $3,360.00 |  |
|  | driving assistance |  |  |

**94**  In terms of past expenses, I find all are reasonable except those amounts the plaintiff claims for home care and driving assistance and the amount he claims for mileage.

**95**  I find that the plaintiff was unclear about the amounts he actually paid Ms. Story to assist him. I find that half of the amount claimed, or $1,680, is reasonable.

**96**  The plaintiff claims $10 in mileage costs per trip for 100 trips, for a total of $1000. In the absence of any evidence in this regard, but assuming that the plaintiff did drive to his medical appointments and to the gym which he accessed for rehabilitation purposes, I would allow half of this amount, for a total of $500.

**97**  Thus, the plaintiff is entitled to special damages for a total of $4,031.88.

**98**  The plaintiff claims future expenses of $500 for his ongoing headaches. I do not find that he has proven that this amount is warranted.

**CONCLUSION**

**99**  The plaintiff will recover judgment against the defendant for $27,200 in non-pecuniary damages, $41,000 for past wage loss, and $4,031.88 in special damages. Thus, the plaintiff will recover a total of $72,231.88.

**100**  The plaintiff shall have his costs.

R.W. METZGER J.

**End of Document**

[***Grewal v. Sandhu, [2010] B.C.J. No. 2263***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X49F-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N.H. Smith J.

Heard: January 18-19, 25, June 14-18, 21-24 and 28-29,

2010.

Judgment: November 18, 2010.

Docket: S054086

Registry: Vancouver

**[2010] B.C.J. No. 2263** | 2010 BCSC 1627

Between Agyapal Singh Grewal, Kuldip Kaur Grewal and South-Slope Enterprises Ltd., Plaintiffs, and Jatinder Singh Sandhu, 676207 BC Ltd., Royal Lepage Westgard Realty Ltd., Lakhvir Kaur Gill and Jaswinder Dhaliwal, Defendants, and Agyapal Singh Grewal, Defendant by Counterclaim

(116 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Costs — Special orders — For reprehensible or inefficient conduct — Action by plaintiff patient for damages for financial losses and psychological injury, alleging the defendant psychiatrist had unfairly exploited him in business dealings allowed — The defendant psychiatrist had breached his fiduciary duty and the defendant was awarded $287,500 in damages, plus damages with respect to a subdivision property to be determined after a reference to the Registrar — The plaintiff was also awarded special costs, as the defendant's conduct in the litigation had been characterized by a lack of candour and efforts to conceal evidence.**

**Damages — Physical and psychological injuries — Psychological injuries — Emotional and mental distress — Action by plaintiff patient for damages for financial losses and psychological injury, alleging the defendant psychiatrist had unfairly exploited him in business dealings allowed — The defendant psychiatrist had breached his fiduciary duty and the defendant was awarded $287,500 in damages, plus damages with respect to a subdivision property to be determined after a reference to the Registrar, plus special costs — The damage award included $125,000 for emotional and social consequences as the plaintiff suffered increased stress and anxiety for business reasons and he was not completely well when the defendant terminated the professional relationship without a referral.**

**Health law — Health care professionals — Breach of fiduciary duty — Fiduciary duty — Duty to avoid conflict of duty — Particular professions — Psychiatrists, psychologists and therapists — Action by plaintiff patient for damages for financial losses and psychological injury, alleging the defendant psychiatrist had unfairly exploited him in business dealings allowed — The defendant psychiatrist had breached his fiduciary duty and the defendant was awarded $287,500 in damages, plus damages with respect to a subdivision property to be determined after a reference to the Registrar, plus special costs — While the parties might have been on an equal footing had they been simply business partners, the fact that their business partnership was superimposed on a doctor-patient relationship gave the defendant additional power and made the plaintiff vulnerable.**

**Professional responsibility — Self-governing professions — Professions — Health care — Psychiatrists, psychologists and therapists — Action by plaintiff patient for damages for financial losses and psychological injury, alleging the defendant psychiatrist had unfairly exploited him in business dealings allowed — The defendant psychiatrist had breached his fiduciary duty and the defendant was awarded $287,500 in damages, plus damages with respect to a subdivision property to be determined after a reference to the Registrar, plus special costs — While the parties might have been on an equal footing had they been simply business partners, the fact that their business partnership was superimposed on a doctor-patient relationship gave the defendant additional power and made the plaintiff vulnerable.**

**Tort law — *Negligence* — Duty and standard of care — Fiduciary duty — Action by plaintiff patient for damages for financial losses and psychological injury, alleging the defendant psychiatrist had unfairly exploited him in business dealings allowed — The defendant psychiatrist had breached his fiduciary duty and the defendant was awarded $287,500 in damages, plus damages with respect to a subdivision property to be determined after a reference to the Registrar, plus special costs — While the parties might have been on an equal footing had they been simply business partners, the fact that their business partnership was superimposed on a doctor-patient relationship gave the defendant additional power and made the plaintiff vulnerable.**

|  |
| --- |
| Action by plaintiffs for damages for financial losses and psychological injury, alleging that the defendant psychiatrist unfairly exploited his patient in business dealings. The plaintiff Agyapal Grewal was a patient of the defendant for two years, during which time they entered into business dealings involving the acquisition of two real properties, a farm property and a subdivision property. Agyapal claimed he was wrongfully deprived of his interest in both of them. The plaintiff Kuldip Grewal was Agyapal's wife, and the plaintiff South Slope Enterprises Ltd. was a company owned by Agyapal. The defendant admitted the transactions amounted to a breach of professional ethics, but denied the plaintiffs suffered any losses as a result.  HELD: Action allowed.  The plaintiff was awarded $287,500 in damages for breach of fiduciary duty, plus special costs, and an amount relating to the subdivision property, to be determined after a reference. There was a fiduciary relationship between the parties. While the parties might have been on a more or less equal footing had they been simply business partners, the fact that their business partnership was superimposed on a doctor-patient relationship gave the defendant additional power and made the plaintiff vulnerable. This was particularly true by Sept. 2004, when the defendant's clinical notes linked the plaintiff's stress and anxiety to business and financial concerns. The defendant also assumed duties as an express trustee in respect of the farm property. He signed a trust agreement confirming he held a one-half interest in the property for the plaintiff. It did not matter if it was the patient who initially solicited the psychiatrist's involvement in the business dealings. The properties at issue were in the name of the defendant or his company, giving him the ability to deal with them without the knowledge or consent of the plaintiff. At minimum, the defendant's duty was to obtain a reasonable price on the sale of the farm property. An appraisal report valued the property at $475,000. The defendant was in clear breach of his fiduciary obligations to the plaintiff when he sold it for $290,000. As the defendant's duty was to sell it at market value in 2005, the starting point of the assessment was the $475,000 market value in 2005. Overall, the plaintiff was awarded $162,500 as damages flowing from the farm property transaction. There was no basis for liability on the part of the defendant purchaser Gill in the absence of any evidence that she or her husband knew of the plaintiff's interest in the property or of his relationship with the defendant. As for the subdivision property, the defendant initially agreed to share the profits from the sale of the subdivided lots. The plaintiff never surrendered his separate contractual right to acquire one lot, and he was to be compensated for that lost opportunity. The plaintiff lost his $50,000 assignment fee and a further fee of $26,000 and was awarded $76,000. His equal share in the profits from the sale of the subdivided lots was to be calculated after a reference to the registrar to determine the amount received on the sale of lots, the costs incurred in the acquisition of the property, and the financing of the acquisition and the costs directly related to subdivision, development and the sale of the lots. As for general damages, the plaintiff suffered increased stress and anxiety for business reasons. He was not completely well when the defendant terminated the professional relationship without referring him to another psychiatrist or physician. There were emotional and social consequences for the plaintiff that went well beyond the financial loss, and an award of $125,000 was appropriate. An award of special costs was appropriate. The defendant's conduct in the litigation had been characterized by a lack of candour and efforts to conceal evidence. The defendant purchaser Gill was entitled to costs on Scale B, to be paid by the defendant psychiatrist. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, *B.C. Reg. 168/2009, Rule 14-1*(18), Rule 18-1(3)

**Counsel**

Counsel for the Plaintiffs and Defendant by Counterclaim: D. Lunny and J.A. Dawson.

Counsel for the Defendants 676207 BC Ltd. and Jatinder Singh Sandhu: J.B. Thompson.

Appearing on her own behalf: Lakhvir Kaur Gill.

**Reasons for Judgment**

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

**1**   Medical and other professionals are generally prohibited, or at least strongly discouraged, from entering into separate business dealings with their patients or clients. Such dealings are not likely to end well, as this case illustrates. The plaintiffs say a psychiatrist unfairly exploited his patient and seek damages for both financial losses and psychological injury.

**2**  The plaintiff Agyapal Singh Grewal was a patient of the defendant psychiatrist Jatinder Singh Sandhu from March, 2002 to December, 2004. During that time they entered into business dealings that involved the acquisition of two real properties and Mr. Grewal now says he was wrongfully deprived of his interest in both of them. Dr. Sandhu admits that the transactions were a breach of professional ethics, but denies that the plaintiffs suffered any loss as a result of them.

**3**  The plaintiff Kuldip Kaur Grewal is Mr. Grewal's wife and the plaintiff South Slope Enterprises Ltd. is a company owned by Mr. Grewal. The defendant Lakhvir Kaur Gill bought one of the properties from Dr. Sandhu in what the plaintiffs allege was a sham transaction. The defendant 676207 B.C. Ltd. ("the Numbered Company") is a company owned by Dr. Sandhu.

**The Doctor-Patient Relationship**

**4**  Mr. Grewal was born in India and came to Canada at the age of 20 in 1984. After coming to Canada, he worked in a variety of jobs, including trucking, before becoming a farm manager and later owning a farm. While working on farms, he learned to operate an excavator and in about 2000 established the defendant South Slope as an excavating company. On a number of occasions prior to the events at issue, he also bought and quickly resold, or "flipped", real property.

**5**  He says he had a grade eight education in India and can neither read nor write English beyond a few simple phrases. However, at trial he seemed to have little difficulty recognizing documents when they were put to him and he admitted in cross examination that when he worked as a truck driver he had to pass a written examination and fill out log books.

**6**  Mr. Grewal began suffering from depression after the death of his sister in 1997. In late 2001, he asked his family physician for a referral to Dr. Sandhu, with whom he was already acquainted. Dr. Sandhu testified that he already considered Mr. Grewal to be "an old friend."

**7**  Dr. Sandhu first saw Mr. Grewal in a professional capacity on March 30, 2002, when he diagnosed a "chronic major depressive disorder with anxious features." He also noted that Mr. Grewal had a "lack of self-confidence and low self-esteem." Earlier that month, Mr. Grewal's family physician, Dr. Karl Chan, had prescribed Effexor, an anti-depressant. Dr. Sandhu increased the daily dosage from 75 to 112.5 mg per day.

**8**  On April 12, 2002, Dr. Sandhu noted that there was an improvement in Mr. Grewal's mood. However, he further increased the dosage of antidepressant to 150 mg per day, with gradual decreases to follow. On November, 6, 2002, he considered Mr. Grewal's depression to be in "full remission," but advised him to continue taking 150 mg of Effexor per day. In his discovery evidence read in at trial, Dr. Sandhu confirmed that "remission" means a current absence of symptoms, not a cure.

**9**  The next visit noted in the clinical records was on May 16, 2003, when Dr. Sandhu said Mr. Grewal's mood was stable and halved the medication dosage. Throughout this period, Mr. Grewal and Dr. Sandhu continued to have a social relationship, with Mr. Grewal frequently dropping into Dr. Sandhu's office or meeting him for coffee. Each also visited the other's home.

**The Business Relationship**

**10**  The business relationship between Dr. Sandhu and Mr. Grewal began shortly after the May 16, 2003, office visit. On June 5, 2003, Dr. Sandhu gave Mr. Grewal a cheque for $20,000. Neither of them gave very clear evidence of the reason for this cheque, but six days later Mr. Grewal paid a $16,000 deposit when he entered into an agreement under which he or his nominee was to purchase a 5.5 acre property on 48th Avenue in Surrey. The property consisted of two lots and a derelict house with an elderly tenant. It was within the Agricultural Land Reserve, although not being used for agricultural purposes at the time. Although this property was the subject of the first business transaction at issue, it was referred to in the pleadings and throughout trial as "the second lands." In an attempt to introduce greater clarity, I will refer to it as "the Farm Property."

**11**  The handwritten agreement of purchase and sale contained no subjects and set a completion date of July 3, 2003. The total purchase price was $275,000. Mr. Grewal testified that his intention was to clear the property and make other improvements, then sell one lot and build a new house on the other. However, he said he would also have been open to flipping the property for a profit if he received an attractive offer.

**12**  The sale completed with three purchasers: Mr. Grewal, Dr. Sandhu and Mr. Boparai, who was a business associate of Mr. Grewal. Mr. Grewal testified that when he told Dr. Sandhu of his plans and showed him the contract, Dr. Sandhu persuaded him to share this opportunity. Dr. Sandhu's evidence is that Mr. Grewal approached him, said he needed cash to complete the purchase and asked him to participate in the transaction. Mr. Boparai, the third member of the group, did not give evidence.

**13**  On this point, I find the evidence of Dr. Sandhu to be more probable. The evidence is clear that Mr. Grewal did not have the money needed to complete the purchase and he had not made the agreement subject to financing. Although Mr. Grewal says he knew private lenders who could have financed the transaction, there is no evidence of him making any other efforts to secure such financing. I also find that the funds advanced by Dr. Sandhu on June 5 were the likely source of the deposit that Mr. Grewal paid.

**14**  Dr. Sandhu advanced $160,000 toward the purchase-the majority of the funds necessary to complete-although he acquired only a one-third interest. Mr. Grewal paid little, if anything, for his own one-third interest, though he or his company, South Slope, was to do the work of clearing and improving the property. On July 16, 2003, Dr. Sandhu gave Mr. Grewal another cheque for $20,000, which Mr. Grewal said was to be used for the purchase of equipment. The word "loan" was written on the face of the cheque.

**15**  Following the purchase of the Farm Property, the buyers obtained an appraisal showing that it had a value of $300,000 and, on the strength of that appraisal, secured a line of credit mortgage of $195,000. Those funds were deposited into Mr. Grewal's bank account and most of them were then paid out to South Slope, although there was also a $65,000 payment to Mr. Boparai. Mr. Grewal began making the monthly payments on the mortgage.

**16**  In the fall of 2003, Mr. Grewal became aware of and introduced Dr. Sandhu to an opportunity to obtain another property. Located on 152nd Street in Surrey, this property consisted of four lots, but had the potential to be subdivided into nine. I will refer to it as "the Subdivision Property".

**17**  At the time Dr. Sandhu and Mr. Grewal became involved, there was an agreement in place giving the Numbered Company the right to purchase the Subdivision Property for $920,000. The Numbered Company was a shelf company created by a law firm and its single share was owned by a company called Paradigm U.K. Holdings (Canada) Ltd. ("Paradigm"). In other proceedings, Dr. Sandhu alleges that Paradigm was controlled by the realtors involved in the transaction.

**18**  By agreement dated October 24, 2003, Dr. Sandhu acquired the share of the Numbered Company for $60,000, plus a further $30,000 representing the deposit to be paid to the vendors of the Subdivision Property. By verbal agreement, Mr. Grewal (or South Slope) was to prepare the property for subdivision and obtain subdivision approval.

**19**  On November 6, 2003, Dr. Sandhu recorded a visit from Mr. Grewal in his clinical notes. That note states Mr. Grewal's mood was stable and that he was "coping well with life" although he was under some work related stress. He recommended continuation of anti-depressants in the same dosage as before.

**20**  This was the first professional contact Dr. Sandhu had with Mr. Grewal since they began doing business together. There is no mention in the clinical notes of their business relationship. Dr. Sandhu admitted that the ethical standards of his profession require a psychiatrist to maintain professional boundaries with any patient and that his business dealings with Mr. Grewal were in violation of those standards. His clear duty by that point was to refer Mr. Grewal to another psychiatrist, but he did not do so.

**21**  Mr. Grewal began working to prepare the 152nd street property for subdivision. This included clearing and servicing the land and retaining consultants to prepare designs and applications to the city of Surrey. Mr. Grewal testified that the verbal agreement he made with Dr. Sandhu provided that when the project was completed he would have the right to buy one subdivided lot for $150,000 and that he and Dr. Sandhu would share equally in the profits from sale of the other lots. Dr. Sandhu says the only payment that Mr. Grewal was to receive as property development manager was the right to purchase one lot and that agreement was later replaced by one that provided a flat management fee of $100,000.

**22**  The Numbered Company's purchase of the Subdivision Property was completed on June 15, 2004 and the agreement for the purchase of one lot (designated as lot four) by Mr. Grewal was formalized in a contract of purchase and sale dated June 30, 2004. That agreement also provided for the Numbered Company to finance the purchase of the lot by carrying a promissory note in the full value of the purchase price. Clearly, the expectation was that Mr. Grewal would be able to resell the lot for an amount in excess of the purchase price.

**23**  Meanwhile, Mr. Boparai had decided to end his business dealings with Mr. Grewal and to withdraw from involvement in the Farm Property. Dr. Sandhu admitted on discovery that he received $80,000 from Mr. Boparai to be paid against the line of credit, but that he kept those funds and did not apply them to the line of credit.

**24**  Upon Mr. Boparai's withdrawal, both his interest in the Farm Property and Mr. Grewal's were transferred to Dr. Sandhu, who assumed responsibility for the mortgage payments. This was, in part, so that Dr. Sandhu could obtain certain tax advantages from the ownership of farm land, but Dr. Sandhu says it was also because Mr. Grewal and/or Mr. Boparai were not making mortgage payments on time and he was concerned about his credit rating. A new appraisal was obtained, showing the property to have a value, as of June 2004, of $410,000.

**25**  On July 5, 2004, Mr. Grewal and Dr. Sandhu entered into a trust agreement in which Dr. Sandhu acknowledged that he held a half interest in the Farm Property in trust for Mr. Grewal. The trust agreement included the following term:

The Trustee covenants and agrees that he shall neither hypothecate, mortgage or deal with the Properties in any fashion whatever save and accept with the consent of the Beneficiary having first been obtained in writing and save and except that he shall be at liberty to sell the Properties or either of them. Forthwith upon sale of the Properties or either of them, the Trustee shall pay one-half the net sale proceeds to the Beneficiary. The Trustee shall notify the Beneficiary forthwith in the event that he intends to sell the Properties or either of them and shall advise the Beneficiary of the terms of any listing relating to the Properties or either of them.

**26**  By this time, Mr. Grewal says he was working full-time on the two properties, primarily the Subdivision Property, where the process was taking longer than expected. He was getting into financial difficulties because of his lack of income and, in September 2004, he entered into an agreement assigning his right to purchase lot four to a Mr. Jagdeep Gill (no relation to the defendant Lakhvir Gill) for an assignment fee of $50,000. He testified that he told Dr. Sandhu of this assignment at the time and that Dr. Sandhu became angry, saying he had no right to assign the purchase agreement. Dr. Sandhu says he only learned of the assignment at a much later date, after he and Mr. Grewal agreed to tear up the purchase agreement and after he had agreed to sell the same lot to another buyer.

**27**  Mr. Grewal's assignment agreement with Mr. Gill was dated September 6, 2004, which is the same day that Dr. Sandhu next saw Mr. Grewal in his professional capacity. His note records a home visit in which he found Mr. Grewal to be "stressed by financial concerns" and to have "anxiety about business." He records a diagnosis of an adjustment disorder and a recommendation to continue the antidepressant medication. It was or should have been obvious to Dr. Sandhu that the stress and anxiety that Mr. Grewal complained of were related, at least in part, to the business dealings in which Dr. Sandhu was involved, but there is no hint of that in his clinical note. Indeed, the timing of that visit is consistent with Mr. Grewal's evidence that the two of them argued about the assignment of the purchase agreement.

**28**  A physician's clinical notes are usually accepted as evidence of the facts observed and recorded. That is because doctors have a professional duty to make and keep such records and there is a presumption in favour of their accuracy. However, by September 6, 2004, Dr. Sandhu's conflict of interest and breach of professional standards was such that I can no longer accept his clinical records as being *prima facie* accurate.

**29**  The note states that Dr. Sandhu was seeing Mr. Grewal on referral from "Dr. R. Sandhu." That is reference to Dr. Sandhu's brother, who is a family physician but was not Mr. Grewal's doctor. Dr. Sandhu had already written three consultation reports to Dr. Chan, from whom the original referral had come. On this occasion, however, Dr. Sandhu recorded that Mr. Grewal did not want him to send a report to Dr. Chan because "some of the secretaries in his office are his relatives." In light of the situation that existed and the clinical history, including the previous reporting letters to Dr. Chan, I do not find that assertion to be in any way credible. The more likely inference is that Dr. Sandhu was by then aware of the seriousness of his ethical breach and wished to prevent it from coming to light.

**30**  During October and November 2004, Dr. Sandhu recorded four clinical visits from Mr. Grewal. His notes for those occasions record that Mr. Grewal was doing well and a note dated October 31 indicates that Mr. Grewal had stopped taking his medication.

**31**  In November 2004, the Numbered Company obtained a mortgage on the subdivision lands in the amount of $320,000. At about the same time, an agreement was prepared in which Mr. Grewal guaranteed that mortgage. Only an unsigned copy of that agreement was put into evidence and Mr. Grewal did not directly give any evidence of having signed it. However, in his discovery evidence Dr. Sandhu acknowledged that Mr. Grewal guaranteed the mortgage.

**32**  By this point, Mr. Grewal had been working on the Subdivision Property for several months without pay, although Dr. Sandhu had made further advances totalling $52,000 to Mr. Grewal and/or South Slope at various points in 2004. Dr. Sandhu's father and brother gave South Slope a further $15,000.

**33**  I find that the situation that existed in 2004 is not consistent with one in which Mr. Grewal was merely a hired development manager. One would not expect such a property manager to work without pay merely on the expectation of future profit from the purchase and sale of one lot, or to assume liability as guarantor of the mortgage. Those facts support Mr. Grewal's assertion that there was a verbal agreement to share the profits. In that light, the payments made to Mr. Grewal or South Slope from time to time make sense as an advance against those future profits.

**34**  On December 5, 2004, Dr. Sandhu recorded another visit to Mr. Grewal's home because Mr. Grewal had suffered a minor head injury. Then, on December 19, 2004, Dr. Sandhu's notes record that he told Mr. Grewal that he no longer needed psychiatric care.

**35**  Dr. Sandhu agreed that patients who have suffered from depression are at risk of relapse, but he did not write a final consultation report to Dr. Chan. He testified that, in order to ensure adequate follow-up, he advised Dr. Chan by telephone that he would no longer be treating Mr. Grewal. No record of that advice is found in his clinical notes, although he admitted that such follow up advice should be recorded. Nor is there any record of such a call in Dr. Chan's clinical notes and Dr. Chan testified that no psychiatrist has called him about a patient in ten years.

**36**  Dr. Chan's clinical notes indicate that he saw Mr. Grewal on January 7, 2005, less than three weeks after Mr. Grewal's last appointment with Dr. Sandhu. He recorded that Mr. Grewal complained of panic attacks that had been going on for about a month, along with decreased memory. Dr. Chan also noted that Mr. Grewal was still taking Effexor at 75 mg. per day, although Dr. Sandhu's last note said Mr. Grewal was no longer on any medication. Dr. Chan doubled the dosage.

**37**  Mr. Grewal testified that, in the fall of 2004 he told Dr. Sandhu that he had difficulty thinking, could not sleep and was crying constantly. He said that when Dr. Sandhu suddenly ended the doctor-patient relationship, he did not know what to do and contemplated suicide. Although I do not necessarily accept that his condition was as bad as Mr. Grewal now recalls, it is clear from Dr. Chan's records that Mr. Grewal was not doing as well as Dr. Sandhu's last note would suggest.

**38**  Following the termination of their professional relationship, Dr. Sandhu and Mr. Grewal agreed to sell the Farm Property. Mr. Grewal signed a promissory note, dated February 16, 2005, agreeing to pay Dr. Sandhu $70,000 out of his share of the sale proceeds. The note does not say what this $70,000 related to, but I presume Dr. Sandhu was attempting to recover some or all of the previous amounts he had paid to Mr. Grewal.

**39**  Dr. Sandhu signed two listing agreements for the Farm Property dated February 25-one for each lot. Mr. Atwal, the realtor, testified that Mr. Grewal was present when Dr. Sandhu signed the agreements. Each agreement referred to a price of $550,000, but it is clear that all involved intended that to be a total price for both lots. On April 14, 2005, the listing price was reduced to $485,000. Mr. Atwal described the property as being in "terrible shape" and having no development potential because it was within the agricultural land reserve.

**40**  Mr. Atwal testified that two offers were received and accepted, but neither sale proceeded because the buyers did not remove subject clauses. He no longer has a record of those offers. Mr. Grewal's understanding was that one offer was for $430,000 and the other was for $390,000.

**41**  Mr. Atwal's listing agreements expired on May 31, 2005. Eight days later, Dr. Sandhu agreed to sell the Farm Property to the defendant Ms. Gill for $290,000. Ms. Gill's husband was Dr. Sandhu's partner in another property development venture and had also been Dr. Sandhu's patient.

**42**  Ms. Gill provided a deposit of $34,000, but was unable to obtain financing for the balance of the purchase price until Dr. Sandhu arranged for his wife, Parminder Sandhu, to become a guarantor of Ms. Gill's mortgage. A mortgage was then obtained for $188,500-an amount which matched almost exactly the amount Dr. Sandhu needed to pay out his own mortgage on the property. Ms. Gill still needed more money to complete the purchase and did so with the benefit of a further $70,000 that she received in the form of a bank draft from Ms. Sandhu, who testified that the money actually came from her husband. Ms. Sandhu said that she had never met Ms. Gill before becoming her guarantor.

**43**  Mr. Grewal testified that he knew nothing of the sale to Ms. Gill until after it occurred and only learned of it when his wife, who worked in a notary's office, did a title search. Dr. Sandhu's evidence was unclear about whether he told Mr. Grewal about Ms. Gill's offer. His initial position in this action was that he tried to contact Mr. Grewal but was unable to do so. At trial he maintained that he did contact Mr. Grewal, but appeared less sure of that on cross-examination.

**44**  Although Ms. Gill's husband had been his patient and was his partner in a business venture, Dr. Sandhu initially claimed at discovery to have never heard of him. At trial, he maintained that he had been trying to protect patient confidentiality. He also admitted that, after conceding that he in fact knew Mr. Gill, he falsely testified at discovery that he had not met him before he received Ms. Gill's offer to purchase the Farm Property. In fact, Mr. Gill and Dr. Sandhu had jointly made an offer to purchase certain property in May 2005, and he had been Dr. Sandhu's patient long before that. Dr. Sandhu also admitted that, at one point in his discovery evidence, he claimed that Mr. Gill was his employee, then admitted that he was his partner.

**45**  The evidence is overwhelming that Dr. Sandhu attempted to conceal his relationship with Ms. Gill's husband in order to create the impression that the sale to her was an arms-length transaction. I clearly cannot accept his evidence about the sale of the Farm Property wherever it conflicts with any other evidence. I therefore accept Mr. Grewal's evidence that he knew nothing about the sale to Ms. Gill until well after it had taken place and the property had been transferred.

**46**  Dr. Sandhu's eagerness to sell the Farm Property to Ms. Gill is somewhat puzzling. The mortgage that Ms. Gill obtained was sufficient to pay out the mortgage on which Dr. Sandhu was liable, leaving net proceeds of about $100,000, and the effect of Mr. Grewal's promissory note was that Dr. Sandhu did not think he needed to share those sale proceeds. But most of those proceeds had been Dr. Sandhu's own money in the first place-the $70,000 he had advanced, through his wife, to Ms. Gill. He had originally contributed $160,000 to the purchase of the property and only received back $80,000 when Mr. Boparai withdrew.

**47**  The circumstances of the transaction create a suspicion that the purchase by Ms. Gill was only a step in plan under which the property was to ultimately revert to Dr. Sandhu, but if that was the plan it has not happened. Ms. Gill is still the registered owner of the property, although she testified she would be happy to be rid of it. Whatever Dr. Sandhu's motivation may have been, I infer that it included an eagerness to sever his business ties with Mr. Grewal as quickly as possible. In that regard, it is significant that the subdivision of the other property was nearing completion at the same time.

**48**  In March, 2005, Mr. Jagdeep Gill, to whom Mr. Grewal had assigned his right to purchase lot four of the subdivision, further assigned that right to a Mr. Athwal. That agreement called for Mr. Gill to receive an assignment fee of $76,000, of which $50,000 was payable to Mr. Grewal pursuant to the original assignment agreement. But on April 3, 2005, the Numbered Company agreed to sell the same lot to a Mr. Janda for $228,000.

**49**  Dr. Sandhu testified that he was no longer willing to transfer lot four to Mr. Grewal because his accountant had advised against it. The accountant, Mr. Nguyen, confirmed that in February 2005, he had advised against that transaction because it would create a taxable benefit that Mr. Grewal might not declare, which might in turn have ramifications for Dr. Sandhu. Whether or not Mr. Nguyen's tax advice was sound, it did not give Dr. Sandhu the right to unilaterally cancel the contract that had been made between Mr. Grewal and the Numbered Company.

**50**  At some point, South Slope and the Numbered Company entered into a contract under which South Slope was to receive a management fee of $100,000 plus GST for its work on the Subdivision Property, with the fee to be paid out of the net sale proceeds of the subdivided lots. That contract was prepared by Dr. Sandhu's lawyer, Ross Davidson, and is dated "for reference" June 15, 2004, but the computer records from Mr. Davidson's office indicate that the document was not prepared until almost a year later, in May 2005. Mr. Davidson agreed that the wide difference in dates makes no sense, but he was unable to recall any further explanation. I find that the agreement was probably backdated in order to coincide with the date the Numbered Company completed its purchase of the Subdivision Property.

**51**  There is no evidence of when Mr. Grewal signed that agreement on behalf of South Slope, but on May 24, 2005, South Slope filed a claim of builder's lien against all nine lots in the subdivision. The amount of the lien claim was $107,000-the amount set out in the management fee agreement. Mr. Grewal also filed a caveat against lot four, based on the agreement giving him the right to purchase the lot.

**52**  Mr. Davidson then prepared an amended management fee agreement, also dated for reference June 15, 2004, which purported to replace the previous agreement. This new agreement called for the same $100,000 fee, but provided that $15,000 of that was to be held back. Half of this holdback related to money being held back by the city of Surrey in respect of the subdivision. The other half was stated to be for legal fees in the event of any legal action by Mr. Athwal, who was still claiming a right to purchase lot four. The agreement also called for South Slope to release its claim of builder's lien, and Mr. Grewal signed a discharge on May 26, 2005.

**53**  I note that Mr. Grewal, in his personal capacity, was not a party to the management fee agreements between South Slope and the Numbered Company. Nothing in either of those agreements purports to cancel the agreement of June 30, 2004, which gave Mr. Grewal the right to purchase lot four.

**54**  From time to time in his evidence, Dr. Sandhu attempted to suggest that Mr. Davidson was acting for Mr. Grewal in these transactions. Mr. Davidson said that he considered Dr. Sandhu and the Numbered Company to be his clients. He said he was never told that Mr. Grewal had been Dr. Sandhu's patient and if he had known that he would have ensured that Mr. Grewal received independent legal advice.

**55**  The result of all of these transactions is that Mr. Grewal received nothing for his interest in the Farm Property. South Slope received $85,000 under the management fee contract, but has never received the $15,000 holdback. Apparently Mr. Athwal eventually got lot four, although Mr. Grewal never received his assignment fee. Mr. Janda obtained judgment against the Numbered Company in the amount of $17,611. The Numbered Company claims that amount from Mr. Grewal in a counterclaim in this action.

**56**  While Mr. Grewal was Dr. Sandhu's patient, he alleges that Dr. Sandhu also demanded a variety of personal services from him. One such service established by evidence is Mr. Grewal's service of a writ on behalf of Dr. Sandhu when Dr. Sandhu became involved in a dispute with his office landlord. Mr. Grewal also alleges, and Dr. Sandhu denies, that he was asked to serve as Dr. Sandhu's "bodyguard" during the conflict with the landlord and to do gardening work at Dr. Sandhu's home. In my view, nothing turns on this issue and I make no findings in regard to it.

**The Psychiatrist's Duties**

**57**  In accepting Mr. Grewal as a patient, Dr. Sandhu assumed a duty to provide medical care in accordance with the accepted standards of his profession. Evidence of those standards, for purposes of this case, is found in the expert report of Dr. Brian Hoffman, an associate professor of psychiatry at the University of Toronto and medical director of the Mental Health and Justice Program at North York General Hospital in Toronto. His report was filed at trial with no demand that he attend for cross-examination and no contrary expert evidence being tendered.

**58**  Dr. Hoffman cites that the Canadian Medical Association's Code of Ethics for psychiatrists, which says that psychiatric treatment turns on the relationship between the patient and the psychiatrist:

By its very nature it is a relationship in which patient vulnerabilities are more exposed than in any other branch of medicine. As such, psychiatrists can hold considerable influence over their patients and must ensure that this does not lead to exploitation for personal gain.

**59**  Dr. Hoffman says that, in addition to the power imbalance that arises from the psychiatrist's ability to continue or terminate treatment, the very problem that the psychiatrist is treating, such as the depression from which Mr. Grewal was suffering, may affect the patient's judgment. For these reasons, Dr. Hoffman says a psychiatrist should never enter into a business or social relationship with a patient.

**60**  A breach of professional rules does not necessarily give rise to civil liability. Professional codes of conduct are designed to serve as a guide to the profession and are typically enforced in disciplinary proceedings. They may be important evidence in determining the nature and extent of duties flowing from a professional relationship, but they are not binding on the court and do not, for example, necessarily describe the applicable duty or standard of care in ***negligence***. This topic was discussed in *Galambos v. Perez*, [*2009 SCC 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1GF-00000-00&context=), [*[2009] 3 S.C.R. 247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1GF-00000-00&context=) [*Galambos*] at para. 29:

However, two points must be made with respect to this rule of conduct. The first is that there is an important distinction between the rules of professional conduct and the law of ***negligence***. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but not breach rules of professional conduct, and breaching the rules of professional conduct is not necessarily ***negligence***. Codes of professional conduct, while they are important statements of public policy with respect to the conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in determining the nature and extent of duties flowing from a professional relationship: *Hodgkinson v. Simms*, [*[1994] 3 S.C.R. 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3FN-00000-00&context=), at p. 425. They are not, however, binding on the courts and do not necessarily describe the applicable duty or standard of care in ***negligence***: see, e.g., *MacDonald Estate v. Martin*, [*[1990] 3 S.C.R. 1235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-654F-00000-00&context=), at pp. 1244-45; *Meadwell Enterprises Ltd. v. Clay and Co.* [*(1983), 44 B.C.L.R. 188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JNS1-M081-00000-00&context=) (S.C.); S. M. Grant and L. R. Rothstein, *Lawyers' Professional Liability* (2nd ed. 1998), at pp. 8-10.

**61**  However, in this case, I am satisfied that the professional rule appropriately reflects and re-enforces the legal duty, and Dr. Hoffman's unchallenged opinion sets out a proposition that would be self-evident even without the benefit of expert evidence. The roles of psychiatrist and business associate are fundamentally irreconcilable and attempts to combine them cannot help but give rise to perceived or actual conflicts of interest.

**62**  By virtue of the professional relationship, the psychiatrist will have knowledge of the patient's affairs, needs and vulnerabilities not normally available to another party in a business transaction. At the same time, the patient's trust in the psychiatrist-which is fundamental to the success of the therapeutic relationship-may make the patient more likely to accept the psychiatrist's assurances and representations at face value and less likely to demand the further information or written contractual protection that he or she might expect and desire in an arms-length business deal.

**63**  In my view it does not matter if, as I have found to be the case here, it is the patient who initially solicits the psychiatrist's involvement in the business dealings. The psychiatrist is expected to know better and to avoid the conflicts that are almost certain to arise between duty and interest.

**64**  The relationship between a doctor and a patient is, at least in some respects, a fiduciary one. 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=) [*Norberg*], McLachlin J. (as she then was), said at 270-71:

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. [Emphasis in original.]

McLachlin J. added at 280 that the argument for imposing fiduciary obligations is particularly strong in the context of psychotherapists, largely owing to "... the uniquely intimate nature of the psychotherapist-patient relationship, the potential for transference, and the emotional fragility of many psychotherapy patients ..."

**65**  Although McLachlin J.'s judgment in *Norberg* was not the majority judgment of the Supreme Court of Canada, the above passages have been applied by this court in characterizing the relationship between a patient and a psychiatrist, *J.R.I.G. v. Tyhurst*, [*2001 BCSC 369*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1KV-00000-00&context=), aff'd [*2003 BCCA 224*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X2WR-00000-00&context=) [*J.R.I.G. v. Tyhurst* cited to S.C.].

**66**  *Norberg* was a case involving a doctor who exploited the professional relationship for sexual advantage, but I agree with Dr. Hoffman when he states:

In my opinion, there are commonalities between the sexual exploitation of a patient and the financial exploitation of a patient in that both occur during a patient's period of vulnerability when the physician/psychiatrist has the advantage of a "power imbalance".

**67**  The essential features of a fiduciary relationship have been more recently discussed and refined by the Supreme Court of Canada in *Galambos*. The existence of a power-dependency relationship does not, in itself, establish the relationship as a fiduciary one: *Galambos* at para. 74. There must also be an undertaking to act with loyalty, which may be express, implied or arising from the exercise of statutory powers or the nature of the relationship itself. The court in *Galambos* adopted the statement, at para. 78, that:

For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interests of another. This is perhaps the most obvious of the characteristics of the fiduciary office for Equity will only oblige a person to act in what he believes to be another's interests if he himself has assumed a position which requires him to act for or on behalf of that other in some particular matter. [Emphasis added in *Galambos*.]

**68**  The existence of a fiduciary relationship also requires that the fiduciary have a discretionary power to affect the other party's legal or practical interests. This requirement was further developed in *Galambos* at para. 84:

The nature of this discretionary power to affect the beneficiary's legal or practical interests may, depending on the circumstances, be quite broadly defined. It may arise from power conferred by statute, agreement, perhaps from a unilateral undertaking or, in particular situations such as the professional advisory relationship addressed in *Hodgkinson*, by the beneficiary entrusting the fiduciary with information or seeking advice in circumstances that confer a source of power ...

**69**  The manner in which the requirement for the exercise of discretionary power is satisfied in the doctor-patient relationship was set out by McLachlin J. in *Norberg* at 275:

Dr. Wynrib was in a position of power vis-a-vis the plaintiff; he had scope for the exercise of power and discretion with respect to her. He had the power to advise her, to treat her, to give her the drug or to refuse her the drug. He could unilaterally exercise that power or discretion in a way that affected her interests. And her status as a patient rendered her vulnerable and at his mercy, particularly in light of her addiction.

**70**  In this case, the discretionary power existed not only in that broader sense, but in the classic sense of a direct legal power: the properties at issue were in the name of Dr. Sandhu or his company, giving him the ability to deal with them without the knowledge or consent of Mr. Grewal.

**71**  Counsel for Dr. Sandhu argues that fiduciary relationships also require vulnerability, which was lacking in this case. He argues that, if anything, Mr. Grewal had more experience than Dr. Sandhu on matters relating to the acquisition and development of property and knew how to protect himself in such transactions. I cannot accept that submission.

**72**  While Dr. Sandhu and Mr. Grewal might have been on a more or less equal footing had they been simply business partners, the fact that their business partnership was superimposed on a doctor-patient relationship gave Dr. Sandhu additional power and made Mr. Grewal vulnerable. This was particularly true by September 2004, when Dr. Sandhu's clinical notes specifically link Mr. Grewal's stress and anxiety to business and financial concerns. As Mr. Grewal's psychiatrist, Dr. Sandhu was in a position to either treat that stress and anxiety or not. As his business partner, he was in a position to either relieve that stress and anxiety or to worsen and exploit it.

**73**  For all of those reasons, I find that there was a fiduciary relationship between Dr. Sandhu and Mr. Grewal. It then becomes necessary to consider if and how there was breach of the fiduciary duty and the impact of any such breach on Mr. Grewal.

**Breach of Duty-the Farm Property**

**74**  In addition to the fiduciary duties arising from the doctor-patient relationship, Dr. Sandhu assumed duties as an express trustee in respect of the Farm Property. After arranging for Mr. Grewal and Mr. Boparai to be removed from title so that he would be the sole registered owner of the Farm Property, Dr. Sandhu signed a trust agreement confirming that he held a one-half interest in the property for Mr. Grewal. It might be suggested that a one-half interest was out of proportion to anything Mr. Grewal had contributed to the acquisition of the property, but that is the agreement Dr. Sandhu signed (and which was drafted by his own lawyer).

**75**  The agreement required Dr. Sandhu to notify Mr. Grewal of his intention to sell the property, but did not require Mr. Grewal's consent to the sale. However, the duty to protect Mr. Grewal's interest was inherent in Dr. Sandhu's position as express trustee, as well as his position as Mr. Grewal's psychiatrist. At a minimum, his duty was to obtain a reasonable price on the sale of the property.

**76**  At the time of the sale to Ms. Gill, the farmland had been on the market for three months and attracted little interest. This may have been, at least partially, the result of the erroneous listing which gave $550,000 as the asking price for each lot rather than the total price for both of them. In any event, at the time Dr. Sandhu agreed to sell the property to Ms. Gill, he neither sought nor obtained any professional real estate advice. However, he knew that an appraisal a year earlier had placed the property's value at $410,000-well in excess of the price he was receiving from Ms. Gill. He also knew that at the time he was selling the property to Ms. Gill, its assessed value for tax purposes was $460,000.

**77**  An appraisal report prepared for trial, and not challenged, places the value of the property, as of June 30, 2005, at $475,000. I accept that as the best evidence of the property's true value at the time of sale and find that Dr. Sandhu was in clear breach of his fiduciary obligations to Mr. Grewal when he agreed to sell it for $290,000.

**Liability of Ms. Gill**

**78**  Counsel for the plaintiffs suggests that Ms. Gill was a knowing participant in a scheme to deprive Mr. Grewal of his interest in the Farm Property, or at least, acquired the property in circumstances that should have made her suspicious.

**79**  When a beneficiary is deprived of trust property, a stranger to the trust may be held liable on the basis of either "knowing assistance" in the disposal of the property or "knowing receipt" of the property. In the case of knowing assistance, the stranger to the trust can only be held liable on the basis of actual knowledge of the trust, recklessness or wilful blindness. However, in cases involving knowing receipt, liability may be found on the basis of constructive knowledge, which arises where the recipient is aware of facts that would put a reasonable person on inquiry, but fails to inquire as to possible misapplication of trust property: *Citadel General Assurance Co. v. Lloyds Bank of Canada*, [*[1997] 3 S.C.R. 805*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3W8-00000-00&context=) at para. 49.

**80**  Ms. Gill clearly knew that she was getting the property at a very favourable price, but there is no evidence she knew anything of Mr. Grewal, much less anything about a trust relationship between Mr. Grewal and Dr. Sandhu. She knew of the business relationship between her husband and Dr. Sandhu and knew that her husband was involved in the discussions leading to her purchase of the Farm Property. Rather than putting her on inquiry, knowledge of a close relationship between Dr. Sandhu and her husband would, in my view, tend to allay any suspicions a reasonable person in Ms. Gill's position might otherwise have about the reasons she was obtaining the property at such a favourable price.

**81**  Counsel for the plaintiff submits that Ms. Gill's husband knew the true nature of the transaction. The husband did not give evidence, but Dr. Sandhu testified that Mr. Gill was aware of Mr. Grewal's interest. In his closing submission, counsel for the plaintiffs argued that "Ms. Gill knew of Mr. Grewal's interest (in the Farm Property) because Mr. Gill clearly knew." Even assuming that Ms. Gill's husband knew of Mr. Grewal's interest, that in itself is not a basis on which that knowledge can be attributed to her.

**82**  At one time, the common law regarded a husband and wife as one person. That has not been the law for more than a century. In the absence of any evidence that Ms. Gill-not her husband-knew or ought to have known of Mr. Grewal's interest in the Farm Property or of the relationship between Dr. Sandhu and Mr. Grewal, there is no basis for finding any liability on her part and the claim against her must be dismissed.

**Breach of Duty-the Subdivision Property**

**83**  In relation to the Subdivision Property, I have already outlined my reasons for accepting Mr. Grewal's evidence that Dr. Sandhu initially agreed to share the profits from the sale of the subdivided lots. That arrangement is consistent with the fact that Mr. Grewal agreed to defer all payment for his or South Slope's work until after the sale of lots and the fact that he was asked to guarantee the mortgage. I have also found that Mr. Grewal never surrendered his separate contractual right to acquire one lot.

**84**  When the project was nearing completion, Mr. Grewal, on behalf of South Slope, agreed to accept $100,000 as a management fee. I have found that this agreement was signed in May 2005, although it is dated almost a year earlier. By that point, the doctor-patient relationship had ended and Mr. Grewal and Dr. Sandhu were clearly in an adversarial relationship, as evidenced by the caveat and builder's lien filed shortly thereafter. Although there was no longer a fiduciary relationship, by that point Mr. Grewal had no bargaining power. He had already done the work he was to do and he had no written evidence of the previous agreement to share the proceeds equally. His earlier acceptance of a verbal assurance had been made more likely by the trust inherent in the doctor-patient relationship that existed at the time.

**85**  Dr. Sandhu relies on the opinion of Mr. Johansen, an expert in property development, to the effect that $100,000 is a more than reasonable fee for a property development manager doing the work that Mr. Grewal apparently carried out on the property. However, Mr. Johansen conceded on cross-examination that such a hired manager would usually be paid as the project went along and would not normally guarantee the owner's mortgage.

**Damages-the Farm Property**

**86**  Mr. Grewal is entitled to damages for the loss of his interest in the Farm Property. Counsel for the plaintiffs argues that this assessment should be based on the current value of the property, which, according to the appraisal evidence, is $725,000. This submission relies on *Guerin v. The Queen*, [*[1984] 2 S.C.R. 335*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-233X-00000-00&context=) for the proposition that where a trustee wrongfully withholds or disposes of the property of the beneficiary, the measure of damages is the highest value the property has had between the date of breach and the date of judgment.

**87**  That principle cannot be applied to the facts of this case because Mr. Grewal wanted the property to be sold. He was not aware of the sale to Ms. Gill before it occurred, but was aware of and agreed to the earlier listing of the property for sale through Mr. Atwal. Dr. Sandhu's duty was not to hold the property and preserve its value to the date of trial, but to sell it at market value in 2005. I have found that market value to have been $475,000 and that must be the starting point for the assessment of Mr. Grewal's loss.

**88**  Upon sale of the property to Ms. Gill, Dr. Sandhu paid the outstanding balance of the mortgage and outstanding property taxes. The total amount of those payments was approximately $190,000. However, from that amount there should be a deduction of $80,000, representing the payment that Dr. Sandhu had previously received from Mr. Boparai which was to be applied to the mortgage, but was not. Therefore, if the property had been sold at market value in 2005, the net equity to be shared between Dr. Sandhu and Mr. Grewal would have been $365,000.

**89**  Mr. Grewal signed a promissory note agreeing to pay $70,000 out of his sale proceeds to Dr. Sandhu. That promissory note was signed without legal advice and, in obtaining it, Dr. Sandhu created yet another conflict between his duties as trustee and his personal interest. However, the fact remains that funds were advanced to Mr. Grewal and should be accounted for.

**90**  I have found that, after the subdivision lands were acquired, further payments to Mr. Grewal were most likely intended as advances against his future share of the profits. But prior to the acquisition of the Subdivision Property, Dr. Sandhu gave Mr. Grewal a total of $40,000, part of which I have found was used for the deposit on the Farm Property. The balance could only have been intended for use in the improvement of the Farm Property and was therefore intended (after Mr. Boparai's withdrawal) for the equal benefit of both owners. I therefore find that half of that amount should be deducted from Mr. Grewal's notional share of the equity in the property.

**91**  The result of these calculations is that, had the Farm Property been sold at market value in 2005, Mr. Grewal would have been entitled to net sale proceeds of $162,500 and I award that amount as his damages flowing from the loss of that transaction.

**Damages-the Subdivision Property**

**92**  In relation to the Subdivision Property, I find that Mr. Grewal is, first of all, entitled to be compensated for the loss of his opportunity to acquire and resell lot 4. He lost the $50,000 assignment fee that he was to collect from Jagdeep Gill. Mr. Gill assigned the agreement to Mr. Athwal for a further assignment fee of $26,000. Mr. Grewal testified that, in order to avoid a claim, he took it upon himself to pay that $26,000 to Mr. Gill. There is no documentary evidence of this transaction, but Mr. Grewal's testimony was not challenged on this point. I therefore award damages of $76,000 in respect of that transaction.

**93**  Mr. Grewal and his company were also entitled to share equally in the profits from the sale of the subdivided lots, other than lot 4. South Slope received $85,000 pursuant to the substitute management fee agreement and Mr. Grewal and/or South Slope received payments from Dr. Sandhu in the amount of $25,000 on March 12, 2004, $12,000 on April 13, 2004 and $15,000 on July 9, 2004. I have found that these payments were advances against future profits. (I have not included in that accounting the funds advanced by Dr. Sandhu's brother and father. They are not parties to this action and there is no evidence from them about the purpose of those advances.)

**94**  Mr. Grewal has therefore received, either directly or through his company, a total of $137,000 in respect of the of the subdivision project. To the extent that one half of the net profit exceeds that amount, he is entitled to the difference.

**95**  There is no reliable evidence before me of the profit earned by the Numbered Company through sale of the subdivided lots. Counsel for the plaintiffs says that sale proceeds in excess of $1 million are being held in trust by agreement of the parties. However, counsel for Dr. Sandhu and the Numbered Company says that includes funds from other sources as well as funds for subdivision expenses that are still payable. The Numbered Company's unaudited financial statements suggest little or no profit, but I stress the fact they are unaudited.

**96**  I therefore direct a reference to the registrar to determine the amount received by the Numbered Company on the sale of lots, excluding lot four, the costs incurred in the Numbered Company's acquisition of the property and the financing of that acquisition and the costs directly related to subdivision, development and sale of lots. In accordance with *Supreme Court Civil Rules*, *B.C. Reg. 168/2009* [*Rules of Court*], Rule 18-1 (3), the registrar will provide a report and recommendations, which I will consider along with any submissions the parties may have at that time.

**General Damages**

**97**  Mr. Grewal claims damages beyond the direct financial losses incurred. He says that, since the breakdown of his professional and financial relationship with Dr. Sandhu, he has suffered from prolonged and worsened depression, affecting his ability to work. His wife, Kuldip Grewal, testified that he was unable to work for three years following his dealings with Dr. Sandhu and was forced to sell his excavating equipment. She says her family lost their home and the financial problems placed great strain on their marriage.

**98**  It is clear from Dr. Sandhu's own records that Mr. Grewal's depression was at one point in remission, but that he later began to suffer increased stress and anxiety for business and financial reasons. It is also clear that, contrary to Dr. Sandhu's clinical records, Mr. Grewal was not completely well when Dr. Sandhu terminated the professional relationship without referring him to another psychiatrist or providing any guidance to the family physician.

**99**  Ms. Grewal testified that her husband now avoids doctors and she has difficulty persuading him to seek treatment. Whether or not that is the reason, there is a shortage of clinical records documenting Mr. Grewal's mental and emotional state in the years following his involvement with Dr. Sandhu. On one occasion, in October 2005, he attended at Vancouver General Hospital's outpatient psychiatric program, to which he had been referred by Dr. Chan. The psychiatrist who assessed him recommended that he participate in a group therapy program for depression and anxiety, but Mr. Grewal did not follow up on that recommendation.

**100**  Counsel has tendered a report from Dr. Allan Young, a psychiatrist who interviewed Mr. Grewal on one occasion more than five years after the events at issue. Dr. Young says Mr. Grewal "continues to suffer symptoms which suggest that he still has a major depressive disorder." Dr. Young also says that Dr. Sandhu's inappropriate financial dealings with his patient "would have" been detrimental to Mr. Grewal's medical condition, but, given the deficiencies in the clinical information that was available to Dr. Young, this must be regarded more as a matter of assumption or informed speculation than a firm medical opinion on causation.

**101**  If this were a medical malpractice action based solely on negligent psychiatric treatment, I would have to apply a "but for" test of causation. On that basis, I would conclude that Dr. Sandhu's conduct likely contributed to a worsening in Mr. Grewal's mental and emotional health. However, it would be very difficult to determine, based on the evidence before me, the extent of that worsening, the contributing role of other factors, and the likelihood that Mr. Grewal's depression would have relapsed at some point in any event. On the application of tort principles, Mr. Grewal would only have proved a claim to modest damages for pain and suffering.

**102**  However, in a case of a breach of fiduciary duty, the court has resort to a broad range of remedies that are not necessarily related to direct or provable loss. In *Todosichuk v. Daviduik*, [*2004 MBCA 191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JK4W-M3MM-00000-00&context=), leave to appeal refused [*[2005] S.C.C.A. No. 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-F1P7-B451-00000-00&context=), the Manitoba Court of Appeal said:

22 In exercising the court's discretion, the court is concerned not only in compensating a wronged plaintiff, but also in upholding the obligations of good faith and loyalty. See *Canson Enterprises Ltd. v. Boughton & Co.*, [*[1991] 3 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6052-00000-00&context=) (*per* McLachlin J. (as she then was) at p. 543):

The essence of a fiduciary relationship, by contrast, is that one party pledges itself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken - an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest": *Canadian Aero Service Ltd. v. O'Malley*, [*[1974] S.C.R. 592*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B06N-00000-00&context=), at p. 606. In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.

23 The emphasis on enforcing the essential element of trust in any fiduciary relationship underlies the equally well-accepted principle that a beneficiary need not suffer an actual loss in order to be entitled to a remedy. See *Ramrakha et al. v. Zinner et al.*, [*157 A.R. 279*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9341-JF1Y-B43S-00000-00&context=) (C.A.), "The courts view fiduciary breaches with the upmost [sic] seriousness. The extent or nonexistence of loss to the claimant is usually irrelevant" (per Harradence J.A. at para. 121). See as well The Hon. J.R.M. Gautreau, "Demystifying the Fiduciary Mystique" (1989), 68 Can. Bar Rev. 1 at 17:

The remedies go far beyond compensatory principles: the defendant may be obliged to account and disgorge to the plaintiff all profits that he has received even though the plaintiff has not suffered a corresponding loss or any loss at all; and third parties as well may be liable if they partake or assist in a breach of trust.

24 Again, this is explained on the basis that (at p. 21):

The stringency of the rules is designed to keep the relationships pure and to safeguard the absolute loyalty that the principal can expect by removing even the possibility of personal benefit. If the fiduciary cannot profit, he will not be tempted to put self-interest before duty.

**103**  In *Norberg*, McLachlin J. said at 295:

As discussed in *Canson*, the goal of equity is to restore the plaintiff as fully as possible to the position he or she would have been in had the equitable breach not occurred: per La Forest J. at p. 577. Traditionally, equity made the defaulting trustee who had mismanaged a fund, for example, restore the entire fund, and would not countenance deductions for market fluctuation or failure of the beneficiary to mitigate or take appropriate care, as would the law of tort or contract. This is not a case where the traditional equitable remedies of restitution and account are available. Restoration *in specie* is not possible. And the plaintiff's loss is not economic. Where these remedies are not available, equity awards compensation in their stead: see *Canson*, *supra* at pp. 574-75. In awarding damages the same generous, restorative remedial approach, which stems from the nature of the obligation in equity, applies. The fiduciary, being the person with the advantage of power, assumes full responsibility and cannot be heard to complain that the victim of his or her abuse cooperated in his or her defalcation or failed to take reasonable care for his or her own interests.

**104**  Those comments do not apply precisely to this case because I have awarded Mr. Grewal what I consider to be his full economic loss. However, such economic restitution does not fully address the damage done by a professional who abused his position of trust and misused the therapeutic relationship for personal gain. I accept that there were emotional and social consequences for Mr. Grewal that went well beyond the financial loss, even if all of those consequences cannot be accurately encompassed by a medical or psychiatric diagnosis.

**105**  In *J.R.I.G. v. Tyhurst*, this court awarded general and aggravated damages of $200,000 to a patient who had been subjected to inappropriate and degrading "therapy" by a psychiatrist:

[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.

**106**  That conclusion appears to have been based on more extensive and detailed psychiatric evidence than I have in this case and neither the nature of the breach nor the nature of its impact are comparable for the purpose of assessing damages.

**107**  There are really no comparable cases guiding an assessment of general damages in this case. Because this case involves a breach of fiduciary duty, I must consider not only the impact on Mr. Grewal, but also the seriousness of Dr. Sandhu's conduct and the need to protect the integrity of the doctor-patient relationship by clearly condemning and attempting to deter such conduct. Taking those matters into account, but also recognizing that Mr. Grewal is being made whole in a financial sense, I conclude that an award of $125,000 is appropriate.

**108**  Mr. Grewal also seeks punitive damages. In *Whitten 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=), [*[2002] 1 S.C.R. 595*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BS-00000-00&context=), the Supreme Court of Canada said at para. 94:

1. Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded *only* where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

I have already considered many of those factors, including the nature of the defendant's conduct and the need for deterrence, in assessing compensatory damage. A further award for punitive damages would therefore not be appropriate.

**109**  The plaintiffs also advance a claim for damages on behalf of Ms. Grewal. In tort law, there must be a relationship of sufficient proximity in order for a duty of care to exist. This court has found, albeit in a very different medical context, that a physician owes no duty to a patient's spouse: *Arndt v. Smith* [*(1994), 93 B.C.L.R. (2d) 220*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F5T5-M2C6-00000-00&context=) (S.C.) at para. 34, rev'd on other grounds [*6 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FG12-62N5-00000-00&context=) (C.A.), aff'd [*[1997] 2 S.C.R. 539*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3W7-00000-00&context=) (S.C.C.). Fiduciary relationships are based on the assumption and acceptance of duties. Ms. Grewal was not Dr. Sandhu's patient and, although he knew her socially, there is no evidence that he expressly or by implication assumed any duties toward her. That evidentiary gap cannot be filled simply by the fact that Dr. Sandhu could have foreseen that a breach of the duty owed to his patient might also have a negative impact on the patient's spouse. I have been given no authority that would support a separate award, either in tort or in equity, to Ms. Grewal and her claim must be dismissed.

**Costs**

**110**  The plaintiffs seek an award of special costs. Such an award is given where the conduct of a party is found to be "reprehensible", meaning "deserving of censure or rebuke". An award of special costs may address both the conduct in the proceedings and in the circumstances giving rise to the cause of action, *T.W.D. v. P.W.S.D., E.M.W. and M.E.J.D.,* [*2004 BCSC 497*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B29K-00000-00&context=), at para. 33:

An award of special costs and an assessment of costs against a party personally as opposed to an estate, are discretionary matters for the Court: see *Szpradowski (Guardian ad litem of) v. Szpradowski Estate* [*(1992), 4 C.P.C. (3d) 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61F5-00000-00&context=), [*[1992] B.C.J. No. 94*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61F5-00000-00&context=) (S.C.). To warrant special costs, the conduct of the party from whom such costs are sought must be "reprehensible". In *Leung v. Leung* [*(1993), 77 B.C.L.R. (2d) 314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F5T5-M236-00000-00&context=), [*[1993] B.C.J. No. 2909*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F5T5-M236-00000-00&context=) (S.C.), Chief Justice Esson, as he then was, held that the term "reprehensible" means "deserving of censure or rebuke", and stated that the term has a wide meaning, from "outrageous" and "scandalous" to milder forms of misconduct" (5). In *Wilcox v. Smith*, [*2003 BCSC 346*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S22N-00000-00&context=), [*[2003] B.C.J. No. 476*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S22N-00000-00&context=), special costs were awarded in a case that arose out of the misuse of a power of attorney.

**111**  I am satisfied that an award of special costs against Dr. Sandhu is appropriate in this case. It was his conduct in blatantly and knowingly ignoring his professional and fiduciary duties that gave rise to this action. Mr. Grewal cannot be properly and fully compensated for those breaches of duty unless his remedy includes an award for special costs. Further, Dr. Sandhu's conduct in the litigation, up to and including trial, has been characterized by a lack of candour and efforts to conceal evidence.

**112**  I have dismissed the plaintiffs' claim against Ms. Gill and she is entitled to party and party costs at scale B. However, I also find that this is an appropriate case to apply Rule 14-1 (18) of the *Rules of Court* and order that Ms. Gill's costs be paid by Dr. Sandhu. The circumstances surrounding the sale of the Farm Property were such the plaintiffs' addition of Ms. Gill as a party was necessary in order to determine the facts and place them before the court.

**113**  Although I have dismissed the separate claim by Ms. Grewal, the presence of that claim does not appear to have added significantly to the cost of pursuing or defending this action and certainly had no appreciable impact on the length of the trial. The dismissal of that claim will be without costs.

**Summary**

**114**  The plaintiff Agyapal Singh Grewal will have immediate judgment against the defendant Dr. Jatinder Singh Sandhu for damages for breach of fiduciary duty in the total amount of $287,500, being damages for loss of his interest in the Farm Property ($162,500), and general damages ($125,000). The first of those two components will attract court order interest from June 16, 2005, the date the sale of the property to Ms. Gill completed. Mr. Grewal will have a further judgment against Dr. Sandhu and the defendant 676207 B.C. Ltd., jointly and severally, in the amount of $76,000 as damages for loss of the ability to acquire and resell lot four of the Subdivision Property. That award will attract court order interest from April 3, 2005, the date the defendants purported to sell lot four to another buyer.

**115**  In addition to the damages set out in the previous paragraph, there will be a reference to the registrar to determine the net sale proceeds received by the defendant 676207 B.C. Ltd. for lots one through three and five through nine of the subdivision property. The defendants Dr. Sandhu and 676207 B.C. Ltd. will be jointly and severally liable to the plaintiff Mr. Grewal for damages in the amount, if any, by which one half of those sale proceeds exceeds the $137,000 previously paid to Mr. Grewal and/or South Slope Enterprises.

**116**  Dr. Sandhu will pay special costs. The plaintiffs' claim against the defendant Lakhvir Kaur Gill is dismissed with party and party costs to be paid by Dr. Sandhu. The separate claim of the plaintiff Kuldip Kaur Gill is dismissed without costs as is the counterclaim of the Numbered Company.

N.H. SMITH J.

**End of Document**

[***Hawley v. Webb, [2002] B.C.J. No. 962***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G132-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Pitfield J. (On Costs)

Heard: April 25, 2002.

Judgment: May 3, 2002.

Vancouver Registry Nos. C993608, C981115

**[2002] B.C.J. No. 962** | 2002 BCSC 679 | 17 C.C.E.L. (3d) 125 | 113 A.C.W.S. (3d) 224

Between Peter Hawley, plaintiff, and Dr. David Webb, GMD Resource Corp. and LMX Resources Ltd., defendants And between Peter Hawley, plaintiff, and GMD Resource Corp. and LMX Resources Ltd., defendants

(25 paras.)

**Case Summary**

**Practice — Costs — Party and party costs — Special orders — For reprehensible or inefficient conduct by party — Discretion to exceed scale of costs — Increase in scale of costs, conduct of opposite party — Circumstances when not ordered.**

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| Application by the plaintiff, Hawley, for special costs and double special costs. Hawley was wrongfully dismissed by Webb, who accused him of ***negligence***, lack of competence, failing to disclose a conflict of interest, and fraudulently backdating an agreement. The allegations were based on pre-employment conduct by Hawley. Hawley sued for wrongful dismissal and defamation. Hawley delayed in disclosing the alleged backdated document. Webb conducted a vigorous defence. Hawley obtained judgment for general, aggravated, and punitive damages. Hawley used co-counsel, and the trial was not lengthy. Webb did not pursue the allegation of backdating. His conduct was proper during the proceedings and he had no improper motives. Hawley failed to allocate between the wrongful dismissal action and the defamation action in his bill of costs. He failed to explain the discrepancy between party and party costs and special costs relating to the complexity of issues, the nature and extent of proceedings, the number and complexity of expert reports, and difficulties in fact gathering.  HELD: Application dismissed.  Hawley's delay in disclosing the backdated document raised reasonable suspicions. Webb's manner in raising the allegation and in not pursuing it did not amount to scandalous or outrageous conduct. Special costs were not justified, as Webb did not deserve reproof or rebuke, and his defence, although lacking merit, was not groundless. The lack of allocations in Hawley's bill of costs and the lack of explanation of the discrepancy between party and party costs and special costs, or the need for co-counsel, precluded the Court from awarding special costs. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18A.

**Counsel**

Julien A. Dawson, for the plaintiff. Stephen M. Zolnay, for the defendants, Dr. Webb and GMB Resource Corp. The defendant, LMX Resources, was not represented.

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| **PITFIELD J.** |

**1**   In reasons dated February 15, 2002, I awarded Mr. Hawley damages of $66,026.79 together with prejudgment interest from February 10, 1998 against each of GMD Resource Corp. and LMX Resources Ltd. in respect of wrongful dismissal. In the same reasons I awarded Hawley general damages of $50,000, aggravated damages of $25,000 and punitive damages of $10,000 against Webb and GMD in respect of defamatory statements made by them. I dismissed the defamation action against LMX. GMD and Webb appeared at the trial. LMX did not.

**2**  Hawley applies for an order that costs be assessed as special costs in both actions from March 4, 1998 to December 16, 1999 and as double special costs from and after December 17, 1999. Alternatively, he applies for an order that costs be assessed as increased costs from March 4, 1998 to December 16, 1999 and as double increased costs from and after December 17, 1999.

**3**  Offers made by Hawley to GMD and LMX on December 17, 1999, to settle the wrongful dismissal actions for the amounts awarded at trial were not accepted. Hawley made no offers to settle the defamation action against any of Webb, GMD or LMX.

**4**  The defendants Webb and GMD say that costs should be assessed as party and party costs at Scale 3 from March 4, 1998 to December 16, 1999 and as double party and party costs from and after December 17, 1999. At the hearing, counsel for the parties did not differentiate between the claim for costs in the wrongful dismissal and defamation actions.

**5**  Hawley says that the defendants' conduct in asserting cause to summarily dismiss him because of ***negligence*** and lack of competence and failure to disclose a conflict of interest, all in relation to the preparation of geological reports for use by GMD and LMX, is reprehensible and worthy of rebuke by an order for special costs. Hawley also claims that the defendants improperly accused him of fraudulent conduct in the "back-dating" of an agreement by which Hawley divested himself of an interest in a mining property in favour of his father-in-law. The conduct on which the defendants relied to support dismissal for cause occurred prior to the commencement of employment at a time when Hawley worked as an independent consultant to GMD and LMX.

**6**  I need not reiterate that which was stated in my reasons for judgment except to say that I found that the matters of which the defendants complained did not justify summary dismissal. I found that the letter agreement which the defendants described as suspect had not been back-dated.

**7**  The principles that apply in deciding whether costs should be assessed as special costs were described by Esson C.J.B.C., as he then was, in Leung v. Leung [*(1993), 77 B.C.L.R. (2d) 314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F5T5-M236-00000-00&context=) at page 315:

The concept of special costs was introduced to our rules in the 1990 amendments. It has been held that entitlement to special costs is to be determined on the same principles formerly applied to awarding solicitor-client costs. The test for awarding such costs was stated thus by Lambert J.A. in Stiles v. British Columbia (Workers' Compensation Board) [*(1989), 38 B.C.L.R. (2d) 307*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B06C-00000-00&context=) (C.A.), at p. 311:

...solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words "scandalous" and "outrageous" have also been used.

There is nothing in the conduct of Mr. Leung in relation to this matter which I would call "scandalous" or "outrageous". But "reprehensible" is a word of wide meaning. It can include conduct which is scandalous, outrageous or constitutes misbehaviour; but it also includes milder forms of misconduct. It means simply "deserving of reproof or rebuke".

**8**  In context, I am satisfied there is no conduct on the part of the defendants in this case that is scandalous or outrageous. Although the word "reprehensible" is a word of broad meaning, I am satisfied there is nothing in the conduct of the defendants in these actions that is deserving of reproof or rebuke.

**9**  The essence of a wrongful dismissal action is usually a dispute between employee and employer with respect to the existence of cause. Whether or not cause exists in particular circumstances is a question of fact. In circumstances where substandard performance is alleged by an employer, the question whether summary dismissal is justified is frequently a matter of degree. In circumstances where the ground for summary dismissal is conduct alleged not to conform to professional ethical standards, issues of interpretation and differences of view with respect to the nature and extent of the applicable standards frequently arise. Allegations that pre-employment conduct justifies summary dismissal compel an inquiry into the nature of the conduct and its effect upon the employment relationship. The issues and factual determinations are often difficult to resolve.

**10**  While I do not suggest that an employer's defence of a wrongful dismissal action can never be scandalous, outrageous or reprehensible, it is my opinion that care must be taken to differentiate between a vigorous defence which an employer is entitled to pursue and conduct that is scandalous, outrageous or reprehensible. Identifying the point at which the line has been crossed is sometimes difficult.

**11**  Lack of merit is not in itself a reason for awarding special costs. In Garcia v. Crestbrook Forest Industries Ltd. [*(1994), 9 B.C.L.R. (3d) 242*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63HG-00000-00&context=) the court said the following at pp. 250-51:

However, the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs. See the reasons for Madam Justice McLachlin, for the majority in the Supreme Court of Canada on the question of costs, in Young v. Young at p. 28 [[*(1993), 84 B.C.L.R. (2d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M39V-00000-00&context=)]. Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.

**12**  In this case the defences of substandard performance and conflict of interest were unsuccessful but they were not groundless allegations, the advance of which by virtue of some other factor or factors would justify special costs. There was no improper motive in defending the actions. There was no improper conduct by counsel or any defendant in the course of this proceeding.

**13**  I agree that the suggestion made during trial that I might infer from the evidence that the transfer agreement of February 27, 1996 had been back-dated was accusatory given that GMD and LMX admitted in their statement of defence that Hawley had divested himself of the interest in the property on that date. At the same time, the suggestion that an inference might be drawn was of minimal importance in the context of the overall defence as it was presented at trial. It was not the basis upon which the defendants persisted in their defence of the wrongful dismissal claims. I also observe that Hawley did not immediately disclose the document in early discussions of potential conflict. The oversight could reasonably raise a suspicion in the mind of the defendants even though the evidence dispelled the suspicion. I am satisfied that the manner in which the allegation of back-dating was made did not amount to scandalous or outrageous conduct and fell short of conduct that is deserving of reproof or rebuke by an award of special costs.

**14**  The next issue with which I must be concerned is whether an award for increased costs is justified. I conclude it is not.

**15**  In my opinion, the wrongful dismissal and defamation actions were matters of ordinary complexity that warrant taxation at Scale 3. While the affidavit evidence on this application points to a discrepancy between party and party costs and the amount that might be assessed by a registrar as special costs, it does not permit me to identify the real amount of the disparity or to conclude that there is a reason for it such that taxation on a party and party basis would produce an unjust result in the circumstances.

**16**  The draft bill of costs exhibited to an affidavit does not appear to be complete. Accounts rendered to Hawley, also exhibited to the affidavit, indicate that an application was made on his behalf for a garnishing order in advance of judgment. There is no evidence from which I can conclude that costs were awarded and taxed on that application. If they were, they should be included to reduce the discrepancy. If they were not, they should now be taxed.

**17**  An application was made under Rule 18A for judgment on Hawley's behalf. The draft bill of costs makes no claim in respect of that application. There is no evidence whether costs in respect of it were previously taxed. My comments in relation to the garnishing order apply equally to that application.

**18**  Hawley was represented by co-counsel at trial. Having regard for the nature and course of the proceeding, it is not readily apparent that such representation was necessary. There is nothing in the affidavit material in support of a contrary view.

**19**  The statements of account rendered to Hawley suggest that most of the fees billed were attributable to the wrongful dismissal action. As an example, fees billed to December 27, 2001 in respect of the wrongful dismissal action totalled $33,753.50. Fees billed in respect of the defamation action to the same date totalled $5,301. Fees billed from December 24, 2001 through to the completion of the trial in respect of the wrongful dismissal action totalled $64,743.50. Taxable fees in relation to the defamation action in the same period are said to total $144.

**20**  The affidavit material does not permit me to conclude that the allocation of total fees as between the wrongful dismissal actions and the defamation action is reasonable in the circumstances. The absence of an allocation makes it impossible to determine whether there is any material discrepancy between party and party costs and special costs that would be assessed in the defamation action.

**21**  Finally, the materials filed on the application do not attempt to explain the discrepancy between party and party and special costs by reference to the complexity of issues, the nature and extent of pre-trial applications, the length of examinations for discovery, the number and complexity of expert reports, or difficulties encountered in the fact gathering process, any or all of which are relevant factors: Transamerica Commercial Finance Corp. Canada v. Dunwoody & Co. (1995), 35 C.P.C. (3d) 153 at 155 (B.C.S.C.).

**22**  This trial was not lengthy by current day standards where a contested wrongful dismissal is involved. As I have noted, the need for co-counsel is not explained.

**23**  For the foregoing reasons I find that costs should be assessed on a party and party basis with double costs in the wrongful dismissal action from December 17, 1999. The plaintiff's application for different relief is dismissed. Having regard for the result, I need not be concerned with the question whether, were increased or special costs appropriate, Hawley should recover double the amount awarded because of the settlement offer.

**24**  On the assessment of costs which will proceed, care must be taken to differentiate between costs recoverable in the wrongful dismissal action as opposed to costs recoverable in the defamation action because of the fact that offers of settlement were only made in respect of the wrongful dismissal action.

**25**  While the plaintiff is entitled to party and party costs in the defamation action, he will be restricted to single recovery for trial preparation and attendance in both actions. Because double costs are recoverable in respect of the wrongful dismissal action, I order that 80% of the amount taxable for preparation and attendance at trial be attributed to the wrongful dismissal action. The remainder is allocable to the defamation proceeding.

PITFIELD J.

**End of Document**

[***Jones v. Zimmer GMBH, [2011] B.C.J. No. 1680***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-623M-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

T.W. Bowden J.

Heard: February 7-9 and April 26, 2011.

Judgment: September 2, 2011.

Docket: S095493

Registry: Vancouver

**[2011] B.C.J. No. 1680** | 2011 BCSC 1198 | 206 A.C.W.S. (3d) 270 | 2011 CarswellBC 2307

Between Dennis Jones and Susan Wilkinson, Plaintiffs, and Zimmer GMBH, Zimmer Inc. and Zimmer of Canada Limited, Defendants Brought Under the Class Proceedings Act, R.S.B.C. 1996, c. 50

(101 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 — Representative plaintiff — Application by two plaintiffs to certify their action as a class proceeding and to appoint one of them as representative plaintiff allowed — Class definition was all persons who were implanted with the Durom Cup, used for hip replacements, in Canada — Pleadings disclosed cause of action — Common issues, with one exception were certified for non-residents of British Columbia and all of them were certified for residents in British Columbia — Class proceeding was preferable procedure to resolve common issues. Tort law — Practice and procedure — Parties — Representative or class actions — Application by two plaintiffs to certify their action as a class proceeding and to appoint one of them as representative plaintiff allowed — Class definition was all persons who were implanted with the Durom Cup, used for hip replacements, in Canada — Pleadings disclosed cause of action — Common issues, with one exception were certified for non-residents of British Columbia and all of them were certified for residents in British Columbia — Class proceeding was preferable procedure to resolve common issues.**

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| Application by Jones and Wilkinson to certify their action as a class proceeding and to appoint one of them as the representative plaintiff. The proposed class definition was all persons who were implanted with the Durom acetabular hip implant in Canada. The device, which was known as the Durom Cup, was used in hip replacement surgery. Both plaintiffs were implanted with the device and experienced problems with it. They recovered once the device was removed from them. The Cup was manufactured by the defendant Zimmer GMBH and it was distributed in Canada by the defendant Zimmer of Canada Ltd. Both of these companies were wholly-owned subsidiaries of the defendant Zimmer, Inc. It was alleged that these three defendants functioned as a joint enterprise in the promotion and sale of the Cup in Canada.  HELD: Application allowed.  The action was certified as a class proceeding. There was an identifiable class of two or more class members and it consisted of all persons who were implanted with the Cup in Canada. The pleadings disclosed a cause of action in ***negligence***. The common issues proposed by the plaintiffs were suitable for certification under the Class Proceedings Act for residents of British Columbia. The common issues, other than an issue that arose under the Business Practices and Consumer Protection Act, were also certified for non-residents of British Columbia. A class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. The plaintiffs proposed a reasonable litigation plan. While either plaintiff was suitable the representative plaintiff would be Wilkinson. |

**Statutes, Regulations and Rules Cited:**

Business Practices and Consumer Protection Act, [*SBC 2004, CHAPTER 2, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5KY-B23W-00000-00&context=), s. 171, s. 172

Class Proceedings Act, [*RSBC 1996, CHAPTER 50, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5TBM-3RM1-F7VM-S13S-00000-00&context=), s. 4, s. 4(1)(a), s. 4(1)(b), s. 4(1)(d), s. 4(2), s. 4(2)(c), s. 5(7), s. 7

Food and Drugs Act, [*R.S.C. 1985, c. F-27*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9X1-JN6B-S1KB-00000-00&context=),

Medical Devices Regulations, [*SOR/98-202, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5FBX-WG91-FH4C-X3SF-00000-00&context=)

**Counsel**

Counsel for the Plaintiffs: D.A. Klein and J.Z. Murray.

Counsel for the Defendants: A.D. Borrell and P.J. Pliszka.

**Reasons for Judgment**

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| **T.W. BOWDEN J.** |

**Introduction**

**1**  The plaintiffs seek an order certifying this proceeding as a class proceeding under the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50* [*Act*], and appointing one of them as the representative plaintiff.

**2**  The proposed class definition is:

All persons who were implanted with the Durom acetabular hip implant in Canada.

**3**  The Durom acetabular hip implant or "Durom Cup" is an artificial device used in hip replacement surgery. It is a prosthetic shell meant to be implanted into a patient's acetabulum, or hip socket, as a component of such surgery or resurfacing surgery.

**4**  Both plaintiffs were implanted with Durom Cups. Mr. Jones in January 2008 and Ms. Wilkinson in April 2008.

**5**  The Durom Cup is manufactured by Zimmer GMBH and imported into Canada and distributed here by Zimmer of Canada Ltd. Both of those companies are wholly-owned subsidiaries of Zimmer, Inc. It is alleged that these three defendants functioned as a joint enterprise in the promotion and sale of the Durom Cup in Canada.

**Background of the Plaintiffs**

**6**  Dennis Jones is a 63-year-old retiree and resides in Langley, British Columbia. He underwent initial hip replacement surgery on his right hip on January 14, 2008, and received an implant of a Durom Cup.

**7**  After starting to recover, Mr. Jones began experiencing pain in his right hip in September 2008. He found it difficult to get out of his car and to stand from a seated position. By December 2008, the increasing pain led him to return to using the cane that he had used immediately after the surgery. Walking with the cane was still painful for him and movement became increasingly difficult. He also experienced pain when he tried to bend or pick up heavy objects. He slept on his left side because of the pain on his right.

**8**  He visited his family doctor and was referred back to the surgeon who had implanted his Durom Cup. He waited seven weeks for an appointment with his surgeon. He was examined and advised to undergo revision surgery to replace the Durom Cup.

**9**  On May 11, 2009, Mr. Jones underwent revision surgery to replace his Durom Cup. The Durom Cup had not adhered to Mr. Jones' bone and his surgeon removed the Durom Cup noting that "the cup tapped and easily removed showing no bony ingrowth in any area."

**10**  Since the removal of his Durom Cup, Mr. Jones has noticed a gradual improvement in his condition. He no longer uses a cane and is able to exercise and swim without much difficulty.

**11**  Susan Wilkinson is a 51-year-old nurse who resides in Osoyoos, British Columbia. She is employed by the Interior Health Region at an extended care facility in Oliver. She was implanted with a Durom Cup in her left hip on April 28, 2008.

**12**  Three months after her hip replacement, Ms. Wilkinson began to experience pain in her left leg, and in August or September 2008 she began noticing more pain in her left groin and hip. She associated the pain with a feeling and sound of a clicking sensation in her left hip. She described it as feeling like her hip was going to "pop out." The pain became worse and she started using a cane in January 2009. She had difficulty sleeping and began taking narcotic pain medication every four hours to manage the pain in her hip.

**13**  As a result of her pain, Ms. Wilkinson experienced considerable difficulty performing her work. Her job as a licensed practical nurse required her to spend 10 hours of her 12-hour shifts on her feet, to reposition patients, to push wheel chairs and to transport heavy boxes of medicine. On some days she would turn down work because of the pain. She was also not able to take extra shifts that were offered by her employer.

**14**  The pain and discomfort in her hip resulted in Ms. Wilkinson being unable to continue many household and leisure activities such as gardening, golfing, skiing, curling, walking or exercising.

**15**  After visiting her surgeon, Ms. Wilkinson was scheduled for revision surgery to remove her Durom Cup. After encountering delays, the revision was performed on October 29, 2009.

**16**  It appears that the Durom Cup had failed to adhere to Ms. Wilkinson's bone. She was awake during the surgery and remembers the Durom Cup popping out, merely with the force of her surgeon's hand.

**17**  After a week in hospital, Ms. Wilkinson began to recover and has been able to return to many of the activities she enjoyed before the replacement surgery. She started a gradual return to work on March 15, 2010, and on April 15, 2010, she returned to full-time employment.

**18**  In general, the plaintiffs say, the consequences of a failed hip implant are significant both in the short and long-term, causing pain and disability and affecting function. Revision surgery involves the removal of the loose or failed component. It is usually more complex, longer in duration than the initial implant operation, and is associated with greater blood loss and greater risk of complication. Often, bone loss requires implantation of a larger implant and there is the potential need for bone grafts.

**General Background**

**19**  At least 4,941 Durom Cups have been sold in Canada since 2005. It is unclear how many of these have been implanted in Canadian residents or how many residents who received implants have experienced failure of their Durom Cup. The plaintiffs' solicitors have been contacted by at least 13 individuals who advise that they were implanted with the Durom Cup and have since experienced pain and discomfort. Of those, at least seven have undergone revision surgery and a further three anticipate revision surgery. Thirty-three cases of revision surgeries involving the Durom Cup have been reported to the defendants. It is unclear whether all failures have been reported to the defendants. The defendants point out that the revision rate for Canadian Durom Cup patients is .67% of all Durom Cups implanted in Canada.

**20**  The plaintiffs also adduced evidence that at least two residents of Ontario say that they have experienced pain and discomfort after being implanted with the Durom Cup. One of those persons, Gloria McSherry, was implanted with a Durom Cup on August 1, 2007. She continued to experience pain after that operation. Following the advice of her doctor, she underwent revision surgery to remove the Durom Cup on June 29, 2010. The related medical records indicate that "there was no ingrowth observed on the back of the Durom Cup."

**21**  The defendants say that revision surgery is a known risk of any joint replacement surgery, including hip replacement surgery. They also say that the fact that a particular patient requires hip revision surgery does not mean that the hip implant device was defective. They point to various other causes of post-operative pain such as infection, trauma, dislocation, bone fractures, metal hypersensitivity, improperly-sized components and others.

**22**  Some problems with the Durom Cup became public in mid-2008 when an American orthopaedic surgeon warned his colleagues in the United States of failures and defects associated with that product. Zimmer suspended the marketing and distribution of the Durom Cup in the United States on July 22, 2008, because of increased revision rates, and determined that additional surgical technique instructions were required. An Urgent Safety Notice regarding the failures of implants followed in Europe on October 13, 2009, after reported revisions. When issuing that notice, Zimmer GMBH indicated that it had conducted "a widespread clinical investigation of the clinical experience of the Durom Acetabular Cup in Europe and Canada." Zimmer again determined that European surgeons required more instruction and training.

**23**  What is called a "Field Safety Notification" for the Durom Cup was issued on November 9, 2009, and published by Health Canada on December 7, 2009. It read as follows:

Reasons for Recall

There have been reports of revisions of Zimmer's Durom Acetabular Cup and the Metalsul LDH (Large Diameter Head) femoral head in certain European markets. As a result of these reports, Zimmer has been conducting an investigation to identify the root cause. Zimmer has been actively investigating clinical data from users regarding the performance of these devices and analyzing their performances compared to similar devices in the market.

Based on the results of the investigation, the most probable root cause for the reported revisions is using a surgical technique which differs from that prescribed in the surgical technique for the Durom Acetabular Cup.

**24**  This resulted in a retraining program for Canadian surgeons. No Canadian surgeon could access a Durom Cup unless the surgeon provided the defendants with written confirmation by December 24, 2009, that their retraining had been completed. A letter from Zimmer to surgeons dated November 9, 2009, contained a revised warning, namely:

Reaming for the Durom Acetabular Component must be verified with the corresponding provisional shell performed according to the surgical technique. Failure to ream properly may lead to component loosening and persistent groin pain.

**25**  The defendants say that the Durom Cup has never been recalled or changed and is still for sale and currently being used in Canada. The defendants also say that "the product has never been the subject of any action by Health Canada." I note, however, that Exhibit "S" of Alicyn Cumming's Affidavit, at Tab 6 of Volume 1 of the plaintiffs' application record, which is an excerpt from the Health Canada Medical Device Recall List from October 2009 to December 2009, refers to Recall Number 51631. This number refers to the defendants' Durom Cup and the stated "Reason for Recall" reflects the wording of the Field Safety Notification referred to above.

**Statutory Requirements for Certification**

**26**  Section 4 of the *Act* provides:

**4**(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

1. the pleadings disclose a cause of action;
2. there is an identifiable class of 2 or more persons;
3. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
4. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
5. there is a representative plaintiff who
6. would fairly and adequately represent the interests of the class,
7. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
8. does not have, on the common issues, an interest that is in conflict with the interests of other class members.
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.

**27**  Section 5(7) of the *Act* provides:

**5**(7) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

**28**  Section 7 of the *Act* provides:

**7** The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

1. the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
2. the relief claimed relates to separate contracts involving different class members;
3. different remedies are sought for different class members;
4. the number of class members or the identity of each class member is not known;
5. the class includes a subclass whose members have claims that raise common issues not shared by all class members.

**Analysis**

**29**  In *Hollick v. Toronto (City)*, [*2001 SCC 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=), [*[2001] 3 S.C.R. 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=) at para. 16, the Supreme Court of Canada described the general nature of the certification process:

... the certification stage is decidedly not meant to be a test of the merits of the action. ... Rather, the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: ... [Emphasis in original.]

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

**30**  The plaintiffs allege that the defendants were negligent in the research, development, testing, manufacture, distribution and sale of the Durom Cup and that they knew or ought to have known that defects in the device would cause foreseeable injury to the plaintiffs and their fellow class members. The plaintiffs also allege that the defendants owed the plaintiffs and class members a duty to use all reasonable care and skill to ensure that the Durom Cup was effective and to warn the plaintiffs, class members, health care providers and regulators of any safety problems with the Durom Cup. Further, the plaintiffs allege that the defendants failed to properly test the Durom Cup before marketing it and failed to conduct subsequent proper post-market monitoring.

**31**  The defendants do not dispute that the pleadings disclose a cause of action in ***negligence***.

**32**  The plaintiffs also say that the pleadings disclose a cause of action under the *Business Practices and Consumer Protection Act*, *S.B.C. 2004, c. 2* [*BPCPA*]. This claim is only available to class members who were implanted in British Columbia.

**33**  In relation to this claim, the statement of claim provides:

1. The Defendants' solicitations, offers, advertisements, promotions, sales and supply of the Product [the "Durom System"] for personal use by the Plaintiffs and by class members were "consumer transactions" within the meaning of the *Business Practices and Consumer Protection Act*, *S.B.C. 2004, c. 2* ("BPCPA"). With respect to those transactions, the Plaintiff and class members who were implanted with the Product in British Columbia are "consumers" and the Defendants are "suppliers" within the meaning of the BPCPA.
2. The Defendants' conduct in their solicitations, offers, advertisements, promotions, sales and supply of the Product, as particularized above, had the capability, tendency or effect of deceiving or misleading consumers regarding the safety and efficacy of the Product. The Defendants' conduct in its solicitations, offers, advertisements, promotions, sales and supply of the Product were deceptive acts and practices contrary to s. 4 of the BPCPA. The Defendants' deceptive acts and practices included the Defendants' failure to properly disclose all material facts regarding the safety and efficacy of the Product.
3. Further, in their marketing brochures, promotional materials and website directed both to consumers and their physicians, the Defendants made representations concerning the efficacy of the Product, including a description of studies that suggested that the Product had a success rate of up to 99%. In reality, the Product's failure rate is unreasonably high compared to other, available implants. The Defendants knew or ought to have known that their marketing claims regarding the Product were inaccurate, incomplete or misleading, and that the Product had an unreasonably high failure rate. Such marketing claims were deceptive and had the tendency, capability or effect of misleading consumers and their physicians.
4. As a result of the Defendants' deceptive acts and practices, the Plaintiffs and class members have suffered loss and damages. The Plaintiffs seek injunctive relief and declaratory relief and damages and statutory compensation pursuant to ss. 171 and 172 of the BPCPA on their own behalf and on behalf of class members implanted with the Product in British Columbia.

**34**  The plaintiffs submit that the statement of claim discloses a statutory cause of action under s. 171 of the *BPCPA*.

**35**  The defendants argue that the failure to disclose information is not a basis for a claim under the *BPCPA* and rely on a decision of this court, *Blackman v. Fedex Trade Networks Transport & Brokerage (Canada), Inc*., [*2009 BCSC 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3MK-00000-00&context=). The plaintiffs say that the defendants' argument is defeated by a decision of the Court of Appeal, *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=).

**36**  The plaintiffs will satisfy the requirement in s. 4(1)(a) unless it is "plain and obvious" that the statement of claim discloses no reasonable cause of action. No evidence is required at this stage to substantiate the pleading.

**37**  In my view, the statement of claim provides particulars of this claim, which includes allegations of both the failure to disclose material facts and misrepresentations. It therefore discloses a reasonable cause of action. In *Chalmers v. AMO Canada Company*, the Court of Appeal considered pleadings containing similar allegations, including the failure to disclose a particular risk, and was satisfied that the claim under the *BPCPA* met the requirements of s. 4(1)(a) of the *Act*.

**Is there an Identifiable Class of Two or More Persons?**

**38**  As noted above, the proposed class definition is: "All persons who were implanted with the Durom acetabular hip implant in Canada."

**39**  The requirement of an identifiable class is discussed by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, [*2001 SCC 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=), [*[2001] 2 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=) at para. 38:

[38] While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: ...

**40**  The defendants say that the lack of evidence adduced by the plaintiffs defeats their position on the proposed class definition. They say that the proposed class would include approximately 4,900 people who have not had a problem with the Durom Cup and the plaintiffs have failed to show a rational connection between a class of every recipient of a Durom Cup and the common issues that they propose.

**41**  Only some basis in fact for the existence of a class need be established by the plaintiffs. In *LeFrancois v. Guidant Corporation*, [*[2008] O.J. No. 1397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF21-F5DR-21HM-00000-00&context=), [*2008 CanLII 15770*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF21-F5DR-21HM-00000-00&context=) (Ont. S.C.J.), the Ontario Superior Court said at para. 66:

[66] The question whether any particular member of the class has suffered damage as a result of the defendants' conduct is, in cases of this kind, essentially an individual issue that, in addition, may raise questions of causation: ... To require further evidence at this stage would cause the court to stray too far into the merits of the claims asserted on behalf of the class ... It follows, moreover, from the prohibition of merits-based class criteria that class definitions will very often -- and I think probably most often -- be over-inclusive to the extent that they will include persons who cannot establish that they suffered damages.

**42**  The fact that the class definition may contain persons who did not suffer any injury is an expected outcome of a class definition. As Cullity J. held in *Tiboni v. Merck Frosst Canada Ltd.,* [*2008 CanLII 37911*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF41-F016-S061-00000-00&context=) at para. 78 (Ont S.C.J.), "this is virtually ordained by the authorities that preclude merits-based class definitions." In *Tiboni*, the rate of problems among the defined class appears to have been only .57%.

**43**  In my view, the proposed definition of the class, namely, "all persons who were implanted with the Durom acetabular hip implant in Canada," satisfies the requirement under s. 4(1)(b) of the *Act*. It is sufficiently clear to meet the requirements for an identifiable class set forth by the Supreme Court of Canada in *Western Canadian Shipping Centres Inc.* Importantly, it also includes all persons who potentially have a claim. As will be apparent from these reasons, I am also satisfied there is some basis in fact for the proposed class.

**44**  The plaintiffs say that a national class is appropriate. The plaintiffs' solicitors have been contacted by one resident of Alberta and two persons who reside in Quebec who have said that they were implanted with the Durom Cup and have experienced pain and discomfort since. Two residents of Ontario have had the same experience. Of the 33 reports of the failure of the Durom Cup which Zimmer has disclosed, the reports have been submitted by physicians in British Columbia, Alberta, Ontario and Quebec. These reports indicate 22 failures in British Columbia, two in Alberta, six in Ontario and three in Quebec. Twenty-one of the failures are said to involve evidence of pain and/or loosening associated with the Durom Cup, and four reports indicate a failure of the Durom Cup to adhere to a patient's bone.

**45**  If I certify these proceedings, it is not disputed by the defendants that a national class is appropriate so as to allow non-residents of British Columbia to participate.

**Do the Claims of Class Members Raise Common Issues?**

**46**  "Common issues" are defined in s. 1 of the *Act* to mean:

1. common but not necessarily identical issues of fact, or
2. common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

**47**  In considering the proposed common issues it is helpful to consider the comments of Cumming J.A. in *Campbell v. Flexwatt Corp*. [*(1998), 44 B.C.L.R. (3d) 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=) (C.A.) at para. 53:

[53] When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.

**48**  The plaintiffs propose the following common issues:

1. Was the Durom Cup defective and/or unfit for its intended use?
2. Did any of the defendants breach a duty of care owed to class members and, if so, when and how?
3. Does the defendants' conduct warrant an award of punitive damages, and, if so, to whom should they be paid and in what amount?
4. With respect to British Columbia residents, did any of the defendants breach a statutory duty under the *BPCPA* owed to class members who received the Durom acetabular hip implant in British Columbia and, if so, when and how?

**49**  The plaintiffs submit that a threshold issue in any medical products case is whether the product can cause injury to anyone. The plaintiffs' expert, Dr. Mahomed, opines that "there is clear concern about the clinical performance of the [Durom Cup] in the clinical situation" and says that reported failure rates "are quite concerning" or "far in excess of what would be expected of an average hip replacement."

**50**  The defendants say, in effect, that there are a multitude of individual issues and that a determination of what necessitated Mr. Jones' and Ms. Wilkinson's revision surgery will not mean success for all class members. They say that the issue of causation must be determined on a patient-by-patient basis with a review of the evidence on each of the individualized factors identified by their expert, Dr. Belzile.

**51**  The plaintiffs argue that it is not the number of individual issues alleged by the defendants but rather the relative importance of the common issues to the claim as a whole. Relying on *Cloud v. Canada (Attorney General)* [*(2004), 73 O.R. (3d) 401*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B2WK-00000-00&context=) (C.A.), they say that the court must make a qualitative assessment, not a quantitative one.

**52**  The defendants also submit that the plaintiffs have not adduced any evidence to provide some basis in fact for the proposed common issues. In particular, they say the plaintiffs have not produced any evidence of a defect in the Durom Cup or that a common defect necessitated the revision surgeries of the plaintiffs. The defendants' expert, Dr. Belzile, says that the 33 patients who have undergone revision surgery did so for varied reasons including pain, infection, broken stem, swelling, avascular necrosis, patient request and failure to ingrow. They say the plaintiffs did not produce any records that would prove otherwise. Dr. Belzile opines that a .67% revision rate gives him no cause for concern about the use and safety of the Durom Cup in Canada. Unlike Dr. Mahomed, Dr. Belzile does not consider the revision rate to be inordinately high or alarming.

**53**  I am satisfied that the evidentiary burden in relation to this issue has been satisfied by the plaintiffs in this case. It is not an onerous burden. They have shown some basis in fact for the presence of a common issue; namely, whether the Durom Cup was defective and/or unfit for its intended use. The evidence of the revision surgery required by the two plaintiffs and Ms. McSherry, among others, raises the question of the cause of the failure of the Durom Cup to attach itself to the bone or what is described as the "lack of ingrowth." The evidence is that there have been at least 33 cases of Durom Cup failure in Canada and it also appears that not all instances of Durom Cup failure in Canada have been reported to the defendants. As an example, it appears that Dennis Jones' Durom Cup failure and revision surgery were not reported to the defendants. Furthermore, the number of suspected product failures in Canada provided by the defendants does not correspond with the experience in the United States and Europe, although the clinical design and recommendations for use of the Durom Cup are materially the same in all jurisdictions. The evidence is that the defendants suspended the marketing and distribution of the Durom Cup in the United States on July 22, 2008, because of elevated revision rates and determined that additional surgical technique instructions and training were necessary. Similar events occurred in Europe, resulting in an Urgent Safety Notice regarding implant failure being issued on October 13, 2009. On November 9, 2009, the Field Safety Notification and letter to surgeons, referred to earlier in these reasons, was issued by the defendants in Canada.

**54**  In describing the reports of revision surgery, the receipt of which presumably prompted the defendants to write to the Health Product and Food Branch Inspectorate of Health Canada, Zimmer Canada said in the Urgent Safety Notice that "the most probable root cause for the reported revisions is using a surgical technique which differs from that prescribed in the surgical technique for the Durom Acetabular Cup." Clearly this notice still leaves the actual cause to be determined. It is also clear from these notices that surgical techniques then being used needed to be reviewed as they appear to have been defective.

**55**  Based on the definition of "recall" in s. 1 of the *Medical Devices Regulations*, [*S.O.R./98-282*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W3Y-TSR1-FC6N-X0HD-00000-00&context=) (enacted pursuant to the *Food and Drugs Act*, [*R.S.C. 1985, c. F-27*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9X1-JN6B-S1KB-00000-00&context=)), it is apparent that Zimmer's warning letter to surgeons amounted to a recall. I agree with the plaintiffs that there is a clear concern about the performance of the Durom Cup in clinical situations.

**56**  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 paras. 42-46 (leave to appeal ref'd [*[2001] S.C.C.A. No. 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-K054-G4BN-00000-00&context=)), a majority of the Court of Appeal described the steps in a products liability case as follows:

[42] At the risk of oversimplifying a complex decision-path, I venture to suggest 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. Some American authorities refer to this step as "general causation", whether a product is capable of causing the harm alleged in its ordinary use.

[43] The second step is the assessment of the state of the manufacturer's knowledge of the dangerousness of its product to determine whether the manufacturer's duty was not to manufacture and distribute, or to distribute only with an appropriate warning. It may be prudent to refer to this as an assessment of the state of the art; it may be that a manufacturer did not but should have known of its product's propensity for harm.

[44] In my view, these two steps are the "risk assessment" Mr. Justice Mackenzie permitted to be undertaken as a part of what he saw as a multi-staged proceeding.

[45] If the value of the product's use outweighed its propensity to injure such that distribution with a warning was appropriate, the third step will be an assessment of the reasonableness of the warning (whether direct or by a learned intermediary) given the state of the art and the extent of the risks inherent in the product's use.

[46] The final step will be the determination of individual causation and damages. The difficult question will be whether the individual's knowledge of the risks would have prevented the injury. If the product should not have been manufactured or distributed, the determination of whether the product caused the injuries to the individual seeking damages and the assessment of those damages will be the last step.

**57**  This so-called bifurcated process was commented upon by Thomas J. of the Alberta Court of Queen's Bench in *T.L. v. Albert (Child, Youth and Family Enhancement Act, Director)*, [*2010 ABQB 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93C1-JSJC-X54M-00000-00&context=), where he said at para. 16:

... In this case, the class proceeding is still at its first stage and as such, the relevance and materiality of the records ought to be determined by reference to the common issues. ... In order to preserve the goals of access to justice and judicial economy, it is imperative to respect the bifurcated process and to not confuse the common issues at the first stage with matters that are best left to the determination of any outstanding individual issues at the second stage.

**58**  It is also important to remember that at the certification stage the injured plaintiffs have had no discovery of the defendants.

**59**  As the Ontario Superior Court noted in *Lambert v. Guidant Corporation*, [*[2009] O.J. No. 1910*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF71-JWR6-S456-00000-00&context=), [*2009 CanLII 23379*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF71-JWR6-S456-00000-00&context=) (Ont. S.C.J.) at para. 65:

... At this stage of the proceeding, however, the plaintiffs are, in my opinion, entitled to treat as in issue facts relating to the defendants' conduct that are exclusively within their knowledge and may bear directly on the resolution of the claims against them. Such an approach is, I believe, necessary to reconcile the rule that certification motions are not tests of the merits of a proceeding with the undoubted fact that evidence that bears on the merits can also be relevant to requirements for certification such as the existence of a class with claims that raise common issues, and the manageability of the litigation.

**60**  Without discovering the various aspects of the design and intended function of the Durom Cup, it is difficult to see how the plaintiffs could present any more evidence than they have done at this Chambers hearing in support of their allegation that the Durom Cup was defective. Where the product is, like the Durom Cup, a highly technical medical device, it would not be expected that without access to what is likely proprietary information of the defendants regarding that device the plaintiffs would be in a position to present evidence of a defect in the device.

**61**  I am also concerned that in support of their position that there is an "evidentiary vacuum," the defendants have stated in their submissions that the product has never been recalled or the subject of any action by Health Canada. That assertion does not appear to be supported by the evidence before me.

**62**  It appears that the action of the defendants in sending out a warning letter regarding the Durom Cup amounted to a recall under s. 1 of the *Medical Devices Regulations*, and that Health Canada included a description of the problem in the publicly-issued recall list referred to earlier in these reasons.

**63**  Although the parties have filed conflicting expert reports, as stated by my brother, Butler J., in *Chalmers v. AMO Canada Company*, [*2009 BCSC 689*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2FN-00000-00&context=) at para. 17, aff'd [*2010 BCCA 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4KC-00000-00&context=), at this stage of these proceedings I do not need to resolve conflicting expert opinions because this is not a determination of the merits.

**64**  As stated by the Court of Appeal in *Campbell v. Flexwatt Corp*. at para. 53, "the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward."

**65**  In my view, the determination of whether the Durom Cup was defective or unfit for its intended use is common to all those Canadians who received an implant of a Durom Cup. There is evidence that at least 33 residents of Canada reported problems with the Durom Cup. Furthermore, at this stage a determination of this issue will move this litigation along.

**66**  The second common issue proposed is, "Did any of the Defendants breach a duty of care owed to class members and if so, when and how?" I accept that this is a threshold question common to all class members and does not depend on the evidence of individual class members. As stated in *Wheadon v. Bayer Inc*., [*2004 NLSCTD 72*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8W1-F2F4-G16W-00000-00&context=) at para. 133:

133 The issue of breach of a duty has been repeatedly certified in product liability class actions. It is an appropriate common issue because it focuses upon the Defendant's knowledge and conduct, can be resolved without the participation of class members, and, depending on its resolution, will either advance or dispose of their claims ...

**67**  This issue will also involve consideration of the defendants' duty to inform regarding deficiencies in the surgical technique originally recommended by them as soon as that was discovered by them.

**68**  The next common issue proposed is whether the defendants' conduct warrants an award of punitive damages, and, if so, to whom should they be paid and in what amount?

**69**  The plaintiffs have pleaded that the defendants acted with reckless disregard for public safety, that their conduct was reprehensible, and that their conduct departed to a marked degree from ordinary standards of decent behaviour or that their conduct was markedly worse than ***negligence***. They say that if such allegations are proven at trial, they support a claim for punitive damages. They also say that the certification of punitive damages as a common issue is consistent with other certified class actions where claims have been advanced in relation to defective medical devices. The plaintiffs say that punitive damages can be awarded without evidence from individual class members.

**70**  The plaintiffs refer to a discussion of the issue of punitive damages by Mackenzie J.A. in *Rumley 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 paras. 48 and 49, aff'd [*2001 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M486-00000-00&context=), [*[2001] 3 S.C.R. 184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M486-00000-00&context=) at para. 34:

[48] ... The purpose of punitive damages is to punish a morally culpable defendant: .. .The plaintiffs' pleading alleges conduct that if substantiated could be characterized as morally culpable. Any award for punitive damages should reflect the overall culpability of the defendant. It does not have to be linked to the harm caused to any particular claimant and does not require individualized assessment. A global award can be assessed for the successful class members as a group, and allocated among them as the trial judge considers appropriate. The plaintiffs would be required to succeed on a common issue related to sexual abuse as well as proving moral culpability to establish a foundation for punitive damages.

[49] As compensatory damages also punish the defendant indirectly, any award for punitive damages should take into account the quantum of compensatory damages awarded. In the context of a class proceeding, that suggests that the assessment of any award for punitive damages should be deferred until the total amount of compensatory damages has been assessed.

**71**  The defendants argue that punitive damages cannot be a common issue where there is no underlying common issue in relation to the plaintiffs' substantive claims. As I have found there to be underlying common issues relating to the plaintiffs' substantive claims, I reject this argument.

**72**  The defendants also say that punitive damages are not always amenable to certification as a common issue in product liability cases. They referred the Court to *Robinson v. Medtronic Inc.*, [*[2009] O.J. No. 4366*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF81-F22N-X1RR-00000-00&context=), [*2009 CanLII 56746*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF81-F22N-X1RR-00000-00&context=) (Ont. S.C.J.), where the issue of punitive damages was not certified. Mr. Justice Perell distinguished *Rumley v. British Columbia* and held that, in the case before him, entitlement to punitive damages could only be resolved after determination of both the common issues and the individual trials on causation and damages.

**73**  In *Chalmers v. AMO Canada Company*, our Court of Appeal said at para. 31:

[31] Although the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, it does not follow, in my opinion, that no aspect of the claim of punitive damages should be certified as a common issue. It is my view that the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the trial in this proceeding where the other common issues will be determined. The focus will be upon the defendants' conduct, and there is nothing in this case that will require a consideration of the individual circumstances of the class members in order to determine whether the defendants' conduct is deserving of punishment. The ultimate decision of whether punitive damages should be awarded, and the quantification of them, can be tried as a common issue following the completion of the individual trials.

**74**  In my view, those comments of the Court of Appeal are applicable to the case at bar. In this case, I have concluded that punitive damages are an appropriate common issue.

**75**  The next proposed common issue is whether any of the defendants breached a statutory duty under the *BPCPA* owed to class members who received the Durom acetabular hip implant in British Columbia and, if so, when and how.

**76**  This issue arises from the statutory cause of action under the *BPCPA*. This claim is only applicable to class members who received the Durom Cup in British Columbia.

**77**  The defendants say that the plaintiffs have not presented any evidence that any representations were ever made to the plaintiffs or any other potential class member regarding the Durom Cup, or that any potential class member was even aware of the alleged representations, or that anyone suffered loss or damage as a result.

**78**  The plaintiffs argue that the *BPCPA* claim addresses conduct and representations directed by a supplier to the world at large in the marketing of its products, as opposed to specifically between a supplier and an individual consumer.

**79**  Support for the plaintiffs' position is found in the following passage from *Wakelam v. Johnson & Johnson*, [*2009 BCSC 839*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S08D-00000-00&context=) at para. 39:

... The plaintiff is relying on specialized consumer protection statutes which focus the inquiry on the impact of the representation on the public at large. The question of whether a representation is deceptive or misleading does not, therefore depend on an individual inquiry. The question of deception or no deception is something that can be litigated without reference to the circumstances of the plaintiff or individual class members: ...

**80**  The plaintiffs' claim under this heading is also based on the failure of the defendants to disclose a material fact. The evidence is that the defendants suspended the marketing and distribution of the Durom Cup in the United States on July 22, 2008, because of increased revision rates, and determined that additional surgical instructions were required. On October 13, 2009, an "Urgent Safety Notice" was issued by the defendants in Europe regarding the Durom Cup, again because of increased revisions. For unknown reasons, a "Field Safety Notification" for the Durom Cup was not published until December 7, 2009, with a recall start date of November 15, 2009, based on letters to Health Canada and a list of Canadian Durom Cup users from the defendants on November 9 and 13, 2009. While it is not clear how many residents of Canada experienced a failure of an implanted Durom Cup, the defendants are aware of 33 of them and it remains to be determined how many of those who experienced such failure had undergone an initial implant after the date of the recall in the United States. In my view, a determination of the issue under the *BPCPA* is an appropriate common issue.

**81**  While it is not essential at the certification stage, I am of the view that the common issues predominate over issues affecting only individual members. Certification may still be appropriate where threshold issues, such as whether the Durom Cup was defective, can be decided as common issues with common evidence. It is to be expected that there may be individual issues of specific causation and damages that will have to be decided following a determination of the common issues.

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

**82**  The next question, under s. 4(1)(d) of the *Act*, is whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. In considering that question, this Court must consider all relevant matters including the factors enumerated in s. 4(2) of the *Act*.

**83**  As my sister, Dardi J., said in *Koubi v. Mazda Canada Inc.*, [*2010 BCSC 650*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-6322-00000-00&context=) at para. 171, citing *Hollick v. Toronto (City)* at para. 15:

... No single factor is determinative. The "preferability" inquiry should be conducted through the lens of the three principle procedural advantages of class actions: judicial economy, access to justice and behavioural modification: ...

**84**  The plaintiffs say that each of these objectives would be achieved by the certification of this case. Judicial economy is advanced by avoiding the need for multiple proceedings, in this case potentially 33 or more; access to justice is enhanced by enabling the fixed costs of this litigation to be shared among class members, and behaviour modification is advanced by way of a tort claim to encourage product safety.

**85**  The plaintiffs cite a number of case authorities to show that the vast majority of medical products class actions brought in Canada have been certified. They submit that this reflects a strong judicial consensus that certification is the best way to manage this type of litigation.

**86**  The plaintiffs also refer to proceedings in the United States where the U.S. Judicial Panel on Multidistrict Litigation found that the centralization of Durom Cup litigation, a procedure which they say is similar to the trial of common issues in a class action, would "eliminate duplicative discovery, prevent inconsistent pretrial rulings on discovery and other issues, and conserve the resources of the parties, their counsel and the judiciary": see *Re: Zimmer Durom Hip Cup Product Liability Litigation*, MDL No. 2158 (9 June 2010) U.S.J.P.M.L. at p. 2. The defendants say that the U.S. Court has since ordered the parties to mediate their claims on a case-by-case basis.

**87**  The defendants also say that the substantial individual elements of the causes of action would yield a proceeding that is too unwieldy to manage fairly and efficiently. Referring to *Abdool v. Anaheim Management Ltd*. [*(1993), 15 O.R. (3d) 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X1NS-00000-00&context=) at 49 and 51 (G.D.), they say that a scrupulous and effective screening of class proceedings is imperative so that the quest for cost effectiveness does not sacrifice the ultimate goal of a just determination to the altar of expediency.

**88**  The defendants argue that the individual issues predominate over common issues, that resolution of the common issues would not end the cases, and that the circumstances of each patient would have to be considered to determine why they each required revision surgery. As I have said, however, the resolution of the common issues of whether the Durom Cup was defective and the duty of the defendants to inform surgeons as to the technique required to implant this device and to warn that there are some dangers associated with the implantation will advance the litigation. If those issues are decided in favour of the plaintiffs, while some individual causes may have to be considered, they will be significantly subordinated to the common ones. On the other hand, if the common issues are resolved in favour of the defendants, that could well bring the class proceedings to an end.

**89**  The defendants say that there is only a small number of claims relating to revisions of the Durom Cup and there is no evidence that a class proceeding will enhance judicial economy. In my view, if there are 33 potential claims, judicial economy will be enhanced by a class proceeding, when compared to 33 separate proceedings to determine what I have found to be common issues.

**90**  The defendants argue that there is no evidence that the individual plaintiffs cannot afford to litigate their claims. While I do not accept that affordability of the litigation is something that the plaintiffs have to address, it seems to me that individual plaintiffs could probably proceed with their separate claims on a contingency basis but that would not serve to enhance judicial economy. Rather, it would potentially increase the number of proceedings, increase the costs and add to the backlog in the courts.

**91**  In my view, a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. In reaching that conclusion I have considered the factors enumerated in s. 4(2) of the *Act* and the other matters referred to by counsel.

**92**  With reference to s. 4(2)(c), the plaintiffs inform the Court that when this proceeding was commenced it was the only proposed class action against the defendants with respect to the Durom Cup in Canada. Two class actions were subsequently filed in Ontario; one by the plaintiffs' solicitors on August 10, 2010, and one by another law firm on October 27, 2010. The plaintiffs submit that in the interests of judicial economy, this action should be certified on a national basis.

**Is there an Appropriate Representative Plaintiff?**

**93**  It is also necessary to determine that there is a representative plaintiff who would fairly and adequately represent the interests of the class; 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 does not have, on the common issues, an interest that is in conflict with the interests of other class members.

**94**  The defendants do not question that there is a representative plaintiff who would fairly and adequately represent the interests of the class.

**95**  The defendants say, however, that there is no workable plan for this proceeding. They say that the plaintiffs' proposed plan is no more than a boilerplate plan that offers no substance and fails to acknowledge or tackle the complexities of this case.

**96**  Subject to my comments regarding the costs of notice, in my view the plaintiffs have proposed a reasonable litigation plan. As the plaintiffs say, it need not be perfect, and it is invariably a work in progress which changes as the litigation proceeds. Importantly, the litigation plan proposed by the plaintiffs is based on litigation plans that have been approved by this court in other certified class actions: *Fakhri v. Alfalfa's Canada Inc.*, [*2003 BCSC 1717*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0NK-00000-00&context=); *Ruddell v. B.C. Rail Ltd.*, [*2005 BCSC 1504*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B29D-00000-00&context=); *Lieberman and Morris v. Business Development Bank of Canada*, [*2006 BCSC 242*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23G9-00000-00&context=); *Chalmers v. AMO Canada Company*; and *MacKinnon v. National Money Mart Company*, [*2007 BCSC 348*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S482-00000-00&context=).

**Conclusion**

**97**  For the reasons given, this action is certified as a class proceeding.

**98**  The class members shall be all persons who were implanted with the Durom acetabular hip implant in Canada.

**99**  The common issues proposed by the plaintiffs are suitable for certification under the *Act* for residents of British Columbia. The common issues, other than the issue under the *BPCPA*, are also certified for non-residents of British Columbia.

**100**  While either plaintiff is suitable, the representative plaintiff shall be Susan Wilkinson.

**101**  The parties shall speak to the issue of costs of the plan for notice and to that end may arrange with trial scheduling to attend before me for one hour.

T.W. BOWDEN J.

**End of Document**

[***Kedia International Inc. v. Royal Bank of Canada, [2008] B.C.J. No. 157***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1FS-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

M.E. Boyd J.

Heard: May 8-11, 14-18, 28-31, June 1, 4-8, 11-15,

18-22, 25-29, August 21-22, 24, September 4, 7, 10-12,

19, 24-22, October 22-26, November 29, December 4-5

and 7, 2007.

Judgment: January 31, 2008.

Docket: S002285

Registry: Vancouver

**[2008] B.C.J. No. 157** | 2008 BCSC 122 | 165 A.C.W.S. (3d) 307

Between Kedia International Inc., GMC Manufacturing Ltd. and Mohan Kedia, Plaintiffs, and Royal Bank of Canada and Wolrige Mahon Limited, Defendants, and Kedia International Inc., Defendant by Counterclaim

(241 paras.)

**Case Summary**

**Commercial law — Banking — Accounts — Financial institutions — Banks — Liability to customers — Loans — Secured loans — Action by the plaintiffs dismissed — The plaintiffs claimed damages for breach of contract and breach of fiduciary duty for the alleged improper administration of a gold bullion trading account by the defendant bank — The court found no evidence of a fiduciary relationship given the plaintiffs' sophistication and lack of vulnerability — The bank did not breach any express or implied term requiring it not to create an overdraft in the trading account — Security agreements were validly entered, and the realization of the security thereto was proper — The bank's counterclaim was allowed.**

**Tort law — Duress — To person — Action by the plaintiffs dismissed — The plaintiff sought damages under the Family Compensation Act — The plaintiffs said that the defendant bank's accusations of cheque kiting and money laundering constituted a deliberate infliction of mental distress that resulted in their son's suicide — The court found that it was not proven that the son's death was a suicide, nor was caused by the conduct of the bank's employees or agents.**

**Bills of exchange — Bills, cheques and notes — Holders in due course — Counterclaim by defendant bank allowed — The bank counterclaimed for the amount of two cheques drawn on the plaintiffs' account for which there were insufficient funds and deposited in a related account — The court found that the bank was a holder in due course and gave value in good faith.**

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| --- |
| Action by the plaintiffs, Kedia International, GMC Manufacturing and Kedia against the defendants, Royal Bank of Canada (RBC) and Wolrige Mahon, for damages for breach of contract and breach of fiduciary duty, and for damages under the Family Compensation Act -- The plaintiffs alleged that RBC failed to properly administer Kedia International's gold bullion trading account with the result that an overdraft developed -- The plaintiffs claimed that RBC forced Kedia to sign certain invalid security documents on behalf of the plaintiffs -- The plaintiffs claimed that Wolrige Mahon improperly realized the security on behalf of RBC -- The plaintiffs sought damages of $130 million from the alleged ruination of their businesses by the defendants -- The Family Compensation Act claim related to Kedia's son -- At the time of the overdraft, the son deposited cheques drawn on Kedia International for which there were insufficient funds -- The plaintiffs said that the bank's accusations of cheque kiting and money laundering constituted a deliberate infliction of mental distress that resulted in the son's suicide -- RBC denied the allegations and counterclaimed for the overdraft owed by Kedia International, and for the balance owed on the cheques written by the son -- HELD: Action dismissed and counterclaim allowed -- There was no express or implied positive covenant whereby RBC agreed it would not act in a manner to create an overdraft in the gold bullion account -- The parties' prior dealings and the documentation evidenced otherwise -- There was no evidence to support a finding of a fiduciary relationship, as there was no evidence of vulnerability or reliance given Kedia's assertion that he was an experienced sophisticated businessman -- The security documents were valid and enforceable and security was properly realized, as there was no evidence to substantiate misrepresentations by RBC prior to execution -- There was no evidence to substantiate the allegation that RBC debited the plaintiffs' accounts without authorization -- It was not proven that the son's death was a suicide, nor was caused by the conduct of RBC's employees or agents -- RBC's overdraft claim was itemized and allowed in the amount of $198,154 -- The claim for the bounced cheques was allowed under the Bills of Exchange Act, as RBC was a holder in due course and gave value in good faith. |

**Statutes, Regulations and Rules Cited:**

Bills of Exchange Act, [*R.S.C. 1985, c. B-4, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BB61-JFDC-X29R-00000-00&context=)[*, s. 55(1)*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BB71-FJM6-60KJ-00000-00&context=)[*, s. 73*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BB81-DYMS-61JH-00000-00&context=)[*, s. 94(1), s. 94(2)*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BB81-DYMS-61VV-00000-00&context=)[*, s. 105(1), s. 105(1)(b)*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BB81-DYMS-6218-00000-00&context=)[*, s. 129*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BBD1-JF75-M1K1-00000-00&context=)[*, s. 133*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BBD1-JF75-M1MK-00000-00&context=)[*, s. 165(3)*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BBF1-F8KH-X253-00000-00&context=)

Family Compensation Act

**Counsel**

Plaintiff acting on his own behalf: M. Kedia.

Counsel for the Plaintiff (on limited retainer on Adjournment Application - August 24, 2007 and Closing Submissions - December 4, 2007): P. Formby.

Counsel for the Royal Bank of Canada and Wolrige Mahon: M.D. Andrews, Q.C., J. Francis and M.D. Parrish.

**Reasons for Judgment**

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| **M.E. BOYD J.** |

**Introduction:**

**1**  The plaintiff's action involves two related yet entirely separate claims for damages. By way of Counterclaim, the Royal Bank of Canada ("RBC") advanced two separate claims for debt against the plaintiffs/defendants by Counterclaim.

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| **1.0** | **Overview of Claims:** |  |

**Plaintiffs' Claims:**

**2**  The first claim is a commercial dispute in which the plaintiffs, Mohan Kedia ("Kedia"), Kedia International Inc. ("KII") and GMC Manufacturing Ltd. ("GMC") seek damages of approximately $130,000,000 arising from the RBC's alleged destruction of the KII and GMC businesses. By virtue of the RBC's alleged breach of contract and breach of fiduciary duty, the plaintiffs say KII's gold bullion trading account was not properly administered by the bank with the result that an overdraft was allowed to develop in KII's accounts. They say the bank forced Kedia to sign certain security documents, both personally and on behalf of both KII and GMC, which security was later improperly realized upon by the bank's agent, Wolrige Mahon. The plaintiffs also seek damages from Wolrige Mahon arising from that firm's alleged wrongful seizure of assets pursuant to the terms of what they characterize as invalid security instruments.

**3**  The second claim, brought under the ***Families Compensation Act***, is related to the first. At approximately the same time the KII overdraft developed, Kedia's son, Viki Kedia ("Viki"), deposited two KII cheques (for which there were insufficient funds in the KII account) into the account of a related company, Goldrich Trading Ltd. ("Goldrich") and then drew out an equivalent amount in cash from the Goldrich account. The plaintiffs say the bank pressured Viki to explain what had happened to the funds and how the shortfall in the Goldrich account would be addressed. They say the bank accused Viki of cheque kiting and money laundering and threatened him with criminal prosecution and jail. All the while they say the bank failed to respond to KII's requests for production of any documentation to assist in allowing the company to first understand and then to resolve the overdraft. They say that in response to the bank's deliberate infliction of mental distress, Viki Kedia ultimately became depressed and committed suicide.

**4**  Kedia says his intention is to deposit any of the damages recovered to the credit of the Viki Kedia Legal Aid Foundation - a society he established to help create a network of lawyers and jurists devoted to exploring ways and means of enabling persons with insufficient resources but meritorious civil claims to pursue their claims in the Canadian legal system.

**RBC Counterclaims:**

**5**  First, the RBC has mounted a counterclaim for the sum of $198,154.42, being the current amount of the KII overdraft, following a number of payments and adjusting entries to the KII Gold Bullion Account. The bank seeks judgment in that amount, together with Court Order Interest and costs.

**6**  Further, the bank claims the sum of $300,000, being the amount of the KII cheques which were written on the RBC account, deposited to the Goldrich account, and then drawn out as cash, thus resulting in an overdraft in the Goldrich account. A subsequent bank chargeback reduced that overdraft to the net sum of $244,055.57, which the bank now seeks to recover, together with Court Order Interest and costs.

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| **2.0** | **Credibility:** |  |

**7**  Before summarizing the facts which I have found arising from the evidence, I must make some general comments concerning Kedia's credibility. While there is a large volume of documentary evidence at hand, most of Kedia's allegations are based on his version of his interactions with various bank representatives. Accordingly, his credibility is central to the success of many of the claims at hand.

**8**  I do not intend to itemize each instance in which I have found his credibility wanting. Suffice it to say this lengthy trial was filled with countless instances in which Kedia either provided his own evidence (both in direct and cross examination) or put propositions to witnesses - much of which was in direct conflict with his own evidence on discovery, or at trial, or the statements which he had made in earlier correspondence directed to either the bank or his legal counsel or other third parties.

**9**  While I initially attributed some of these conflicts to potential language difficulties on his part, I eventually came to appreciate that despite his heavy accent and dialect, Kedia has no difficulty understanding and appreciating the nuances of the evidence or the Court proceedings. I found him to be a most intelligent, wily party who, moment by moment, crafted his narrative or his position to gain the best tactical, legal advantage. While he was generally respectful, he was nonetheless a difficult personality throughout the proceedings, often ignoring Court Orders and apparently having little respect for the Rules and general procedures of the Court, wherever they obstructed his goals.

**10**  While there are many examples which could be drawn from the proceedings, I will recount but one, since in my view it is the quintessential example of the lengths to which Kedia is prepared to go in accomplishing his mission here.

**11**  As I will note later in my findings of fact, Kedia first retained a Mr. Dale Pope ("Pope"), then of the firm of Singleton Urquhart, in an attempt to resolve his dispute with the bank. Kedia called Pope as a witness in his case, presumably to support his allegations that the bank had accused his son of fraud, that the clearance of those accusations was at the heart of Kedia's initial legal efforts, and that ultimately, it was those same threats and accusations which drove his son to commit suicide.

**12**  Pope, like every other lawyer who has represented Kedia (other than Mr. Matthews and Mr. Formby) has been the subject of Kedia's complaints to the Law Society of British Columbia and has also been joined as a defendant in a separate action in which Kedia claims he is guilty of professional ***negligence***. Since Pope's office file concerning Kedia had been handed over to Kedia some years earlier, he had had no access to any of his notes in preparing for trial, but for a few letters which Kedia had attached to his own earlier affidavits in the proceedings.

**13**  While I will not review his evidence here, Pope denied the thrust of Kedia's allegations, both in his evidence in chief and under cross examination by the bank.

**14**  Sometime after Pope had left the witness box, Kedia told the Court that he had now completed a proper comprehensive search of his apartment and had found Pope's office file (a statement I do not accept). He told the Court that he could now prove Pope, like a number of other witnesses, had lied to the Court and he sought leave to recall Pope to the witness stand to cross examine him, now with the file documents before him.

**15**  I decided that in order to determine whether to exercise my discretion in Kedia's favour and allow for the recalling of the witness, I would first have to hear Kedia provide this evidence under oath, since he had filed no affidavit in support of his allegations. From the witness box, Kedia testified that after reviewing the contents of Pope's file he had contacted Pope and on two occasions had arranged to meet him outside the Courtroom. On the second occasion, he said that on reviewing his file notes, Pope told him he could now recall that the focus of the initial retainer meeting was indeed the bank's allegations of fraud and not the overdraft. He was also now able to recall at least some of the details of the initial meeting with the bank's lawyer. However, Kedia testified that Pope stopped short of admitting his total recollection of that meeting and instead began what he described as a negotiation. He says Pope told him that if Kedia withdrew his professional ***negligence*** action against him he would "recall everything".

**16**  With this evidence before the Court, I acceded to Kedia's application and Pope was recalled as a witness. Although called in the plaintiff's case, he testified that a review of his complete file notes did not significantly change his earlier testimony. He vehemently denied making the statements which Kedia alleged, including attempting to negotiate a withdrawal of the solicitor's ***negligence*** action in consideration of his agreement to provide truthful evidence to the Court. As I say later in my findings of fact, I do not question Pope's credibility. His evidence is entirely supported by the documentary evidence and is corroborated by the evidence of the bank's lawyer with whom he dealt, Mr. Jeff Poulsen ("Poulsen").

**17**  In my view, Kedia's decision to recall Mr. Pope to the stand - in the context of an alleged discovery of lost documents and an allegation of Pope's admission that he would tell the truth if Kedia withdrew his lawsuit - demonstrates the lengths to which he is prepared to go and the ludicrousness of the statements he is prepared to make in achieving his means.

**18**  In the end result, I must state that I place no weight whatever on Kedia's evidence wherever his evidence conflicts with that of other witnesses or other documents, unless that evidence is otherwise corroborated.

**19**  I am at a loss to understand the root of the problem here. This may be a case of a grief-stricken father who has lost all objectivity or judgment in his desire to seek vindication for his son's death. Perhaps it is the case of a guilt-ridden father who believes he may be personally responsible in some way for his son's death, yet remains fixed on shifting the responsibility elsewhere. Perhaps this is simply the case of an individual with some deep-set personality disorder who has had the time and resources to pursue the never ending rounds of this hopeless litigation. Whatever the case, my sympathy for his terrible loss cannot militate an outcome in his favour.

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| **3.0** | **Facts:** |  |

**20**  Kedia is 58 years of age. He was born and raised in India. He testified that for several generations his family has been involved in the diamond and precious and semi-precious gemstones business in India. He left school at an early age to join his father in business. He eventually set out on his own and by the early 1990's he had received permission from the Indian Government to open a jewellery factory in the free trade zone in Bombay, India. The factory, which operated with a workforce of approximately 120 people, began full-scale production in approximately 1990. Kedia's daughter, Dimple Jain, and his wife, Mrs. Kedia, oversaw the factory operations, while Kedia and his son Viki travelled, establishing contacts, and arranging sales. Labour problems developed at the factory, ultimately resulting in a strike. By the spring of 1996, Kedia decided to close the factory.

**21**  In May 1996, Kedia's wife was murdered at home. The murder remained unsolved.

**22**  Distressed by the loss of his wife, Kedia isolated himself at the local Hari Krishna Temple but was eventually persuaded by family members to resume his business efforts for the sake of his son. Unable to reconcile himself with living in India, he went to North America to explore business opportunities and to find a proper venue to establish a business for Viki to oversee and operate. He and Viki travelled first to New York, then to Toronto, and ultimately settled in Vancouver in 1996. While Viki's application for a work permit was granted, Kedia never pursued such an application. He apparently entered Canada on a Visitor's Visa and since 1996 he has never taken any steps to pursue an application for landed immigrant status.

**23**  At approximately this time, Kedia incorporated the corporate plaintiff, KII, in Ontario for the purpose of buying and selling gold. (The company was later incorporated in British Columbia as well). He also incorporated a second company, GMC Manufacturing Ltd. ("GMC"). While operating as a subsidiary of KII, GMC was formed for the purpose of manufacturing 24kt, 22kt and 18kt gold and silver jewellery. Kedia's business plan was to establish a manufacturing plant in Vancouver and to eventually sell the jewellery to the public through various jewellery retailers and wholesalers.

**24**  Kedia was the directing mind of both KII and GMC. He was an officer and director of both KII and GMC. Viki was a director and officer of GMC and an officer of KII. At trial, Kedia admitted that Viki had his full authority to transact business on behalf of both companies. Ultimately, it was Kedia's plan to withdraw from the operation, leaving Viki to single-handedly run the GMC business.

**25**  In October 1996, KII opened a bank account at the RBC Fraser & 49th Street branch in Vancouver (the "Fraser branch"). At the same time, KII began gold trading with the RBC Precious Metals Department in Toronto, a division of the RBC ("Precious Metals"). KII would purchase gold from Precious Metals for physical delivery to an authorized representative who would pick up the gold at an RBC branch.

**26**  Initially KII's operations were limited to Vancouver and Toronto. However in February 1997, Kedia, on behalf of KII, asked that the bank establish facilities so that KII could take delivery of gold in New York. The bank agreed and made arrangements for gold to be delivered through the JP Morgan Bank in New York.

**27**  Having established this facility, KII began to do business in New York through its agent, Mr. Vinit Bora ("Bora"). (Although Bora had no previous experience in gold bullion trading, he had succeeded in convincing Kedia to fund the establishment of a KII office in New York, it being understood that Kedia would make the initial capital investment, lease an office in New York and arrange for the supply of gold, through RBC. Bora would remain on probation for a period and then begin to contribute to the capitalization of the business.) Bora would attend at the JP Morgan branch to pick up gold on behalf of KII, sell the gold to local jewellers, and then deposit the proceeds of sale to the KII account at Midland Marine bank. Sometimes Bora sold the gold and then deposited the funds to cover KII's purchase. At other times, arrangements were made for the deposit of the purchase funds to be made in advance. Kedia described it as a "running business".

**28**  This situation continued without incident until May 1997 when Bora telephoned Kedia to advise that $10,000 had gone missing from the New York office safe. He said Bora confessed the money had either been stolen from the office safe or that he (Bora) had made an accounting error of some kind.

**29**  Although Kedia apparently acceded to Bora's request that he cover the $10,000 loss, he privately viewed Bora's "mistake" as unacceptable and thereafter lost confidence in him. Whether he lost confidence in Bora's honesty or business acumen or both is not clear.

**30**  Since the GMC jewellery manufacturing business was not yet operating in Vancouver and gold bullion sales in Vancouver were modest, he decided to send Viki to New York, both to sort out the issue of the missing funds and to generally keep control of the New York operations. While he expected Viki would "take charge" from Bora, he also considered Bora to assume a quasi-parental role vis-à-vis Viki and thus responsible for supervising him around the clock, both at his family home and at the office.

**31**  In the months which followed, Viki and Bora worked together in KII's New York business. They soon grew impatient with the KII's established pattern of delivering some 10-20 kilos of gold daily and requested that Kedia arrange a larger supply. Kedia said he could not deliver any greater quantity of gold. Without his knowledge or consent, Kedia says that Bora and Viki successfully "manipulated" the KII Midland Marine bank account in New York so as to use proceeds from the KII sales (deposited to that account) to fund their own independent gold business. He says they used the KII funds on deposit at the Midland Marine bank to purchase gold which they then independently sold to local New York jewellers.

**32**  Kedia says he did not discover anything was amiss until July 1997 when various cheques which he had written on the Midland Marine bank account bounced. At this point, he estimated some $400,000 to $600,000 had been embezzled from the KII account. He immediately stopped supplying any gold to Viki and Bora. For a period he remained estranged from Viki who continued to conduct business with Bora, albeit without any supply of gold through KII.

**33**  Kedia says he later learned that Bora, who was frustrated and unhappy with Kedia, sought retribution by mistreating Viki, forcing him out of his home and banishing him from the New York KII office.

**34**  In April 1998, Kedia says that in retaliation Viki stole some of Bora's credit cards and other pieces of identification and used them to withdraw $1200(US) from Bora's bank account. Criminal charges were laid against Viki and he was taken into custody by New York police. When Viki contacted Kedia pleading for help, Kedia refused to provide legal assistance or any other help. However, consistent with his future pattern, he called upon his son-in-law, Mr. Ravi Jain ("Jain"), (Dimple's husband) to deal with the matter. He asked him to travel to New York to address the situation and while he was there, to work with Viki to obtain a full accounting of the amounts due to KII.

**35**  By the time Jain arrived in New York, Viki had spent a weekend in jail before being released. Jain testified that while Viki was very upset by the incident, he did not want to discuss the matter with him. He said that on being confronted, Bora denied any wrongdoing in terms of embezzling any KII funds. He insisted that Viki too had taken delivery of gold in New York, thus implying it was Viki who was the guilty party. Faced with Bora's denials and veiled accusations, no access to any JP Morgan documentation, and no constructive assistance from Viki, Jain was unable to accomplish anything by way of an accounting of the missing $400,000-$600,000. (I should note here that in September 1999 KII eventually commenced legal proceedings in New York against Bora.)

**36**  Despite this bleak situation and with Kedia's apparent blessing, Viki and Jain then decided to conduct their own gold business in New York, working though a company which Viki had earlier incorporated, Sona Jewellery. Viki introduced Jain to all his New York contacts and explained the gold bullion business to him. Kedia agreed to purchase gold on their behalf through RBC, with delivery through the Republic National Bank in New York. Viki and Jain continued to work together until June 1998, when Viki moved back to Vancouver. Jain remained behind in New York, now working through his own company, Zevar Incorporated.

**37**  In the interim, on March 10, 1998, Kedia approached Mr. Beau Olmstead ("Olmstead"), KII's new account manager at the Business Banking Division of the RBC in Vancouver, seeking a gold forward trading facility. Specifically KII wished to book forward gold bullion transactions with Precious Metals in Toronto, so as to take advantage of market fluctuations and advanced orders from clients. The bank agreed to provide a gold bullion credit limit to KII to a maximum value of $675,000 for up to a maximum of seven days, meaning that KII could have up to $675,000 worth of transactions outstanding at any one time. The terms of the forward trading facility were reflected in a Forward Trading Facility letter agreement dated March 11, 1998 (Exhibit 229).

**38**  I should note here that while the Forward Trading Facility is described as providing a gold bullion credit limit, it is not a credit facility in the sense the bank was financing KII's purchase of gold. To the contrary, KII had to pay for whatever gold it purchased on the maturity of each forward position.

**39**  In consideration of granting this facility, the bank required that Kedia, on behalf of KII, execute a Cash Collateral agreement over KII's U.S. term deposit of $19,500 as well as a General Security Agreement. The Cash Collateral agreement protected the bank from possible fluctuations in the market in the event KII failed to complete a gold bullion purchase on the maturity of each forward position and the position had to be sold by the bank into the market at a different rate. Kedia signed and returned a copy of the Forward Trading Facility Letter and both security documents. (See Exhibits 27, 230 and 254).

**40**  At the same time as the Gold Forward Credit Limit was established, Kedia attempted to obtain financing for the GMC jewellery manufacturing business. On behalf of GMC, he applied to the bank for a 150kg gold loan, a $700,000 capital loan to finance the purchase of equipment and a $300,000 operation loan.

**41**  In April 1998, while denying Kedia's request for financing, Olmstead advised he would reconsider the possibility of financing some of GMCs equipment needs and a small operating loan once "accountant prepared review' engagement financial statements" regarding both companies and a certified appraisal of GMC's equipment and machinery were provided to the bank (Exhibit 68).

**42**  Ultimately, even after financial statements and an appraisal were provided, Olmstead did not change his view that GMC was not financially solid and lacked sufficient assets to secure any credit facility request. In the interim, Olmstead advised Kedia the bank would be happy to accommodate his gold and foreign exchange needs under the existing arrangements.

**43**  In June 1998, at approximately the time Viki returned to Vancouver, the earlier Forward Trading Facility letter was amended to add a silver option. It permitted KII to book transactions up to seven days in advance, to a maximum value of $675,000 for gold or $337,000 for silver, or a combination of gold and silver.

**44**  At this time, in an effort to assist the company to better manage its accounts, further new accounts were opened and each account was assigned a short name for purposes of identification: the KII Gold Bullion Account, the KII General Account, the KII Forex Account, the KII US Forex account, and finally the KII Canadian Gold Bullion account.

**45**  In the fall of 1998, Kedia moved from Vancouver to Toronto. Viki now assumed major responsibility for the KII-GMC operations in Vancouver. Mr. Jain remained on in New York, trading through his own company, Zevar Inc.

**46**  During this period, the evidence is not at all clear as to precisely how KII's business was operated in Vancouver. Kedia testified that between 1997 and 1999, over six different accountants or bookkeepers worked for KII. He said that each accountant's or bookkeeper's average term of employment was 1-2 months before quitting. This suggests that for considerable periods, there was no accountant or bookkeeping staff working at KII. He admitted that his own management of KII was "not so great" and that no "serious attempt" was made to keep proper accounting records. His position was that in the event of any dispute with a customer, he would simply rely on the bank's documentation to resolve any issues.

**47**  While Kedia nevertheless insisted KII was properly tracking all gold bullion and foreign exchange transactions, he had no knowledge of what specific system was used to do so, nor what documents the staff received from RBC or Precious Metals to confirm the various transactions. None of the various accountants or bookkeepers who were employed by KII were called as witnesses at trial.

**48**  Mr. Jain (who is a university commerce graduate) testified that in the earliest stages of the company's operations, while he was visiting in Vancouver, he attempted to help his father-in-law in the establishment of an accounting system. He installed TALLY, a computer accounting program, in the company's computers and attempted to provide the bookkeeping staff with some instruction regarding the use of the program. He did not know whether the staff subsequently used the program nor the extent to which any books of account were thereafter maintained by KII.

**49**  I should note here that in March 1999, when the bank appointed Barnes & Kissack to review the company's affairs with a view to determining whether the bank was adequately secured, Jain - who was in Vancouver at the time - informed the firm that KII's books of account could not be relied upon since there was insufficient documentation available to prepare any proper current reconciliation of the company's accounts. Nothing akin to a general ledger was available for review. No books of account were available for review either in database form in the computers or in hard copy form.

**50**  While Kedia insisted at trial that his staff had matters under control, he also insisted that the bank failed to provide KII with the documents required to properly track KII's business and in particular its gold bullion transactions. Further he repeatedly insisted that throughout, he had operated on the clear understanding the bank was responsible to monitor his bank accounts and not allow any gold bullion purchases to occur, without first ensuring there were adequate funds in the KII accounts to cover same.

**51**  The general chaos caused by KII's lack of any proper books of account was exacerbated by the many players Kedia allowed to participate in the company's business affairs. While he insisted that Viki had full authority to book gold and operate the KII business, Kedia continued to simultaneously make his own independent gold purchases from Toronto, while he lived there. While there was no set system of communication, he said that Viki usually verbally informed him - either daily or weekly - of any gold purchases he had booked. He did not know how Viki tracked those transactions. While he expected Viki to keep him apprised of his activities, for his own part Kedia did not see the obligation as a reciprocal one. What gold purchases he made was apparently his own business and he had no obligation to report to Viki. It is not clear how or whether Kedia apprised KII's accounting staff of these transactions.

**52**  To further complicate matters, during this period, various KII customers, including Goldrich, were authorized to directly book gold using the KII's trading facility with the RBC. Since the customers objected to the amount the RBC charged for processing deposits to the KII account to cover their purchases, KII eventually opened accounts with other banks - the Khalsa Credit Union and the National Bank of Canada ("NBC") - to accommodate the customers' demands to avoid these charges. The customers' deposits to those accounts would then be transferred to KII's RBC account to cover KII's purchase of the gold.

**53**  Kedia testified that since KII essentially dealt with only four customers - Goldrich, JRS Gold (Chaudry), BMI and Futura - it was a simple matter of keeping track of deliveries to those customers and their deposits to KII's various bank accounts, in payment of each purchase. While he did not know what systems the bookkeepers adopted to do so, he testified that he "controlled most of it in my head". However he admitted that to some degree, the gold bullion business' success depended in large measure on the trust he reposed in his customers (to make the requisite deposit following a delivery) and the trust he reposed in the bank to ensure a proper monitoring of his accounts. He admitted that the business was a difficult business, dependent on thin margins and a constantly moving gold bullion market. He acknowledged the pressure on KII to carefully dovetail purchases and deposits since he usually booked gold purchases in an amount almost to the limit of the cash balance in the KII account. Thus he depended heavily on his customers' timely deposits to avoid the development of overdrafts.

**54**  In effect, Kedia testified he expected the RBC would not process any debit in relation to any gold bullion transaction, without first confirming the debit with him and then confirming there were sufficient funds in the account to cover the purchase.

**55**  I accept Olmstead's evidence the KII account was never operated in such a fashion. To the contrary, over the entire period of the gold trading facility, gold was booked through Precious Metals, a debit slip was produced and like any other instrument, the debit slip was presented to RBC, processed through the clearing center and posted to the KII account. As Kedia himself admitted at discovery and at trial, the credits and debits arising from the gold bullion trades were all reflected on the monthly statement for the account. This system of debiting the account was known and understood by Kedia and properly founded on paragraph 7 of the Financial Services Agreement which reads:

The bank may present and deliver Instruments for payment, clearing, collection, acceptance or otherwise through any bank or other party and in any manner as it deems appropriate. The Bank may also accept and deliver any form of settlement or payment for any Instrument as it deems appropriate.

**56**  Not surprisingly, given the manner in which KII's business was operated and Kedia's admitted pattern of operating to the very limits of the company's cash balance, there were regular problems with the KII account. From time to time, Precious Metals staff (who did not have access to KII's current account information) telephoned Olmstead to confirm the balance in the KII account. Olmstead understood the issue was whether there were sufficient funds in the KII account to cover their gold transactions with KII. In his role as account manager, Olmstead received a "daily excess sheet" for the accounts under his administration, highlighting those transactions which, if processed, would cause accounts to go into an overdraft position, including debits relating to gold transactions. When presented with such items, Olmstead was free to exercise his discretion as the account manager to either bounce the item or process it. As a matter of practice he would usually telephone the customer before deciding on a course of action.

**57**  In the case of KII, Olmstead regularly spoke to Kedia or other members of his staff to deal with such potential overdraft issues. He estimated KII regularly appeared on the "excess sheet" four or five times every couple of weeks. On those occasions, Kedia would beg him to process the items on the strength of his promise to deposit sufficient funds to cover the item. For the most part, Olmstead acceded to his requests.

**58**  It was in this chaotic situation that 24-year-old Viki found himself in control of KII's Vancouver operations in the summer and fall of 1998, while his father settled in Toronto to expand the company's business in Toronto and Montreal.

**59**  Olmstead found that increasingly, KII's transactions appeared on the "daily excess sheet" except that now Kedia was failing to meet his promises to deposit funds to cover overdrafts in a timely manner. In Olmstead's view the situation had now become intolerable.

**60**  On December 17, 1998, Olmstead telephoned Kedia and then faxed a letter to him, advising that the bank was "not prepared to continue accommodating debits to any of (the) accounts which, if cleared, would create an overdraft." He pointed out that a significant portion of the debits to the account were generated by RBCDS Global Markets for KII's foreign exchange transactions. He warned Kedia that the bank's failure to honour such debits might well impair KII's relationship with RBCDS. He reminded him that "management of the credit balances in your accounts to prevent any overdrafts, is your full responsibility". In the event his office was advised that any of the KII accounts were in an overdraft position, he warned Kedia that "your ability to transact directly with RBCDS Global Markets (Treasury) will be cancelled". (Exhibit 47)

**61**  While Kedia arranged for immediate deposit of funds to cover the overdraft on that occasion, further problems arose in January 1999. On reviewing KII's current account history as of January 12, 1999, Olmstead learned that some $656,000 worth of transactions had been closed with Precious Metals. However due to a lack of funds in the KII account, the majority of the transactions had not been processed through the account and remained outstanding. Olmstead's assistant, Marylou Statham, immediately sent a fax to KII imposing a change in procedure and requiring funds to be wired to the KII account, in advance of any transactions being processed (Exhibit 48). Viki forwarded the fax to his father who in turn replied by letter, apologizing to Olmstead for "some mistakes behind my control in our account".

**62**  However even before Kedia's letter of February 1st was received, a series of other events occurred, which together created a "perfect storm" in KII's business and led to the implosion of its relationship with the RBC.

**63**  The events fall into three general categories:

1. Kedia's own deposit and redeposit of the NBC cheques, which created an overdraft in the KII account:
2. Viki's drawing of two KII cheques totalling $300,000 on the KII Forex Account, payable to Goldrich; and
3. KII's accumulation of unpaid gold transactions with Precious Metals totalling approximately $385,000 which remained unpaid.

**64**  While it is difficult, if not impossible, to precisely trace the timing of each of these events, I will at least generally describe each separate "event".

1. NBC cheques and resulting overdraft:

On January 11, 12 and 13, 1999, Kedia wrote three different cheques on KII's account at the NBC: Cheque #19 in the amount of $98,000 drawn on January 11, 1999; Cheque #20 in the amount of $95,000 drawn on January 12, 1999, and Cheque #21 in the amount of $95,600 drawn on January 13, 1999. The cheques were all signed by Kedia and were made payable to KII. They were deposited to the KII General account at RBC on January 12, 13 and 14 respectively.

Immediately prior to the debit of the first NBC cheque (Cheque #19), the balance in the KII account at NBC stood at $13,888.78. Following the debiting of the cheque, KII's NBC account fell into an overdraft position and remained so on January 13 and 14, 1999.

Knowing there were insufficient funds in the NBC account to cover the NBC cheques, Kedia took steps to try to stop the NBC cheques being returned NSF. On January 12, 1999, the same day that Kedia deposited Cheque #19 in the amount of $98,000 to the KII General account at RBC at a Toronto bank machine, Viki drew Cheque #198 in the amount of $95,000 on the KII General account and deposited it to the KII Forex account, from which Kedia wrote Cheque #1013 in the amount of $95,000 and deposited it to the KII's NBC account. Kedia admitted that the reason he transferred $95,000 from RBC to NBC by way of Cheque #1013 on January 12, 1999 was to cover the $98,000 he had transferred from NBC to RBC by way of Cheque #19.

In the end, all of his efforts to avoid the bouncing of the NBC cheques did not work. They were all returned NSF. Cheque #19 in the amount of $98,000 was returned on January 15, 1999. Cheque #20 in the amount of $95,000 was returned on January 18, 1999 and Cheque #21 was returned on January 22, 1999. At the close of business on January 22, 1999, the KII General account at RBC, as a result of these returned items, was overdrawn by $287,417.62 (Exhibit 170, Tab 1, Document 295).

While the overdraft in the KII account created by the return of the NBC cheques was immediately offset by other credit balances in other KII accounts, this series of transactions triggered the appearance of the KII accounts on the "Accumulated High Fluctuation Report" generated by the RBC Fraud Detection Group. In accordance with RBC procedure a Suspect Transaction Report was issued by that Group and reviewed by Olmstead, the responsible account manager. In accordance with the procedure set out in the Suspect Transaction Report, he placed all KII accounts on a deposit only status as of January 25, 1999.

1. The KII/Goldrich Cheques:

Almost on the heels of the bouncing of the last NBC cheques, Viki, on behalf of KII, began to write cheques on the KII Forex account for deposit to the Goldrich account. First on January 19, 1999, on behalf of KII, he drew Cheque #1138 on the Kedia Forex account, in the amount of $150,000 payable to Goldrich. That same day, this time on behalf of Goldrich, he presented Cheque #1138 for deposit to Goldrich's RBC account #100-349-9. Then he drew Cheque #190 on the Goldrich account in the amount of $150,000 payable to cash. He presented the cheque for payment and withdrew the funds.

On January 20, 1999, Cheque #1138 was returned NSF since there were insufficient funds in the KII account to cover the cheque. A credit was posted to the KII Forex account to offset the debit applied when Cheque #1138 was initially processed, reversing any impact of the transaction on the KII Forex account. For the moment, an adjusting entry was processed to RBC's suspended account regarding Goldrich.

Two days later, Viki repeated the process. On January 20, 1999, on behalf of KII, he drew Cheque #1139 in the amount of $150,000 on the Kedia Forex account payable to Goldrich. On January 21st, this time on behalf of Goldrich, he presented the KII cheque for deposit to Goldrich's account #100-340-9. He immediately signed and drew Goldrich's Cheque #191 in the amount of $150,000, payable to cash on the Goldrich account and presented the cheque for payment.

Thus by January 21, 1999, Viki had withdrawn $300,000 in cash from the Goldrich account, for which there were insufficient funds in the account. On January 22, 1999, both the KII Cheques (#1139 and 1138) were returned NSF. Credits were posted to the KII Forex account to offset the debits applied, reversing any impact of the transactions on the KII Forex account.

On the Goldrich side, no adjusting entries were made in the Goldrich account. Instead, adjusting entries were processed to the Branch suspense account.

1. Unpaid Gold Transactions:

On January 27, 1999, just two days after the KII accounts were placed on a "deposit only status", Olmstead was advised that while the $287,000 overdraft in the KII account (caused by the return of the NBC cheques) had been covered, accumulated gold transactions with RBCDS Global markets, totalling $385,360.45 remained unpaid. These transactions had accumulated as a result of him returning debits from Precious Metals when there were insufficient funds in the KII accounts, including some items which, having been re-presented for clearing, were returned NSF a second time.

**65**  On January 29, 1999, while the effect of the return of the NBC cheques was not yet understood and the development of the overdraft in the Goldrich account had not yet been related to KII, Olmstead was clearly aware that the KII account was now completely out of control. That same day he cancelled KII's gold trading privileges as well as any electronic banking privileges. The KII account remained on a deposit only status.

**66**  Olmstead telephoned Kedia in New York and advised him the RBC had retained legal counsel and that he ought to attend at a meeting with the bank's representatives in Vancouver on February 4, 1999 to discuss the situation. Kedia agreed and reassured Olmstead that some $94,000 had already been deposited to the KII account.

**67**  On February 4, 1999, Kedia attended a meeting with the bank's representatives, including Olmstead, Mr. Thompson, Mr. Hodgson, Mr. Lees, and the RBC's legal counsel, Poulsen.

**68**  Kedia has insisted the meeting was called to discuss the dishonouring of the NBC cheques which had created an overdraft in the KII account. He is emphatic the meeting was not called to discuss the overdraft which arose by virtue of $385,000 of unpaid gold transactions. He insisted the bank's officers interrogated him about the NBC cheques and that only when he responded with equal force and anger to these "clerks", did the tone of the meeting change and the bank agree to properly provide him with details of how the overdraft had developed. He says Poulsen told him the bank needed some security in case any further problems were encountered in the future. He says Poulsen reassured him not to worry and to simply sign the security documents presented, which he did.

**69**  As I have noted earlier, I am unable to place any weight on Kedia's version of events where his evidence is in conflict with that of other witnesses and is not corroborated. In this case, Kedia's version of events is completely at odds with the evidence of Mr. Lees, Olmstead and Poulsen. While I accept each of these individual's evidence, Poulsen impressed me as a particularly careful, concise witness. In keeping with his general solicitor's practice he kept detailed handwritten notes as the meeting progressed and he was able to review and rely on those notes in providing his evidence at trial.

**70**  Relying on the evidence of these defence witnesses, I am satisfied that the issue of the NBC cheques, although raised peripherally in the course of the meeting by Kedia, was not the focus of the meeting. Rather the specific focus was the overdraft of some $385,000 in the KII account resulting from KII's gold trading activities and in particular, how the overdraft would be paid back. I find that at no time did Kedia dispute the existence of the overdraft or even question how the overdraft could have developed. He advised the bank's officers of his belief that following various adjustments (i.e. deposit of amounts owing from Goldrich, as well as the application of cash on deposit and credits for minor mistakes by the bank), the overdraft would be reduced to approximately $290,000-$300,000.

**71**  Some considerable time was spent reviewing KII's various accounts receivable with a view to identifying potential sources of repayment.

**72**  While Kedia complained about various banking "clerical errors" which had arisen during the previous six months and some minor service problems, he expressed his overall satisfaction with the bank. There were no complaints about the bank's practices regarding delivery of gold. There was no request for production of documents or accounting and no request that the bank produce copies of all gold bullion transactions so as to verify those transactions.

**73**  Kedia suggested an extension of time for repayment of the overdraft and in response, Olmstead advised that the bank would require security. As Kedia admitted at trial, he told the assembled group he "would sign anything" and "would give his whole life if he had to".

**74**  Olmstead had prepared the security documents in advance of the meeting. I accept his evidence that in order to confirm its accuracy, he reviewed with Kedia the list of equipment which was attached as a schedule to the General Security Agreement. Kedia agreed to pledge shares in both KII and GMC as further security. At no time did Kedia ask Poulsen whether he should sign the security documents. Nor did Poulsen provide Kedia with any reassurances that the bank would not use or rely on the security documents. At no time did Poulsen or anyone else tell Kedia (as Kedia suggested in his cross examination of the bank's witnesses) that he was being asked to sign the security documents simply to cover the possibility of some future NSF cheques.

**75**  Finally Kedia raised the possibility of KII continuing gold bullion trading business with Precious Metals on a cash and carry basis. Olmstead told him that this could be considered at some point in the future but was subject to the approval of Mr. George Dlugosh, the manager at RBCDS. It was agreed Kedia would return the following week to discuss a proposal for repayment of the overdraft.

**76**  Over the next few days, the KII account was debited the entire sum of the accumulated gold transactions ($385,000(US)), which amount had remained in a suspense account to this point. Following the deposit of a Goldrich cheque, the transfer of other funds from other KII accounts, and the collapsing of KII's US term deposit (pursuant to the Cash Collateral Agreement), the overdraft was reduced to $209,256.68(US) as of March 10, 1999.

**77**  Between February 5, 1999 and February 15, 1999, KII was allowed to continue to trade in gold bullion on a cash and carry basis. Although confirmation slips in relation to each transaction were sent by Precious Metals to KII, to the attention of Mohan Kedia, Kedia insists that it he was not aware of this ongoing trading until March 1999 when he was provided with a transaction listing sheet. It is notable that payment for each transaction was made by way of a cheque drawn on the Goldrich account signed by Viki. Eventually RBCDS disallowed all trading.

**78**  On February 16, 1999 Olmstead learned for the first time that when the KII cheques payable to Goldrich had been returned NSF, the branch had held the items in a suspense account rather than charging them back to the Goldrich account. He directed that the branch immediately process a chargeback to the Goldrich account in the amount of the two cheques. The chargeback, which was processed on February 16, 1999, created an overdraft in the Goldrich account in the amount of $299,428.30. Following a later set-off of other amounts in the account, an overdraft of $244,055.57 remained in the account. (I will address this matter further later in these reasons, in connection with the bank's Counterclaim)

**79**  On learning of the Goldrich overdraft, Olmstead contacted Kedia and told him that quite apart from the unpaid gold transactions, the bank faced a further potential loss in connection with the Goldrich cheques drawn on KII's account. Kedia almost immediately telephoned Poulsen to advise him of this other "problem" and to reassure him that he would send his son Viki to the bank to sort out the issue. Based on both Olmstead's and Poulsen's evidence and strong denials, I entirely reject Kedia's evidence that during the earlier telephone call, Olmstead made accusations that Viki had cheated the bank and threatened Kedia that unless the money was repaid within 24 hours, he would put Viki in jail.

**80**  In keeping with Olmstead's request, a meeting was held on March 1, 1999 to discuss the Goldrich overdraft. At the bank's invitation, Viki, Jain, and Mr. Manjeet Kooner ("Kooner") attended to explain the matter. On behalf of the bank, Olmstead, Mr. Thompson, Nick Pross ("Pross"), and Maurice Lees attended. While Jain insisted that Poulsen was also in attendance, I accept Poulsen's evidence he did not attend.

**81**  KII's position, resting exclusively on the evidence of Jain, is that during this meeting, the bank's officers conducted a brutal cross examination of Viki, shouting at him, accusing him of fraud and theft, and demanding the return of the money, failing which the police would be brought in and Viki would face jail time. He insisted Viki was asked what houses or cars he had purchased with the money.

**82**  While Kooner's recollection of the meeting was fairly vague, his evidence was in conflict with that of Jain. He could not recall anyone in the meeting making such accusations or threatening Viki with jail time. He generally recalled the bank was focused on the fact the money was missing and wanted to know where the $300,000 had gone.

**83**  Based on the evidence of Olmstead, Mr. Lees, and in particular the evidence of Pross, who prepared contemporaneous notes of the meeting, I find that the meeting proceeded in a formal, businesslike fashion. In keeping with the bank's requests, Viki produced copies of the cheques in question. He confirmed he had signed both $150,000 cheques and had withdrawn the funds from the Goldrich account. He insisted that the entire amount was used to close certain foreign exchange transactions and that the proceeds were deposited back to the Goldrich account. He explained that the shortfall in the KII account was likely related to the dishonouring of the NBC cheques. The KII group was asked to consider the matter further and to prepare a proposal for repayment within the next week or thereabouts.

**84**  By early March 1999, KII had no access to any gold bullion trading facility. Kedia moved quickly, approaching the main branch of the Bank of Nova Scotia where he says he was welcomed as a prospective gold bullion purchaser. He placed an order to purchase a quantity of gold and returned to the bank later that same day to complete the purchase and take delivery. After having to wait for some period, he says that a Mr. Atkinson, the bank manager, met with him and in the presence of a second BNS employee, a Mr. Rudy Rao, told him that he ought to take the funds designated for the gold purchase to the RBC. When Kedia demanded to know why he should do that, he says that Mr. Atkinson responded: "You don't know? You cheat the RBC". He testified Mr. Atkinson returned the money to him and told him that no gold purchase would take place.

**85**  Again, I entirely reject Kedia's version of events. Mr. Atkinson testified at trial. He denied that the events occurred in the fashion described by Kedia. He did recall that at some point his staff told him that while he was out of the office, Kedia had attempted to make a gold purchase at the bank. The transaction was not authorized to proceed since Kedia was unable to provide the bank with sufficient information to satisfy the bank's "source of funds" inquiry policy. Quite apart from denying that he ever accused Kedia of cheating the RBC, Mr. Atkinson stated that he would never consider making such a statement to a bank's customer, in such circumstances. I entirely accept his evidence in this regard.

**86**  Finally on March 10, 1999, approximately a week following the March 4th meeting with Kedia, the RBC demanded that KII repay the $209,256(US) overdraft by March 22, 1999. In addition the bank demanded that both Kedia and GMC repay this amount, pursuant to the personal guarantee and corporate guarantees signed on February 4, 1999. The bank also served its Notice of intention to enforce Security.

**87**  A few days earlier Kedia arranged to retain Pope, then of Singleton, Urquhart, as his legal counsel. Their first meeting together occurred on March 10, 1999. Kedia recounted attending the meeting with Mr. DeMello (an accountant who had set up the retainer) and Kooner. He insisted that he told Pope about the bank's accusations of fraud and the bank's officers' threats to jail Viki. He insisted he instructed Pope to demand that the bank stop making its allegations of fraud against his son.

**88**  Kedia's description of his first meeting with his legal counsel is in marked contrast to that offered by Pope. I should say that Pope impressed me as a very careful, precise witness, doing his best to recollect the events as they occurred, without the benefit of any access to his file notes, apart from those few letters attached to Kedia's earlier affidavits. (I noted earlier under the heading CREDIBILITY, that Pope eventually had access to his entire file notes when Kedia produced those documents after Pope first left the witness stand). In any case, wherever Pope's evidence is in conflict with that of Kedia, I accept Pope's version of the events.

**89**  Relying on his notes and some of his own independent recollection of the meeting, Pope testified that during this first meeting the issue of fraud was not raised by Kedia. Indeed he testified that neither during the March 10th meeting nor at any point thereafter was he ever aware of any complaint from Kedia or anyone at KII that the RBC had made wrongful allegations of fraud against Viki. To the contrary he said it was he, Pope, who raised the issue during his first meeting with Kedia. Since it struck him as improbable that the bank would stop doing business with KII over a $200,000 debt, in circumstances in which the bank appeared to be fully secured, he says that during this first meeting he wondered aloud whether this was perhaps a case in which the bank suspected money laundering. No one responded to this theory. Further, it is significant that at no point during the meeting was he told that only days earlier, the Bank of Nova Scotia had allegedly refused to transact a gold purchase with KII, on the grounds that KII had "cheated" the RBC.

**90**  Pope was never instructed to demand that the RBC desist in any allegations of fraud against Viki. To the contrary, the focus of Pope's retainer was to resolve the dispute with the bank and to find some means of reinstating KII's gold trading facility so that it could resume its business.

**91**  Various settlement proposals were exchanged over a period of weeks. During this period, KII's newly formed allegations of "significant accounting errors" began to gel and Kedia authored his own letter to Olmstead making such an allegation (Exhibit 37). Olmstead responded that he did not understand the allegation and asked for evidence of such errors to as to address them. Kedia's request for a one-week extension to the deadline for repayment was allowed, subject to him providing the bank with access to his accounting records so as to obtain independent verification of KII's alleged accounts receivables and payables and an evaluation of the other assets covered by the RBC's security.

**92**  Thus, from March 23 to March 25, 1999, acting as the RBC's consultants, the firm of Barnes & Kissack attended at KII's Ontario Street warehouse so as to review the financial status and assets of both KII and GMC, with a view to assessing the strength of the bank's security position. Barnes & Kissack's mandate did not include a determination of whether KII owed any money to RBC.

**93**  The Barnes & Kissack review exposed the depths of the overall chaos at KII and GMC. On arrival at the Ontario Street warehouse, Mr. Kissack found the great majority of the jewellery manufacturing equipment to be old and rusty and lying about on pallets. (I gather all of the equipment originated from the then defunct Indian factory). Apart from a couple of operational stations, no jewellery manufacture appeared to be underway.

**94**  While Kedia and Jain provided various documents as requested by Barnes & Kissack, they were unable to produce any recent financial documents, including balance sheets, accounts receivable, or accounts payable. As a result Mr. Kissack was unable to prepare a liquidation balance sheet for the RBC. He was forced to seek information directly from Kedia but warned the bank he had no way of corroborating Kedia's information (Exhibit 41). In the end result, Mr. Kissack reported his general impression that "the Bank could be significantly undersecured in the event of forced realization."

**95**  Following delivery of the Barnes & Kissack report, Pope sought an opportunity to meet again with the bank's officers. Kedia testified the object of the proposed meeting was to clear the allegations of fraud so as to "save his son" whose health was suffering as a result of the still looming allegations of fraud. He says he pleaded with Pope to save his son. I entirely reject that evidence. I accept Pope's evidence, corroborated by his own correspondence as well as the bank's officers and Poulsen that the focus of the meeting requested was simply to ascertain the bank's position and to explore whether the bank was willing to re-establish a business relationship with KII.

**96**  The meeting proceeded as planned on April 19, 1999 and to Poulsen's surprise, Pope attended with both Kedia and Viki, although he had understood the meeting would be between legal counsel only.

**97**  In response to Kedia's invitation that the bank's representatives should all act "as if they are family" and ask questions directly of Viki, Poulsen asked Viki several questions in reference to the two $150,000 cheques which Viki had written to cash. What happened to the money? Where did the money go? Why was Goldrich overdrawn by $244,000?

**98**  In the course of responding to Poulsen, Viki produced Exhibit 72 (a cash flow chart produced largely by Jain, with the assistance of various Goldrich staff) and explained that the money had been converted to US dollars and deposited back to Goldrich's RBC account. Kedia himself raised the issue of the NBC cheques and explained that the two cheques Viki had written on the KII account, were written on the strength of the deposits to the KII account from NBC. He advanced the theory that because of the RBC's mistakes and the consequential dishonouring of those cheques, there were insufficient funds in the KII account, causing the Goldrich account to go into overdraft.

**99**  Kedia testified that at this point, Poulsen brushed aside Viki's explanations and began an aggressive interrogation of Viki, demanding "what car you buy" or "what house you buy", ultimately threatening that Viki would be sent to jail if the money was not returned within 24 hours.

**100**  I entirely reject this version of events which is directly denied by Pope and Poulsen. In Poulsen's case, he had the benefit of his contemporaneous notes of the meeting. He flatly denied that during the meeting there was ever any allegation made that Viki was guilty of fraud.

**101**  In their respective legal roles, I accept both Pope's and Poulsen's unqualified evidence that neither individual would have participated in such a discussion or interrogation of Viki. Pope was emphatic that he would not have tolerated his client undergoing such questioning at the hands of the bank's solicitor. For his part, Poulsen testified that whatever the circumstances, he would never have considered making such threats or accusation against one of the bank's clients. In my view, Kedia's allegations are quite simply ludicrous.

**102**  While Viki and Kedia drove Pope back to his office, Pope sat in the back of the car, listening while Kedia and his son spoke to each other in the front seat. While he could not understand the language spoken, he said it was clear that Viki appeared "sad" and morose, no doubt now realizing the seriousness of the situation at hand.

**103**  On May 12, 1999, within approximately three weeks of the meeting, Kedia instructed Pope to forward a letter to the bank setting out KII's settlement proposal (Exhibit 149). Based on premise that the total security held by the bank exceeded the amount owed, Pope proposed the RBC grant a credit of $40,650.16 for alleged errors by the bank to be applied against the debt; that the contents of the safety deposit boxes be released to Kedia for sale, with the sale proceeds to be applied against the debt; and that the remainder of the debt be repaid within 90 days from the collection of outstanding receivables due to KII. Further Kedia would make his best efforts to retire the Goldrich overdraft within 12 months, provided RBC advised Precious Metals satisfactory arrangements had been made to retire the debit balance.

**104**  During this same timeframe, Kedia, as well as various family members and friends and business associates began to notice changes in Viki's behaviour. Although usually a very friendly, happy individual Viki now appeared pre-occupied, withdrawn, and "a little upset" or somewhat depressed. He began to neglect his personal hygiene and usual careful grooming. He no longer talked openly with his sister and became reluctant to return telephone calls or to leave the family apartment. Alarmingly, from Dimple's point of view, he began to complain that someone was following him. Each alleged sighting was followed up but no lurking person could be found. No amount of reassurance quelled these apparently paranoid delusions. Dimple became sufficiently concerned that she raised the issue with her father on his return from a business trip. Kedia suggested that Viki should return to India for a break, leaving him to manage the situation in Vancouver, Viki refused to return to India. Dimple initiated steps to arrange for a doctor to assess Viki's mental condition.

**105**  Viki's best friend, Manveer Kooner ("Manveer"), also identified a change in Viki's behaviour which he believed dated back to early April 1999. When he confronted Viki about his change in behaviour, Manveer insisted that Viki denied there was any problem. Yet he also claimed Viki complained he was stressed about business and "something about fraud".

**106**  More significantly, and apparently not noticed by the Kedia family, Manveer took note of Viki's "red, glaring eyes" which he related to possible drug use. He was aware that Viki was regularly using Nytol tablets during this period. He testified that he had seen Viki carrying a bottle of the pills in his jacket during the daytime.

**107**  During this period, while Viki was apparently paranoid and depressed, Kedia testified that he received a telephone call from Sgt. France McCreadie ("McCreadie").

**108**  McCreadie was and is a long-serving member of the RCMP In 1997, in the course of an MLAT (Mutual Legal Assistance Treaty) investigation of a jewellery smuggling ring (which interestingly involved one of Kedia's current customers), she met Kedia, whose company was doing business with that company in the USA. She did not implicate Kedia in any way in the smuggling ring and merely recalled him as a cooperative, helpful individual throughout her investigation.

**109**  Kedia testified that when he received McCreadie's telephone call in 1999, Viki was either sitting beside him or within earshot. Thus he says that Viki was able to hear his father's telephone exchange with McCreadie. Kedia said that to his surprise, McCreadie told him she had received a complaint from the RBC and that she would be travelling to Vancouver to interview Viki in relation to matters between KII and RBC. He says she told him to instruct Viki not to leave the jurisdiction and to remain in the city, awaiting her arrival for the interview. Following the telephone call Kedia says that Viki appeared or "became shocked". He says he reassured Viki and told him not to worry.

**110**  I entirely reject Kedia's evidence in this regard as a complete fabrication. While McCreadie did in fact have a telephone discussion with Kedia during this period, the nature of the call was entirely different from that alleged by Kedia.

**111**  Sometime earlier, in March 1999, Pross had telephoned the RCMP to confirm Kedia's own earlier advice to the RBC (relayed during the meeting of February 4th) that he had assisted the RCMP in an earlier investigation. As part of the RBC Fraud Detection team's overall security check, Pross was referred to a series of police officers and eventually put in touch with then McCreadie. (While McCreadie was uncertain of the identity of the RBC employee who called her, in cross-examination she accepted that it could have been Pross). She generally outlined the nature of her relationship with Kedia, that he had been a witness in another matter, and that she had recently provided him with advice about how to deal with his ongoing dispute with a Mr. Chaudry. She had recommended he file a compliant with the local Ontario police, since the RCMP had no jurisdiction in the matter. She told the RBC representative that she had no information to offer concerning KII's own business activities and that she had no knowledge of any suspicious transactions.

**112**  Immediately after this telephone call, McCreadie testified that she called Kedia to report the call. She told him that she had been unable to offer any assistance to the bank since she was unaware of his business transactions. She denied that she ever told Kedia she was coming to Vancouver to interview Viki in relation to matters between KII and RBC. She denied that she had commenced any investigation into matters between KII and RBC. She denied she had any plan to interview either Kedia or Viki with regard to complaints made by RBC. She denied that she instructed Kedia to keep Viki in Vancouver in order to facilitate an imminent interview. She denied ever receiving any complaint from the RBC regarding Kedia or KII.

**113**  Kedia's obviously distorted reconstruction of his conversation with McCreadie is both bizarre and troubling. It highlights Kedia's tendency to take small strands of any event and twist them into a more sinister narrative in which the Kedias are once again the victims of the bank's allegedly wrongful actions.

**114**  In any case, following the telephone call Viki's behaviour apparently did not improve. Then he disappeared. On May 23, 1999, when Viki had not returned home for a few days, Kedia filed a Missing Person report with the Vancouver City Police. The following day Kedia contacted police and withdrew the report, advising that one of Viki's friends had called to reassure him that Viki was in Kelowna and would soon be in touch.

**115**  In fact, it appears that Viki was not in Kelowna. On May 20, 1999, Viki and an unidentified male person checked into a room at the Best Western Inn on Kingsway in Vancouver. There is no evidence as to precisely what occurred during the three-day stay at the hotel except that on one occasion, someone in the room placed a 911 call complaining of an intruder. The police apparently investigated the matter with no apparent need for any further follow-up action.

**116**  On May 25th, at approximately noon, the motel staff found Viki alone in the hotel room, lying prone on the bed, dead. Police attended and found a small quantity of cash and two bottles of Nytol tablets, 9 tablets missing from a bottle of 10 tablets, and all 20 tablets missing from the second bottle of 20 tablets. There were no signs of foul play.

**117**  The coroner attended and eventually issued a Judgment of Inquiry (Exhibit 2, Tab 9) finding the immediate cause of death to be "the inhalation of gastric contents due to or as a consequence of diphenhydramine (Nytol) intoxication". The death was classified as an accidental one.

**118**  Following the news of Viki's death, Pope continued to press the bank for a response to KII's May 12th settlement proposal letter. The bank responded on June 8th, offering a full credit relating to the missing trading profits of $9,112 and a credit equal to half the amount of the disputed Montreal transactions. However the bank insisted the overdraft be repaid over three months from the sale of the contents of the safety deposit boxes and the collection of accounts receivable. KII would be required to use its best efforts to retire the Goldrich overdraft. The bank refused to reinstate KII's gold bullion trading account, without the overdraft first being repaid in full.

**119**  Further meetings followed culminating in KII's next settlement proposal of June 22, 1999 which was rejected by the bank in early August. The bank advised that it would proceed with the framework of settlement set out in the June 8, 1999 letter.

**120**  Almost immediately a credit of $9,112.26 (the trading credits identified earlier) was applied to the overdraft, reducing it $200,144.68.

**121**  On August 6, 1999, RBC appointed Wolrige Mahon as its agent to seize and realize upon the Bank's collateral pursuant to the security agreements in place. Steps were taken to serve Kedia with the Notices of Disposition of Collateral.

**122**  On August 6th, Wolrige Mahon's staff moved immediately to attend KII's Ontario Street warehouse to seize and take control of KII's and GMC's assets. Contrary to Kedia's evidence, the firm did not break down any doors. Rather the firm retained a locksmith to provide access and change the locks. Contrary to Kedia's evidence, Wolrige Mahon did not hang a "big banner" outside the premises or in the window, advising the public of the business' demise. Rather, following its usual practice, the firm taped a copy of the letter appointing Wolrige Mahon as RBC's agent to the door window.

**123**  While I will not address all the details of the seizure, I will only note that like Barnes & Kissack, Wolrige Mahon's principal, Mr. Michael Cheevers, was surprised to find an almost complete lack of business records for either company on the premises. There were no payroll documents, no ledger books, no tax documents, and no financial statements. Whatever documents were found were gathered and returned to the Wolrige Mahon office, together with the hard drives of the computers on site.

**124**  Both Mr. Cheevers and his associate, Mr. Jonathan McNair, described a seemingly non-operational warehouse, furnished with a smattering of office equipment, no inventory or samples of gold jewellery and a multitude of old rubber jewellery molds scattered about the empty upper floor of the warehouse.

**125**  Likewise when the firm attended the East 49th Street premises on August 9, 1999 (when this second location came to Wolrige Mahon's attention), it found no inventory on site and no corporate or financial documents of any kind relating to either KII or GMC.

**126**  Settlement discussions continued, this time under the direction of Kedia's new counsel, Mr. Ernest Matthews ("Matthews"). Over the months which followed various safety deposit boxes were opened with Kedia's consent, under his own or a representative's supervision. In keeping with Matthews' proposal, the contents of KII's various safes and safety deposit boxes in Vancouver and Toronto were opened, inventories prepared and steps taken (under Kedia's control) to divide the contents into six lots for sale. Despite a number of viewings by prospective purchasers, none of the contents were ever sold.

**127**  In April 2000, KII, GMC, and Kedia commenced this action against the RBC and Wolrige Mahon. Since then the defendants have made repeated proposals for Kedia to take possession of his equipment but he has refused, insisting through counsel that the equipment be maintained in storage, pending the resolution of this litigation. Although near the conclusion of the trial, Kedia advised that he was now prepared to pick up the equipment, he almost immediately reversed his position, advising the Court that he would only do so, if the RBC assumed the costs of packing and shipping the equipment to India.

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| **4.0** |  | **Commercial Dispute - The Plaintiff's Claims:** |  |

**128**  While the Third Amended Statement of Claim advances a multitude of allegations of wrongdoing, the plaintiffs have effectively advanced these claims:

1. That the bank breached its express written agreement with KII not to complete any gold bullion transaction and deliver any gold, unless there was sufficient money to cover the transaction in the KII Gold Bullion Account.
2. That the bank breached its implied agreement with KII to the same effect.
3. That the bank breached its fiduciary duty to KII and GMC, by failing to provide accurate detailed confirmation of gold bullion transactions to KII, when the bank knew or ought to have known that KII relied on the bank to maintain such records, and to ensure there were sufficient funds in the gold bullion account to cover all such purchases.
4. That by virtue of the bank's alleged misrepresentations, the Security documents executed by KII and GMC, ought to be set aside and be declared void and unenforceable.
5. That the Court should find unauthorized debits totalling $525,507.94 were debited from the KII account from January 15, 1999 to June 1999.
6. That the Court should find $116,199 was wrongfully debited from the KII accounts, by applying an unauthorized blending/mark-to-market price in various forward trading account transactions.

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| **4.1** | **Was there any express "No credit" term?** |  |

**129**  At the heart of the plaintiff's commercial claim is the simple proposition that the bank either expressly or impliedly agreed it would not act in such a way to create an overdraft in the KII Gold Bullion account, but would rather only complete a transaction and deliver gold when there was sufficient money in the KII Gold Bullion Account to do so. (See paragraph 19(a)(iv), (v), (vi), and (vii) and paragraph 19(e) of Third Further Amended Statement of Claim).

**130**  As Kedia repeatedly stated at trial, the bank never granted him any credit. The claim advanced appears to suggest the plaintiffs relied on some form of "positive covenant" on the part of the bank which would disentitle it from recovering on a debt created by any completed gold transaction for which there were insufficient funds in the KII account.

**131**  None of the actual written agreements between KII and the bank - (the Financial Services Agreement dated November 22, 1996 ("the ***FSA***"); the four Safety Deposit Box agreements; the Forward Trading Facility agreement dated June 19, 1998 as replaced by the Agreement dated December 23, 1998, or the various security documents)-contain any terms which give rise to the finding of any such a covenant on the bank's part.

**132**  The most significant of the various documents is the ***FSA*** (Exhibit 178) which specifically addresses such matters as overdrafts (paragraph 2), KII's obligation to verify its own account statements (paragraph 3), and the general terms relating to the relationship between KII and RBC.

**133**  Paragraph 3 of the ***FSA*** provides no positive obligation on the bank to provide the customer with periodic statements for its accounts. While the bank nevertheless did provide KII with monthly statements, it was under no contractual obligation to do so. Kedia testified he never discussed any of the terms of the ***FSA*** with Olmstead and in the absence of any such discussion, I must assume the contract governed.

**134**  Specifically regarding the gold bullion sales, there was no contract which governed the procedure followed by the Precious Metals department. Mr. McAfee ("McAfee"), one of the main RBCDS traders during the relevant period, testified that for much of the period in which KII dealt with his department, RBC had an internal procedure whereby Precious Metals checked with the relevant RBC branch (Fraser & 49th) to ensure there were sufficient funds in the KII Gold Bullion account to cover any KII purchase of gold before instructing the delivery location to release gold to Kedia or to a KII authorized representative. This procedure is set out in the Internal Memorandum of Ms. Tina Messina, Vice President of Precious Metals to Lori Davidson of the Vancouver Branch on October 8, 1997 (Exhibit 23).

**135**  While this procedure was an internal procedure of the RBC, it was not the product of any agreement between the parties. The October 8, 1997 memorandum was neither sent to nor shared with Kedia at any point in time prior to the commencement of the litigation. I am satisfied that the bank's implementation of this internal procedure never gave rise to any agreement with KII that such a procedure would be followed, that KII could rely upon same, or that failing the implementation of the procedure, KII had the legal right to refuse to pay for the gold it had ordered and taken delivery of. As the bank's counsel has submitted, the procedure was always an internal or unilateral procedure and at no time did it form part of any bilateral agreement between the parties.

**136**  Finally, I must note that the Forward Trading Facility Letter of June 19, 1998 (as replaced by the subsequent Forward Trading Facility letter of December 23, 1998) does not allow for provision of any credit to KII with regard to the purchase of bullion for delivery. The letter pertains only to forward trading.

**137**  McAfee testified that at the time the Forward Trading Facility letter was entered into, he, like other traders in the Precious Metals group, received new parameters for trading with KII. The traders were now allowed to enter into transactions with KII, whether forward trades or physical delivery deals, up to a total value of $675,000 without concerning themselves with payment. Payment up to this amount was now the responsibility of the branch. In this regard, he made reference to the relevant BBTR (Business Banking Transaction Report of March 10, 1998 - Exhibit 226). Whatever the effect of the BBTR on internal RBC practice (as between Business Banking or the Vancouver Branch and Precious Metals in Toronto), there is no evidence that as between RBC and KII, the Forward Trading Facility was intended to create a line of credit for KII.

**138**  Finally, without reference to any of the written contracts between the parties, KII has simply alleged that there was an express unwritten "general trading agreement" between the parties, which agreement governed the parties' respective actions and expectations. KII alleges that the "general trading agreement" included: (i) a "no credit" term; (ii) an understanding that time was of the essence in terms of debiting the gold bullion account; (iii) an understanding that the bank was to maintain detailed records of every transaction and delivery; and finally (iv) an understanding that the bank would obtain KII's consent before any debits were processed. (see paragraph 19(a), (c), (d), and (e) of the Third Further Amended Statement of Claim).

**139**  Kedia put forward no evidence to support the existence of any express unwritten agreement to such an effect. Nor did he put such a proposition to Olmstead on his examination in chief, as his own adverse witness. Indeed Kedia adopted his own discovery evidence in which he stated he never discussed such matters with the bank since they were banking matters and none of his concern.

**140**  I find the evidence strongly supports a finding that contrary to there being an express agreement for "no credit", the bank repeatedly and unhappily found itself in situations in which it was forced to grant credit to KII. As I noted earlier, Olmstead recounted the many occasions through 1998 and early 1999, in which the KII accounts appeared on his "daily excess sheets". When he contacted Kedia to resolve the matter (so as to potentially avoid posting an overdraft) Kedia repeatedly implored him not to return the items when there were insufficient funds to cover them, promising an immediate deposit of funds to cover the items. These dealings are completely inconsistent with the existence of any express or implied agreement that KII would never be provided with any form of informal credit.

**141**  Further the documentary evidence rebuts the plaintiffs' allegations that no credit would ever be advanced. Exhibit 170 (a large collection of KII bank statements) shows that overdrafts did indeed occur from time to time. In his letter of December 17, 1998 (which I referred to earlier), Olmstead reminded Kedia that "management of the credit balances in your accounts to prevent any overdrafts is your full responsibility". There is no evidence that Kedia took issue with this letter. To the contrary on February 1, 1999, he wrote to Olmstead stating:

I realized that there was some mistakes behind my control in our account and those mistakes resulted to some irregularities in our account. I would like to assure you that those mistakes happened by some misunderstandings and I apologise for that (see Exhibit 30).

**142**  At no point during the first critical meeting with the bank on February 4, 1999 did Kedia raise any complaint that the existence of the unpaid gold purchases (and the consequential overdraft) was inconsistent with the bank's own agreement not to allow any overdraft to arise. While Kedia complained at the meeting about various service issues and later complained of some "minor accounting" mistakes, this allegation of any agreement on the bank's part was never raised or even suggested by anyone at KII. At no point prior to the commencement of this litigation, in all of the correspondence which followed, authored either by Kedia or his legal counsel, was there any assertion the RBC was contractually prohibited from delivering gold to KII absent payment or prohibited from giving credit or creating an overdraft.

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| **4.2** | **Was there any implied "no credit" term?** |  |

**143**  In the Third Amended Statement of Claim, the plaintiffs allege that the No Credit Term should be implied in order to give "business efficacy" to the General Trading Agreement between the parties (see paragraph 19(e)). The plaintiffs say that to the knowledge of the bank, KII relied on the Precious Metals office to verify there were sufficient funds in the KII Bullion bank account before completing a bullion trading transaction.

**144**  Applying the test articulated in ***M.J.B. Enterprises Ltd. v. Defence Construction***, [*[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=), such a term will be implied "where it is necessary to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed".

**145**  On the evidence as a whole I find that there is simply no evidentiary foundation to support such an implied term. The evidence is clear that the bank provided KII with extensive information which, if competently managed by KII, would have allowed KII to know the state of its business and accounts, and in particular, whether it could afford to buy gold.

**146**  McAfee's evidence, corroborated by the documentary evidence, was that every gold transaction was confirmed by the RBC - first by the trader during the initial call with KII when the purchase order was placed; next during the second telephone call placed by the Precious Metals back office accounting group to KII; next by a faxed confirmation slip sent that same day; and finally by a mailed confirmation slip which arrived a day or two later in KII's offices. Thus on four separate occasions, KII would be informed of the details of the transaction and on the first two occasions, the customer himself (either Kedia or whoever placed the order) would verbally confirm the deal. The parties expected that any miscommunications between the customer and Precious Metals would be resolved quickly while the transaction was fresh. In the event of any lingering dispute concerning the terms of the trade, a tape recording of any conversation was available for review. There is no evidence of any specific disputes which were raised and not dealt with immediately.

**147**  Here, following the general practice, and in accordance with the ***FSA***, every one of the bullion charges was recorded as a debit in the KII Gold Bullion account for which monthly bank statements were provided to KII. As Jain somewhat reluctantly admitted on cross examination, the many handwritten markings in KII's collection of bank statements (Exhibit 170) demonstrate that someone (likely one of the bookkeepers) at KII had indeed regularly reviewed those bank statements at least until the end of October 1998, apparently reconciling the KII bank accounts on a monthly basis.

**148**  As the earlier correspondence between Kedia and the bank demonstrates, Kedia was aware that KII was fully responsible to manage its corporate account bank balances and to take steps to avoid overdrafts. There is no evidence to support a finding that the bank knew or ought to have known KII relied on the bank to manage such matters on KII's behalf. The evidence is entirely to the contrary.

**149**  Barnes & Kissack's and Wolrige Mahon's inability to unearth any financial records at the KII offices in either March 1999 or August 1999 is extremely puzzling. Nevertheless, the available evidence demonstrates that the information provided by the bank was more than adequate to allow KII to keep track of its financial position, at least as regards the ongoing gold transactions and current bank balances. It is significant that at no time did any representative of KII complain to the bank that the company was incapable of managing the information provided or that KII was relying on the bank to manage the information for the company.

**150**  Finally I must note that throughout much of this litigation and at regular intervals during the trial, Kedia has complained bitterly that the bank never provided KII with any proper documents. In particular he complained that the bank did not fax KII any confirmation slips which would have allowed KII to track gold bullion sales in a timely fashion and in particular, following the creation of the alleged overdraft, to reconcile its accounts so as to properly determine the amount owing, if any, to the bank.

**151**  Later he Kedia insisted that while at least some of the confirmation slips may have been sent to KII, those documents had been confiscated and eventually destroyed by Wolrige Mahon during the seizure of assets in August 1999 (As I noted earlier, any such allegation was denied by both Mr. Cheevers and Mr. McNair of Wolrige Mahon).

**152**  Finally, in the very late stages of the trial, Kedia came to the Courtroom with a large box of confirmation slips which he claimed (in complete conflict with his earlier evidence) he had found years before in a garbage bag left behind by Wolrige Mahon in the warehouse, following the seizure process there. He admitted that contrary to various Court orders requiring production, he had secretly kept the documents in his possession for years, intending to use the documents as ammunition in the event he was able to catch the bank's officers lying about any particular transaction.

**153**  In my view, even this bizarre explanation does not ring true. I believe that Kedia was not simply attempting to gain some possible tactical advantage at trial. Rather, in my view, he deliberately buried the evidence and failed to respond to any previous Court orders for production, since he well understood that this evidence not only graphically demonstrated, to KII's prejudice, the bank's continual and timely confirmation of transactions with KII, but it would also likely assist in the bank's proof of the overdraft alleged.

**154**  In the final result, I find that the claim for any implied "no credit" term is utterly groundless. There is no foundation for suggesting a "no credit" term must be implied in order to give business efficacy to the contract between the parties.

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| **4.3** |  | **Whether there are any other implied terms?** |  |

**155**  Further, the plaintiffs allege that the "general trading agreement" between the parties included two additional terms:

1. that time was of the essence in terms of debiting the plaintiff prior to the release of the bullion; and
2. that Precious Metals was required to record all details of bullion transactions and to provide KII with accurate detailed confirmation of the transactions as well as both weekly and monthly gold statements.

**156**  There is simply no evidence that Kedia ever had any discussion with any representative of RBC regarding either matter. While the bank did indeed maintain and provide KII with a variety of documents (confirmation slips, debits slips, release forms, delivery documents), there is no evidence that this was the result of a request from KII, rather than simply a reflection of the bank's own practice, instituted for its own purposes.

**157**  Likewise, throughout the entirety of the parties' relationship, the bank debited the KII gold bullion account, as it was entitled to do under the terms of the ***FSA***. KII was clearly aware of this debiting practice. There is simply no necessity to imply any requirement that KII consent to any particular debiting of its account, beyond the requirement that the debit be for a transaction entered into by KII.

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| **4.4** |  | **Did the bank owe KII or GMC any fiduciary duty?** |  |

**158**  I will spend little time addressing this issue since, in my view, there is simply no evidence to support a finding of any fiduciary relationship between the parties in this action.

**159**  Here there were none of the classic hallmarks of a fiduciary relationship including vulnerability, reliance by the vulnerable party on the other, and the exercise of a "power" or "discretion" by the other which affected the former's interests (***Coast Capital Savings Credit Union v. Lindquist***, [*[2004] B.C.J. No. 1224*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X415-00000-00&context=), (2004) 353 WAC 48 (B.C.C.A.)). While the Courts have held that banks owe a fiduciary duty to their customers where financial, investment or business advice is provided by the bank and relied upon by the vulnerable, less sophisticated customer, this was not the case here.

**160**  At trial, Kedia proudly and repeatedly described himself as a tough, sophisticated businessman, highly experienced in gold bullion trading. He explained that he was a member of a caste which has historically run the business sector in India. Prior to establishing any relationship with the RBC, he boasted that he had a long history of conducting business on an international level, that he had previously obtained large gold loans through the Union Bank of Switzerland, and that he had successfully operated a large factory in India with hundreds of employees. At no point did he profess any lack of understanding of his written agreements with the bank nor the fundamentals of gold bullion trading. Kedia's professed knowledge and apparent business sophistication impressed both Olmstead and McAfee, themselves both sophisticated bankers.

**161**  As I noted earlier, there is simply no evidence to support a finding that Kedia or anyone at KII suggested to the bank that KII was incapable of managing its financial affairs, or that the company required some special supervision or guidance or support from the bank in doing so.

**162**  The fact that KII may in fact have been run completely incompetently, without any proper financial and business controls, does not give rise to a finding of some fiduciary obligation on the part of the bank.

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| **4.5** |  | **Validity and Enforceability of the Security Documents:** |  |
| **4.5.1** |  | **The March 11, 1998 General Security Agreement ("GSA"):** |  |

**163**  While not pleaded, Kedia asserts that the GSA applies only to those debts incurred in relation to the trading facility created by the Forward Trading Facility Letter and is not applicable to KII's general debts. This assertion is contrary to the express terms of paragraph 2 of the GSA which provides that the security applies to "any and all obligations, indebtedness and liability of the Debtor to RBC ...". Further, paragraph 30 of the Forward Trading Facility Letter contains a whole agreement clause, limiting the terms of that agreement to the terms of that contract.

**164**  While Kedia testified that he believed the GSA could be used only in relation to debts arising from his gold bullion trading activity, he did not suggest this understanding flowed from any representation or omission made by Olmstead at the time he presented the GSA to him for signature. Rather he said this understanding arose simply from his own personal knowledge as an international gold trader.

**165**  Olmstead could not recall any discussion with Kedia at the time he signed the GSA. His general practice was simply to review the document with the client, and where the security was not segment specific (as in the case of the GSA and the Cash Collateral Agreements) he would explain that the security was a floating charge over all assets, providing general security to the bank for any and all liabilities owed to the bank. I accept Olmstead's evidence that in all likelihood, he followed his general practice at the time he presented these documents to Kedia for signature in March 1998.

**166**  In these circumstances and absent any evidence from Kedia as to reliance on any Olmstead or any other RBC employee, I find there is no basis to limit the enforceability of the GSA.

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| **4.5.2** | **The February 4, 1999 security documents:** |  |

**167**  Regarding these documents, Kedia's challenge is far more direct. He submits that these documents were obtained by the bank as a result of the bank's breach of its fiduciary duty owed to KII, GMC and himself and further as a result of the misrepresentations by the bank. At trial (although not raised in the plaintiff's pleadings) Kedia further alleged that the security documents were, at least in part, fabricated by the bank. (This seemed to have been raised as an after-thought and was resolved by an examination of the documents at trial).

**168**  As I have noted earlier, Kedia testified that in an effort to induce him to sign the security documents at the February 4th meeting, the RBC's legal counsel, Poulsen, falsely represented to him that the bank would cooperate in reconciling KII's accounts, that the bank would continue to support KII in the operation of its business, and further that he could rest assured the bank would not use the documents. As I have already noted earlier in my review of the facts, these allegations are baseless. Apart from Kedia's own evidence, which I have entirely rejected in this regard, there is no evidence of any such representations being made or relied upon by Kedia. To the contrary those allegations are completely contradicted by Poulsen's evidence, which I have accepted in its entirety.

**169**  While Kedia attempted to suggest he was caught unaware at the meeting, without the benefit of legal advice and at some disadvantage because of his language difficulties, the evidence is clear that an earlier version of the GSA and guarantee for GMC had actually been sent to him as early as December 1998, although that guarantee was for the sum of $200,000 only. Kedia signed those documents in advance of the February 4th meeting and brought them with him to the meeting. The new Guarantee for GMC which was presented at the meeting of February 4th was now for the sum of $600,000. Kedia signed and affixed the GMC seal to the GSA and Guarantee at the February 4th meeting, indicating, in my view, that he fully expected he would be presented with security documents for signature at that time.

**170**  I am satisfied that Kedia signed the February 4th security documents willingly and with a complete understanding of their meaning. He was very clearly anxious and highly motivated to secure time for repayment of the KII debt. As he said at the meeting and repeated at trial, he was prepared to "do anything" including "giving his life" to resolve the issue and resume his business relationship with the bank.

**171**  There is simply no evidentiary foundation for any finding of a fiduciary relationship between the parties on the occasion of the taking of this security.

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| **4.6** | **The Cash Collateral Agreement:** |  |

**172**  As I noted earlier, this Agreement was signed in March 1998 and provided RBC with a security interest in KII's US Term Deposits as general and continuing security for the payment of liabilities. The Agreement permits the bank to exercise its rights and remedies under the agreement immediately upon the event of a default, without prior notice to the customer or demand for payment.

**173**  At the meeting of February 4, 1999, Poulsen explained to Kedia that the cash collateral was one means by which the KII overdraft could be reduced.

**174**  Ultimately, on February 8, 1999, Olmstead's assistant, Ms. Statham, issued instructions that the US Term deposit (which was the cash collateral under the Agreement) be deposited to the KII Gold Bullion account. On maturation of the term deposit on March 5th, the sum of $20,262.35 was deposited to the Gold Bullion account, thus reducing the KII overdraft by that amount.

**175**  Kedia has suggested that the bank had no authority to either cash the Term deposit or to apply the amount of the Term Deposit against the overdraft without his instruction or consent.

**176**  While the evidence is that Kedia was fully aware of the cashing in and application of the term deposit to the overdraft, it remains the case that neither his knowledge nor his consent was required for the bank to take this action.

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| **4.7** |  | **Claim for general unauthorized debiting of KII accounts in the sum of $525,507.94.** |  |

**177**  At paragraph 45 of the Third Further Amended Statement of Claim, the plaintiffs allege that on or about March 9, 1999, the bank wrongfully seized $525,507.94 from various KII accounts in Vancouver. There is no evidence that any such funds were seized on that date.

**178**  Instead, as RBC's counsel submits, this claim appears to reflect the compilation of various debits totalling $525,507.94 during the period January 15, 1999 to March 17, 1999. These debits were all made at a time when KII alleges the bank had already wrongfully cancelled KII's trading privileges and placed the KII bullion bank account on a deposit only status (See paragraph 81(b) of plaintiff's Third Further Amended Statement of Claim). In other words, the plaintiffs seem to allege that since KII's trading privileges were cancelled, the bank ought not to have allowed any further transactions to be processed through the account.

**179**  This claim cannot be sustained. First, KII's trading privileges were not cancelled, nor were its accounts put on a deposit only status on January 15, 1999. As I earlier noted, Olmstead's evidence was that the KII accounts were not put on a deposit only status until January 25, 1999. In the interim, KII's trading privileges remained in effect. The trading privileges were not cancelled until January 29, 1999 when Olmstead learned of the accumulated gold transactions. McAfee confirmed that thereafter trading continued on a cash-and-carry basis. The documentary evidence corroborates both individuals' testimony (see Exhibit 167-168, Exhibit 170).

**180**  A review of the documentary evidence also confirms that several of the debits represent gold purchases transacted in December 1998 and January 1999, all of which transactions were authorized by KII and properly debited to the account. Two debit items (which total $76,586.33) were originally included as "disputed deals" in an earlier version of the Statement of Claim, but both items were withdrawn from the plaintiffs' later pleadings. The largest single item, which totals $385,360.44, relates to four gold deals conducted by KII in December 1998 and January 1999, primarily in New York. The confirmation slips (Exhibit 340) show that these deals were all confirmed and that over 40 kilograms of gold were delivered either to Viki in Vancouver or Jain in New York.

**181**  There is simply no evidence that the bank wrongfully debited KII's account in respect of any of these gold deals. In effect, this allegation of wrongful debiting is a reiteration of the "No Credit" argument. In other words, while the plaintiffs enjoyed the benefit of taking delivery of all of the gold, they say that since the KII accounts were not debited on the day the orders were placed, the bank was not entitled to debit its accounts at a later date.

**182**  There is no evidence, documentary or otherwise, of any agreement that gold would not be released to KII until the debit in issue was processed. As Olmstead testified, during this period various debits could not be processed immediately since KII simply did not have sufficient funds to cover the gold deals and other transactions it was conducting. By January 29th, Olmstead learned that $385,000 worth of unpaid gold transactions had mounted and immediately terminated KII's trading privileges.

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| **4.8** |  | **Claim for unauthorized debiting of KII Gold Bullion account in the sum of $116,000:** |  |

**183**  At paragraphs 124-125 of the Third Further Amended Statement of Claim, KII alleges that the bank wrongfully debited $116,199 from the KII bullion account, this amount being "the difference or loss to KII, between the total average price of bullion in the Forward Trading Account and the closing market price".

**184**  At trial, this claim appeared to rest on the evidence of Mr. Ravi Jain. In the spring of 1999, after this dispute arose with the bank, Kedia asked his son-in-law to review KII's trading records. While Jain has a Bachelors' Commerce degree and has had some experience as a stockbroker in India, he admitted that he had no previous experience in forward trading. Clearly he had little understanding of the transactions listings which Kedia had provided to him nor the manner in which KII conducted its business.

**185**  First he mistakenly believed that the deals on the transactions list were all forward deals, whereas in fact only two of the many transactions were such. Secondly he mistakenly assumed that all forward trades involved a seven-day hiatus before the deal closed. Based on his mistaken assumption that the maturity and settlement date would always be seven days from the deal date, Jain identified some $115,819.07 of questionable debits. He admitted that he really did not understand the transactions and thus passed the analysis (Exhibit 114) to his father-in-law, who he expected would better understand the matter.

**186**  Instead Kedia appears to have uncritically accepted and seized on this rudimentary analysis as more evidence of the bank's wrongdoing.

**187**  In fact, contrary to Jain's understanding that the transaction listing reflected primarily forward trading, the majority of all the KII deals throughout the entirety of its relationship with the RBC were on an unallocated basis as spot deals, meaning that settlement of the transaction would take place two business days after the transaction date. KII could also do forward gold deals, meaning that settlement was more than two business days after the transaction date. Pursuant to the Forward Trading Facility KII had authority to take forward positions for up to a maximum of seven days. But as McAfee testified, KII rarely engaged in any forward trading.

**188**  However, as McAfee testified, it was common for KII to instruct the bank to roll its position forward, postponing final settlement of the transaction to a date further into the future. When the bank telephoned KII to confirm its position at the appropriate date before maturity, KII would either instruct the bank it intended to close its position on the maturity date or it would advise the bank to keep the position open and roll the position forward. In the case of forward trades (where the maturity date was more than two business days after the transaction date), while KII was authorized to continue to roll forward its position to a maximum of seven days, McAfee testified that KII generally rolled its positions for a single day only. This concept of a rolling transaction, as distinct from a forward trading transaction, was unknown to Jain. However according to McAfee, the trader who handled most of the forward trades, there was no suggestion Kedia did not understand this trading concept.

**189**  While the essence of the pleading is that the debits resulted from a collapsing or arbitrary change in the price of a forward deal, this is simply not the case. While the debits at least partially reflect debits flowing from the bank's practice of applying the market rate to roll spot transactions forward on KII's instruction, there is no evidence that this resulted in any loss to KII.

**190**  In the final analysis, the plaintiffs' allegations of $116,000 of wrongful debits to the Gold Bullion account are simply without merit. Indeed the irony of this claim is that in the course of his analysis, Jain identified not simply the questionable total debits of $115,819.07 but also credits totalling $142,719.63. In other words, he identified overall trading profits of $45,000. There is no suggestion by the plaintiffs these trading profits were not properly earned by KII and not properly recorded as such in the banking records.

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| **5.0** |  | **Plaintiffs' claims for damages for defamation:** |  |

**191**  I intend to spend little time with this part of the plaintiffs' claim. The claim rests on the allegation that the bank's representatives made wrongful allegations of fraud against Viki, first in the presence of Kooner at the meeting of March 1, 1999, and later to the Bank of Nova Scotia representatives, allegedly causing Mr. Atkinson to report to Kedia the RBC's advice that "Kedia and his son cheated the Bank". As I have already found earlier, none of these allegations have any substance whatsoever and accordingly, there is no evidentiary foundation for any claim of defamation.

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| **6.0** |  | **Plaintiffs' claims for damages for wrongful realization:** |  |

**192**  The plaintiffs have made multiple complaints concerning the realization efforts undertaken by Wolrige Mahon. I will deal with each in turn:

1. that Wolrige Mahon acted pursuant to the terms of invalid security:

I have found the security was indeed valid and enforceable so this allegation requires no further comment.

1. that Wolrige Mahon damaged the plaintiff's leased premises and its equipment in the process of removing the equipment and during the storage of the equipment:

Kedia provided no particulars of any of these allegations. There was no evidence of any inventory of warehouse equipment, nor its general condition, prior to the seizure. Nor was there any evidence of any alleged damage. Based on the evidence of Mr. Michael Cheevers and Mr. Jonathan McNair, I am satisfied that Wolrige Mahon took proper care and acted in an entirely reasonable and commercially reasonable manner throughout. This claim is entirely without foundation.

1. that Wolrige Mahon deliberately failed to dispose of the gold and jewellery, but sold other assets well below their market value:

This complaint has no foundation. To date, any effort to dispose of the jewellery in the manner negotiated with Kedia and his legal counsel has failed. Any of the few sales of any items to date are in accordance with the appraisals obtained.

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| **7.0** |  | **Plaintiffs' claims for damages arising from Viki Kedia's death:** |  |

**193**  This claim for damages is brought by Kedia in his personal capacity, pursuant to the provisions of the ***Family Compensation Act***. While the Court previously disallowed any amendment to the pleadings to allege a claim for wrongful death due to ***negligence*** (see Smith J. Reasons for Judgment, December 2, 2004), the Court did allow amendments founded on a claim for damages for wrongful death due to the intentional acts of the defendants.

**194**  The thrust of Kedia's action is that the bank's representatives (including its legal counsel, Poulsen), are guilty of the tort of intentional infliction of mental distress. In ***Rahemtulla v. Vanfed Credit Union 91984*** [*(1984), 51 B.C.L.R. 200*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2M6-00000-00&context=) (S.C.), relying upon the decision of Wright J. in ***Wilkinson v. Downtown*** (1897) 2 Q.B. 57, McLachlin J. held that such conduct must be "plainly calculated to produce some effect of the kind which was produced".

**195**  It appears that in both cases the Court accepted a form of constructive rather than actual intention was sufficient to establish liability. Nevertheless, I agree with the defence submission that the Court should not assume or constructively find intention unless there is evidence which demonstrates some intention on the part of the bank, rather than merely ***negligence***.

**196**  In the case of intentional torts, the defendant is generally liable for all the consequences flowing from the tortious conduct, whether foreseeable or not, on the basis that the limiting principles of foreseeability and remoteness have no applicability in cases of deliberate misconduct. In the context of a claim for damages arising from an intentional tort, I agree with the defence submission that it makes no sense to deem intention on the basis of simple foreseeability, while at the same time denying the defendant the benefits of the limitations of liability applicable in a ***negligence*** action. Put another way, the standard of constructive intention must be very high.

**197**  In the context of an alleged suicide, my sister judge, Smith J., has already ruled that suicide is considered too remote a consequence to permit recovery in a ***negligence*** action except in certain very limited circumstances. The suicide will generally constitute a *novus actus interveniens* which is not foreseeable and accordingly, in such a case, a finding in ***negligence*** will generally not succeed. As a result, the plaintiffs' proposed amendments to the pleadings in this action, based on a cause of action framed in ***negligence***, were not allowed.

**198**  That said, in what cases can a suicide be said to go beyond mere foreseeability of harm? I accept the defence submission that the English Court of Appeal's decision in ***Wong v. Parkside Health NHS Trust*** (2001) EWCA Civ. 1721; (2003) All E.R. 932, (Eng. C.A.) offers some useful guidance. There the Court held that before a defendant can be found to have committed an act "calculated to cause harm", it must be proven the defendant intended to violate the plaintiff's interest in her freedom from such harm, namely physical injury or a recognized psychiatric illness. The defendant must not only have deliberately engaged in this conduct, but it must be shown the degree of harm was so likely to result from such conduct that the defendant cannot be heard to say he did not mean to do so.

**199**  Relying on his own evidence and that of Jain, and other family and friends, Kedia submits that the bank and its agents engaged in a campaign of harassment against Viki and made false allegations of fraud against him. Kedia says the bank repeatedly pressured him and Viki to cover the overdrafts in the KII gold bullion account, as well as the Goldrich overdraft, knowing that in the face of such allegations, someone with Viki's cultural background would feel extreme shame and dishonour. Kedia says the bank's representatives knew or ought to have known that their allegations would not only harm the reputation and goodwill of KII, but would harm the personal reputations of Kedia and his son. He says the bank's allegations of money laundering, theft and fraud were deliberately intended by the bank and its agents to subject Viki to emotional duress or harm. He says the bank's representatives cannot now say they could not have anticipated Viki's death by suicide.

**200**  In effect, Kedia faces two hurdles. First he must establish on a balance of probabilities that Viki's death was suicide, rather than an accidental death. Assuming he succeeds in proving Viki's death was suicide, he must then prove, on a balance of probabilities, that Viki's death was caused by the conduct of the bank's employees or agents, rather than by other factors such as Viki's own depression or drug use or his own anxiety resulting from the failure of the family business.

**201**  In addressing the first issue, Kedia dismisses the Coroner's Judgment of Inquiry in which it was concluded Viki's death was the result of an accidental overdose of Nytol. Instead Kedia relies heavily on the expert report of Dr. Sidhu, a clinical psychologist, who was asked by plaintiff's legal counsel to assume Viki committed suicide and to comment on the possible reasons for his actions. In this sense, the report is of little help.

**202**  While in the text of her reports (Exhibit 235/Exhibit 236), Dr. Sidhu admitted that she was not medically qualified to comment on the actual mechanism of Viki's death, at trial she nevertheless insisted she was indeed qualified to provide an opinion as to whether Viki committed suicide. On the whole, her opinion is rather equivocal. In the body of the report she describes her opinion as "speculative" and that it may be considered a "preliminary assessment" only. However, based on information gathered from Kedia and Viki's circle of friends and family members, she opined that at the time of his death, Viki was suffering what she diagnosed as a "Major Depressive Disorder, Severe with Psychotic Features". Although Viki had experienced earlier stresses (i.e. his mother's murder; the criminal charges arising from his theft from Bora), she noted that he had successfully weathered all these apparent stresses and had been functioning well prior to January-February 1999. She could point to no triggers for his depression, other than the bank's allegations of fraud. She opined that his particular sensitivities (.ie. his generally introspective personality, his Marawari Hindu background; his strong immersion of identity in the family's business, and his belief that his own and his family's honour were being challenged) - were all factors which may have increased his risks of committing suicide.

**203**  Dr. Roy O'Shaughnessy testified on behalf of the defence. In his report (Exhibit 237) he was highly critical of Dr. Sidhu's opinion, noting that quite apart from other difficulties, she had not taken account of Viki's abuse of Nytol. In his opinion Viki's history of visual hallucinations, illusions and his sudden change in behaviour were much more consistent with a toxic state resulting from Nytol abuse, as opposed to a major depressive disorder. Statistically, he noted that suicides were uncommon.

**204**  In his view various factors suggested this was not suicide: Viki checking into a hotel with another person; Viki apparently phoning the police in an agitated state during the course of his hotel stay, complaining of an intruder in the premises; and Viki ultimately not taking even a lethal dose of Nytol. As Dr. O'Shaughnessy noted, the toxicology report indicates Viki had only a slightly higher than therapeutic level of Nytol in his bloodstream. The toxicology report however did note the presence of other drugs including metabolites of cocaine.

**205**  While he acknowledged the evidence that Viki had apparently telephoned another jeweller from the hotel, asking for cyanide for bombing (a process used by jewellers for cleaning jewellery), he stated that this evidence alone did not support the conclusion Viki had committed suicide. Perhaps Viki had been attempting to identify a supplier source for cyanide which might have been legitimately used at some later point in GMC's gold manufacturing activities. He noted that Viki was the indeed the principal of GMC and was in the process of attempting to establish a jewellery manufacturing business. Even assuming Viki had intended to poison himself, but had been unable to find a source of supply of cyanide, Dr. O'Shaughnessy questioned why there still appeared to be no follow-up behaviour in terms of pursuing some obviously more lethal method of suicide. Having not secured possession of any cyanide, why did Viki not then pursue one of the other sure fire methods often adopted by young males - jumping off a building or driving or walking into oncoming traffic? He noted that in this case, Viki's actions (the apparent overdose of Nytol) were neither clearly intentional, nor clearly lethal.

**206**  Overall, I prefer Dr. O'Shaughnessy's opinion to that of Dr. Sidhu. He is a highly qualified forensic psychiatrist who, in my view, provided a much more detailed, balanced, and medically sound review of the evidence. Adopting his opinion, I conclude Kedia has failed to establish, on a balance of probability that Viki's death was indeed a suicide.

**207**  However even assuming I am wrong and it can be said that Viki did commit suicide, I nevertheless find that Kedia's claim must still fail. Adopting the test in ***Wong***, I find that Kedia has come nowhere close to establishing, on a balance of probabilities, or at all, that the bank's officers and agents' actions were "calculated to cause harm" to Viki.

**208**  As I have already noted, I have completely rejected all of Kedia's evidence concerning the meetings in which he says the bank's officers or legal counsel aggressively questioned Viki, accused him of fraud, or cheque kiting or money laundering, and threatened him with jail. I regret to say that in my view, all of this evidence is a complete fabrication on his part. I find Mr. Jain's evidence of the bank's aggressive threats during the meeting of March 1999, equally untenable. I view Jain as a bystander in this family tragedy, repeatedly called upon to "fix" various crises, while also expected to later loyally support his father-in-law's preposterous reconstructions of events.

**209**  In my view, the bank's representatives found themselves faced with a difficult task. As they were required to do, they met with the customers on multiple occasions, investigated the underlying facts, as best they could, and then explored various means of settlement to resolve KII's financial crisis. While Kedia professed to be desperate to resolve the crisis and to have whatever financial resources were necessary to satisfy the overdraft, his settlement offers remained premised on a re-establishment of the RBC trading facility - something the bank was understandably not prepared to do until the debt was first addressed.

**210**  Based on the evidence of Olmstead, Poulsen, Pross, and Kedia's own legal counsel, Pope, I am satisfied that throughout this difficult period all of the bank's dealings with Kedia and his son were formal, businesslike, and respectful. No false allegations nor any threats were ever made, either directly or indirectly.

**211**  If Viki did indeed commit suicide (which I doubt), I expect that tragic act was much more the result of his own despair and guilt, given what he perhaps perceived as his role in the demise of the family business. Whether Viki's actions had actually caused the shutting down of the businesses or whether his actions were simply one small part of the companies' general pattern of incompetence and mismanagement in which a complete business failure was inevitable I cannot say.

**212**  In any case, the plaintiffs' claim for damages arising from the intentional infliction of mental distress is entirely without foundation and is dismissed.

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| **8.0** |  | **RBC Counterclaim for debt of $ 200,000, overdraft:** |  |

**213**  As I have noted earlier, the debit to the KII Gold Bullion account for accumulated gold transactions in the sum of $385,360.05 was recorded on March 10, 1999. The overdraft was reduced to $336,173.34(US) after various remaining positive account balances were applied to the overdraft. Following a number of payments and adjusting entries, the overdraft was eventually reduced to $198,154.42(US), which is the amount presently claimed by the bank.

**214**  KII has effectively defended this claim in debt, asserting that it was caused or contributed to by the bank's various breaches of duty; that there were unauthorized debits in the gold bullion account or the forward trading account; and finally that the bank had no authority to process any of the debits where there were insufficient funds on hand in the KII accounts ("the no credit term submission"). I have addressed and dismissed each of those claims/defences earlier and they require no review here.

**215**  In terms of the general reliability of the bank in both tracking and calculating the overdraft, I have the benefit of the report of Mr. Michael Bowie of KPMG dated May 10, 2007 (Exhibit 354). Mr. Bowie was retained by the bank to respond to the report which a Mr. Meentz prepared for KII (Exhibit 355), which report the plaintiffs' chose not to file in evidence.

**216**  Mr. Meentz had reviewed the KII bank statements for the period August 1998 to February 26, 1999, as well as all gold purchases for that period. Based on his review, he concluded there were $764,000 worth of debits to the account for which he was unable to find any explanation.

**217**  Mr. Bowie's mandate was to examine the records in order to explain this large alleged discrepancy. In every case, Bowie was able to reconcile all gold bullion transactions conducted by KII during this period, up to and including the final debit resulting in the overdraft claimed by the RBC. He linked up each particular debit either the specific gold bullion or silver purchase, or the transfer of monies to other accounts, or he was able to identify a corresponding offsetting credit in the account. In the result he was able to reconcile the alleged discrepancy to within $5. Based on his largely unchallenged evidence I conclude the overdraft claim is indeed accurate and reflects gold transactions for which KII received many kilos of physical gold.

**218**  The bank has properly characterized the claim for the overdraft as a claim in debt. In effect, an overdraft account is a loan which is granted to the bank's customer. Paragraph 2(b) and (c) of the ***FSA*** imposes on KII an obligation to pay the overdraft in the account with interest.

**219**  While KII pursued no formal defence to the Counterclaim, I have found that none of the evidence adduced on behalf of KII provides any evidentiary foundation for any defence to the Counterclaim. Accordingly I grant judgment to the bank in the sum of $198,154.42.

**220**  In final submissions the bank's legal counsel, Mr. Andrews, advised he had instructions not to pursue contract interest but rather to restrict the claim to Court Order Interest which has accrued. I will make that order.

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| **9.0** | **RBC Counterclaim for Goldrich overdraft:** |  |

**221**  I have already reviewed the facts underlying this claim. There is no dispute, and indeed Viki admitted to the bank's officers, that on January 19 and 21, 1999, on behalf of KII, he drew Cheques #1138 and 1139 on the KII Forex Account, payable to Goldrich, each in the amount of $150,000. There is also no dispute that Viki presented these cheques for deposit to the Goldrich account at RBC and that Goldrich received credit for the KII cheques deposited.

**222**  The KII Cheques were subsequently returned for insufficient funds on January 20 and January 22, 1999, at which point the debits processed to the KII accounts were reversed. On February 16, 1999, a chargeback of $300,000 was processed to the Goldrich account in an effort to recover the proceeds of the KII cheques for which credit had been given. At this time, there were insufficient funds to cover the chargeback. The bank was only able to recover $55,557.73, leaving $244,055.57 outstanding.

**223**  In late June 2007, in the course of this trial, RBC's counsel, Mr. Andrews, advised the Court that Goldrich Trading Ltd., the second defendant to this Counterclaim, had consented to judgment and to a payment out of court to the RBC of the sum of $20,657.83, which amount had previously been garnished from Goldrich. Accordingly, the RBC's claim against KII is reduced to $223,397.74.

**224**  The RBC's claim against KII arises under the ***Bills of Exchange Act***, [*R.S.C. 1985, c. B-4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB31-F27X-6419-00000-00&context=) (the "***BEA***"), the relevant provisions of which are as follows:

1. "holder" means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof.

...

1. A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely,
2. that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; and
3. that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

...

1. The rights and powers of the holder of a bill are as follows:
2. he may sue on the bill in his own name;
3. where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.

...

1. A bill is dishonoured by non-payment when
2. it is duly presented for payment and payment is refused or cannot be obtained; or
3. presentment is excused and the bill is overdue and unpaid.

...

1. Notice of dishonour is dispensed with
2. when, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or endorser sought to be charged; or
3. by waiver, express or implied.

...

1. The drawer of a bill by drawing it
2. engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or any endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken.

...

1. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, are
2. the amount of the bill;
3. interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case; and
4. the expenses of noting and protesting.

...

1. Where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course of the cheque.

**225**  I am satisfied that pursuant to s. 165(3) of the ***BEA***, upon presentation of the KII cheques by Viki on January 19 and 21, 1999, in crediting the Goldrich account for the amounts specified in the cheques, the RBC did indeed acquire all of the rights and powers of a "holder in due course" of the cheques. Further I find that pursuant to s. 55, as a "holder in due course", the RBC has also satisfied the requirements in giving "value" in good faith, within the meaning of the ***BEA***, by immediately crediting the Goldrich account upon presentation of the cheques and without notice of defect.

**226**  While not specifically defined in the ***BEA***, the accepted definition of a "drawer", as stated by Bradley Crawford in **Payment, Clearing and Settlement in Canada** (Aurora: Canada Law Book Inc., 2002, p. 697) is "the person who draws or gives the order." The order for the cheques in this case was given by Viki, an authorized representative of KII, and accordingly KII is the drawer of the cheques.

**227**  Section 73 of the ***BEA*** also provides the RBC, as the holder in due course, the right to sue in its own name and enforce payment against all parties liable on the bill, including KII as the drawer of the cheques.

**228**  Sections 94(2) and 129 of the ***BEA*** hold KII liable to RBC as the "holder" upon dishonour of the cheques. I find that RBC has taken the requisite proceedings on dishonour and that KII has expressly waived its entitlement to notice of dishonour under clause 6 of the ***FSA*** between KII and RBC, as permitted by s. 105(1)(b) of the ***BEA***.

**229**  Here, KII has not filed a defence to the Counterclaim but claims that RBC should have refused to honour the cheques immediately upon presentation by Viki, or in a more timely manner thereafter.

**230**  There is no statutory nor any common law duty on a bank to dishonour a cheque immediately upon presentation. Moreover, the ***FSA*** between KII and that bank does not contain any timing requirement for dishonouring cheques. Clause 2(a) of the ***FSA*** explicitly preserves RBC's discretion, at any time, to refuse to honour any instrument which might overdraw an account or increase an overdraft. This term effectively reserves RBC the right to dishonour a cheque at any time following presentation, as Olmstead did in dishonouring the cheques one day after presentment.

**231**  Here, counsel for the RBC has submitted that the decision in ***Ubacol Investments Ltd. v. Royal Bank of Canada*** [*(1995), 171 A.R. 122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9341-DY33-B4KP-00000-00&context=) (Alta. Q.B.) presents an analogous situation to that of the case at bar. In ***Ubacol Investments Ltd.***, Kent J. held that a one-day delay in deciding to dishonour a cheque was not unreasonable given the use of an overnight posting system where items were cleared through a central data system and presented to the bank manager for decision the following day.

**232**  In the case at bar, Olmstead, as the manager of the KII accounts, would receive a report each morning listing the items that would result in an overdraft if processed. He would typically consult the client as to whether payment would follow and would then decide whether to honour the item. He dishonoured the KII cheques on January 20 and 22, 1999, the day he received the reports, or one day following presentment of the cheques.

**233**  It must be further noted that the ***Canadian Payment Association Rules*** generally require that any unpaid item normally be processed or turned around by the drawee branch no later than the business day after its physical receipt.

**234**  Having regard to the ***Canadian Payment Association Rules***, the decision in ***Ubacol Investments Ltd.***, and the history of the bank'' practices regarding the KII accounts, I am satisfied that Olmstead's act of dishonouring the cheques within one day of presentment was not unreasonable.

**235**  The other issue advanced by KII is RBC's delay in debiting the Goldrich account until approximately three weeks after the cheques were presented. The ***FSA*** provides for no time limit on RBC's chargeback rights. Nor does there appear to be any common law time limit upon the bank's exercise of a chargeback, although there may be an implicit condition precedent that the right be exercised within "reasonable time" after the bank receives the dishonoured item: see **Payment, Clearing and Settlement in Canada** at 280.

**236**  I am satisfied that three weeks was not an unreasonable amount of time following the dishonouring of the cheques to process the chargeback given the reasons for the delay, including Viki's history of daily dealings with the RBC. Thus I am satisfied that the bank could still exercise its right of chargeback when it did so on February 16, 1999. Clause 8 of the ***FSA*** specifically reserves RBC's right to chargeback if a cheque is dishonored or if the bank is unable to collect. Further it must be noted that in this case the delay in this chargeback also effectively allowed the RBC to recover a larger amount of funds than if it had done so immediately, at which point there was a smaller positive balance in the account.

**237**  Here KII has failed to make out any of the defences that are available against a holder in due course. No defence to the counterclaim was ever filed. Other than the submission that there were sufficient funds in the KII account such that the cheques should not have been dishonoured and that the RBC did not dishonour the cheques or chargeback the Goldrich account in a timely fashion (all of which allegations I have found to have no merit) ,KII has not advanced any other position.

**238**  In the result I hold that the bank has a valid claim as a holder in due course of the cheques pursuant to ss. 55(1) and 165(3) of the ***BEA*** and succeeds in its counterclaim against KII as drawer of the cheques. RBC is entitled to recover the amount of the cheques under s. 133 of the ***BEA***.

**239**  Since RBC has already recovered $55,557.73 by way of chargeback to the Goldrich account on February 16, 1999, and a further $20,657.83 (from the garnishment funds following Goldrich's consent to judgment), I grant judgment in its favour in the net sum of $223,397.74. Court Order Interest must be calculated based from the time of presentment on January 19, 1999 forward, with any necessary adjustment required to reflect the crediting of the garnishment proceeds in June 2007.

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| **10.0** | **Conclusion:** |  |

**240**  In summary, I make the following orders:

1. All of the plaintiffs' claims against RBC and Wolrige Mahon are dismissed;
2. RBC is entitled to judgment in the sum of $198,154.42 plus Court Order Interest from March 10, 1999 until present, being the net amount of the outstanding overdraft in the KII Gold Bullion Account.
3. RBC is entitled to judgment in the sum of $223,397.74 plus Court Order Interest from January 19, 1999 until present, being the net amount of the KII cheques deposited to the Goldrich account and subsequently dishonoured (with any adjustment required to reflect the larger outstanding claim which persisted until Goldrich's consent to Judgment in June 2007 when the garnishment funds were applied to the amount claimed).

**241**  As a matter of course the RBC and Wolrige Mahon are entitled to the costs of this action. However since I am unaware of any settlement offers which may have been exchanged or any other circumstances which might result in some different Order, if will make no order concerning costs at this time. If the issue of costs cannot be resolved directly between the parties, I leave it to them to contact the Registry to arrange an early date for submissions on the matter.

M.E. BOYD J.

**End of Document**

[***Meehan v. Dixon, [2008] B.C.J. No. 119***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-20DV-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

R.W. Metzger J.

Heard: December 17, 2007.

Judgment: January 24, 2008.

Docket: 05/2406

Registry: Victoria

**[2008] B.C.J. No. 119** | 2008 BCSC 87 | 164 A.C.W.S. (3d) 84

Between Patrick Meehan and Lloyd Zimmerman, Plaintiffs, and Marion Dixon, Century 21 South Island Realty Ltd. and John Doe, Defendants

(48 paras.)

**Case Summary**

**Contracts — Formation — Implied terms — Trade custom — The plaintiffs were awarded $2,400 amounting to three months' rent on their property -- the defendant property manager had not been under an express or implied duty to periodically perform walk-in inspections of the property, but upon discovering the damage caused by the marijuana grow-op, was required to immediately inform the plaintiffs rather than wait three months in an attempt to have the renter repair the damage.**

**Contracts — Breach of contract — Remedies — Damages — Liquidated damages — The plaintiffs were awarded $2,400 amounting to three months' rent on their property -- the defendant property manager had not been under an express or implied duty to periodically perform walk-in inspections of the property, but upon discovering the damage caused by the marijuana grow-op, was required to immediately inform the plaintiffs rather than wait three months in an attempt to have the renter repair the damage.**

**Landlord and tenant law — The premises — Damage to premises — The plaintiffs were awarded $2,400 amounting to three months' rent on their property -- the defendant property manager had not been under an express or implied duty to periodically perform walk-in inspections of the property, but upon discovering the damage caused by the marijuana grow-op, was required to immediately inform the plaintiffs rather than wait three months in an attempt to have the renter repair the damage.**

**Tort law — *Negligence* — Standard of care — The plaintiffs were awarded $2,400 amounting to three months' rent on their property -- the defendant property manager had not been under an express or implied duty to periodically perform walk-in inspections of the property, but upon discovering the damage caused by the marijuana grow-op, was required to immediately inform the plaintiffs rather than wait three months in an attempt to have the renter repair the damage.**

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| --- |
| The plaintiffs sought $20,516 in damages for breach of contract, breach of duty of care, and breach of fiduciary duty as against their property manager and the remaining defendants -- The plaintiffs had retained the property manager and the firm to manage a rental property -- However, the renter had subsequently sub-leased the property to a person who ran a marijuana grow-op there without the property manager's consent or knowledge -- The property suffered significant damage, and the original renter was bankrupt -- The plaintiffs sought to recover the cost of the repairs -- The parties could not locate the written agreement which set out the responsibilities of the property manager -- HELD: The plaintiffs were awarded $2,400 for three months' lost rent -- There was no actual or implied term requiring the regular inspection of the interior of the property -- The court was satisfied that the agreement was the standard management agreement used by the previous managing firms for all their similar rental agreements -- That agreement set out no responsibility for the property manager to do periodic walk-through inspections of the building -- She had, in fact, occasionally inspected the exterior of the premises, and there had been no external evidence of a grow operation or damage inside the house -- The renter had been renting the house for five years, and he had previously undertaken repairs to the residence -- There was no reason for the manager to believe there might be damage to the interior of the home -- Furthermore, there was no evidence as to how long the grow-op was in existence, and the plaintiffs had not proven the performance of regular inspections would have prevented the creation of the operation and the resulting damages -- Her conduct did not clearly fall below an obvious standard of care -- However, she failed to tell the plaintiffs of the damage for three months, and the plaintiffs should have had an opportunity to repair the extensive damage at the earliest possible date, in order that they could mitigate their losses and continue to collect rent from the house -- The plaintiffs lost three months of rent before they were told of the damages. |

**Counsel**

Counsel for the Plaintiffs: P.J. Penner.

Counsel for the Defendants: P.G. Guy.

**Reasons for Judgment**

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| **R.W. METZGER J.** |

**INTRODUCTION**

**1**  The plaintiffs, Pat Meehan and Lloyd Zimmerman, purchased a secluded property in Colwood, British Columbia, in 1980. The purchase was made to immediately generate rental income from the two residential premises and as an investment for future development.

**2**  In 1991, the plaintiffs retained a property management firm to manage the rental property. The defendant Marion Dixon became and remained the agent responsible for managing the property even though the property management firm changed ownership several times. The defendant Century 21 bought out the previous firm in 2000.

**3**  I am satisfied that Ms. Dixon was acting as agent for Century 21 at the time the damage occurred. While performing her property management duties, she had office assistance from Century 21, the rent cheques were sent to the Century 21 office, and she consulted with her manager at Century 21 with regard to the damage to the rental property.

**4**  The parties could not locate the written agreement that set out the obligations of the property manager. I am satisfied that the contract between the plaintiffs and the defendants was the standard management agreement used by the previous managing firms for all of their similar rental arrangements.

**5**  The plaintiffs assert that it was Ms. Dixon's duty to do periodic walk-through inspections of the buildings. The standard management agreement sets out no such responsibility.

**6**  In 1998, Ms. Dixon rented the house on the property to Lonnie Blanchard for $800 per month. She inspected the interior of the building at some point after he moved in, as was her practice, but did no further interior inspections.

**7**  The house required maintenance during Mr. Blanchard's tenancy, such as painting, rat extermination, roof repairs and cleaning. Ms. Dixon was aware of the plaintiffs' plans to sell the property to developers and that she was to spend as little money as possible on the property. Mr. Blanchard paid his rent on time and made several improvements to the house with the plaintiffs' consent.

**8**  At some point in 2001 or 2002, Mr. Blanchard advised Ms. Dixon that he would use the house for drywall storage only, but that he would be attending the property regularly. The plaintiffs agreed to this intended use. They allege that they specifically told Ms. Dixon that there was to be no growing of illicit substances on the property. Ms. Dixon has no recollection of this statement.

**9**  The second dwelling on the property, known as the cabin, was rented out to another tenant for about eight continuous years, including the time of Mr. Blanchard's tenancy. This tenant was subpoenaed by the defendants but did not appear.

**10**  Ms. Dixon did not go inside the house after Mr. Blanchard began to use the location for drywall storage. She periodically checked the exterior of the property, and found its appearance to be normal. She testified she was not able to look through the windows, as they were high off the ground and the window coverings were drawn.

**11**  In March 2003, Mr. Blanchard notified Ms. Dixon that he had been subletting the property without her consent or knowledge, and that there had been damage to the interior of the main house as a result of a marijuana grow operation. Ms. Dixon collected her last rent cheque from Mr. Blanchard in February or March 2003.

**12**  Ms. Dixon inspected the interior of the house in early April 2003 and found extensive damage. She did not immediately report the damage to the plaintiffs. She insisted that Mr. Blanchard repair the damage himself. He agreed.

**13**  Damage to the house included the removal of some interior walls and carpets plus holes punched in the remaining walls and the floors for duct work. Considerable debris was left in the house including plant soil, staples, nails, glue, and plastics.

**14**  Mr. Blanchard filed for bankruptcy in late May 2003.

**15**  In late June 2003, Ms. Dixon revealed to the plaintiffs that the house was damaged.

**16**  With the consent of the plaintiffs, Ms. Dixon initially took charge of effecting repairs to the property through Mr. Blanchard. She indicated to the plaintiffs that the work would be completed by August 2003. Under her supervision, Mr. Blanchard undertook a number of repairs but the work proceeded slowly. Mr. Blanchard requested $3,100 for materials in July, but the plaintiffs refused to take on any expense with regard to the damage. Mr. Blanchard stopped all work.

**17**  In January or February 2004, Mr. Zimmerman advised Ms. Dixon that the plaintiffs would finish the repairs, as none had been effected since August 2003.

**18**  Mr. Zimmerman, a professional handy-man, with the help of Mr. Meehan and his wife, Margaret Meehan, completed the repairs. The repairs were finished in March 2004, and the property was rented in May 2004. In 2006 the plaintiffs sold the property to a developer for about 1.25 million dollars.

**19**  In their Statement of Claim, the plaintiffs sought damages for breach of contract, breach of duty of care, and breach of fiduciary duty. The issue of fiduciary duty was not argued. In their submissions, the plaintiffs claim $3,963.34 for the cost of materials, plus $6,162 for their labour. They also claim $10,115.84 for lost rent, bringing the total amount claimed to $20,515.84.

**20**  The plaintiffs did not make any submissions about the amount of time and money it would have taken an outside contractor to complete the necessary repairs to the house.

**ISSUES**

**21**

1. Was it the duty of property manager Marion Dixon, in contract or in tort, to regularly inspect the exterior and interior of the house such that she should have discovered the grow operation before the damage occurred?; and
2. What, if any, damages flow from the fact that Ms. Dixon did not disclose the grow operation to the plaintiffs until June 2003? Which of the two remaining defendants, Century 21 or Marion Dixon, is responsible for these damages?

**DISCUSSION AND ANALYSIS**

**22**  The plaintiffs say that Ms. Dixon breached the contract to regularly inspect the interior premises on a periodic basis. If no contractual duty is found, the plaintiffs submit that Ms. Dixon assumed a duty of care with regard to the property, which they say she failed to meet.

**23**  The plaintiffs contend that in the absence of an express contractual term, the conduct of the defendant, Ms. Dixon, has led to an implied contract to inspect the interior of the premises. Implied contractual terms can arise from custom or from the parties' conduct: see, for example, ***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=); and s. 251, *Canadian Encyclopedic Digest* (Western, WLeC), citing ***Equipment Sales Ltd. v. Munro & Allen Rentals Ltd****.* [*(1972), 4 N.S.R. (2d) 443*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPR1-F65M-621J-00000-00&context=) (C.A.).

**24**  I am not satisfied on a balance of probabilities that the plaintiffs have proven there was an implied contractual term that Ms. Dixon was to inspect the interior of the premises on a regular basis after a tenant moved in. There may well have been an implied term that she inspect the interior of the premises soon after a new tenant moved in, which she did in the case of Mr. Blanchard. No evidence was adduced with regard to the supposed frequency or extent of interior inspections, and the plaintiffs did not expect any kind of regular reporting from Ms. Dixon, in writing or otherwise.

**25**  Likewise, there was no expert evidence regarding the industry standards for property inspections that would support a contractual duty to regularly inspect the interior of a dwelling. As Edwards J. articulated at para. 15 in ***Seiler v. Mutual Insurance Co. of British Columbia***, [*2003 BCSC 1423*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20VB-00000-00&context=), affirmed by Finch C.J.B.C. at [*2003 BCCA 696*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-6111-00000-00&context=):

Regardless of whether the plaintiffs' claim is in tort or contract, a key element they must prove is that the defendants failed to meet the tort law standards of care required of professionals in their respective disciplines, or standards they implicitly warranted in any contract that they would meet in carrying out the work they did. ...

In the absence of such evidence, it is difficult for this Court to find that there was a contractual duty for Ms. Dixon to inspect the interior of the premises such that she would have discovered a marijuana grow operation before damage occurred.

**26**  The plaintiffs also rely on Question 98 of the examination for discovery of Ms. Dixon as an admission that the property management agreement included the requirement of periodic interior inspections. In Question 98, it was asked, "once the tenant was in (sic) the property, you considered it part of your duty to do walk-through inspections from time to time, correct?" Ms. Dixon replied, "Yes".

**27**  However, read in context of the entirety of Ms. Dixon's examination for discovery, as well as her oral testimony, it is clear that Ms. Dixon was not required to inspect the interior of the premises in question with any particular frequency. I accept Ms. Dixon's evidence that other walk-through inspections were conducted when a tenant had a complaint that required an interior repair or when there was a reason to do so. Ms. Dixon did inspect the property prior to its use as drywall storage.

**28**  Ms. Dixon did occasionally inspect the exterior of the premises on the plaintiffs' property. There was no external evidence of a grow operation or of damage inside the house when she visited the property.

**29**  In 2003, Mr. Blanchard had been renting the house for nearly five years. He undertook repairs to the residence in the past. He paid his rent on time. Ms. Dixon had no reason to believe that there might be damage to the interior of the home. She had no reason to demand that Mr. Blanchard allow her to inspect inside the house.

**30**  Even if there were an implied contractual term that Ms. Dixon inspect the interior of the house regularly, there is no evidence that such inspections would have enabled her to discover the damage from the grow operation earlier than she did. The grow operation could have been established between inspections, with exactly the same damage to the home. The evidence did not conclusively establish how long the grow operation was in existence. The plaintiffs have simply not demonstrated that the performance of regular inspections would have prevented the creation of the marijuana grow operation and the resulting damages.

**31**  I find that there was no actual or implied contractual term that Ms. Dixon was to inspect the interior of the plaintiffs' rental property regularly. Even if there had been such a term, the plaintiffs did not demonstrate that the alleged damages actually flowed from Ms. Dixon's failure to inspect.

**32**  The plaintiffs submit that the appropriate duty of care in this instance is that which Ms. Dixon assumed and the parties understood, rather than the duty considered reasonable in the industry.

**33**  The defendants submit that any duty of care must be evaluated in the context of the standard of care required of a reasonable person in Ms. Dixon's profession, and that expert evidence was necessary to determine this standard. There was no evidence that industry standards require frequent interior inspections of rental premises.

**34**  The defendants referred to ***Seiler***, where Edwards J. considered whether there was sufficient evidence to find ***negligence*** in a case where the plaintiffs alleged that a contractor's work caused their health problems. At paras. 16-17, Edwards J. wrote:

The defendants' short point is that there is no expert evidence of what standards of care are required of the defendants so there is no basis upon which the Court can make a key finding of fact, that is, breach of the appropriate standards ... necessary for the plaintiffs' action to succeed.

The defendants' submission is that this is not a case where a breach of the standard of professional competence is obvious to a lay person. ...

**35**  Edwards J. ultimately agreed with the defendants in ***Seiler***, and held at para. 38:

... Expert evidence is necessary to establish the appropriate standards of care these defendants had to meet ... There is no such evidence.

**36**  There were similar findings in ***Walls v. Ross***, [*2001 BCPC 187*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-243P-00000-00&context=), ***Shaak v. McIntyre***, [*[1991] B.C.J. No. 2607*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X2WN-00000-00&context=), [*1991 CarswellBC 1783*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X2WN-00000-00&context=), [1991] B.C.W.L.D. 2196 (B.C.S.C.), and ***Haag v. Marshall*** [*(1989), 39 B.C.L.R. (2d) 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B036-00000-00&context=), [*61 D.L.R. (4th) 371*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B036-00000-00&context=) (B.C.C.A.).

**37**  In ***Shaak***, however, Ryan J. noted at para. 51 that, "[t]here may be cases where the defendant has so clearly fallen below the standard required of him or her that expert evidence is not required." Such a case would entail a particularly egregious act or omission, such that an ordinary person would easily be able to recognize the ***negligence***.

**38**  Counsel for the plaintiffs in the case at bar suggested that Ms. Dixon had the onus of proof to demonstrate that she met her duties of care as a property manager for the defendants, because the subject matter lies within her knowledge only. This case, however, is not one of *prima facie* ***negligence***: see ***British Columbia Buildings Corp. v. Commerce Court Property Ltd.***, [*[1992] B.C.J. No. 2268*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JC0G-630M-00000-00&context=), 1992 CarswellBC 1756, [1992] B.C.W.L.D. 2584 (B.C.S.C.), affirmed at [*[1994] 43 B.C.A.C. 157*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M14F-00000-00&context=), 69 W.A.C. 157. It is not clear that Ms. Dixon's acts or omissions caused the damage, and it is admitted that third parties were directly responsible for the grow operation. The burden remains on the defendants to demonstrate that Ms. Dixon was negligent.

**39**  In the instant case, as in ***Seiler***, ***Haag***, and ***Shaak***, the standards of conduct of the professional in question are not in the ordinary experience of a judge or lay person. I cannot conclude, as the plaintiffs urge, that ***negligence*** should be found within the narrow confines of this case and the expectations of these particular plaintiffs. Without evidence adduced about the standard inspection duties of property managers, it is difficult to conclude whether those duties were breached. In addition, in the absence of expert evidence about the characteristics of marijuana grow operations today, I cannot know how reasonably easy or difficult it is for a property manager to anticipate such operations, or to detect them before major damage is done to a house.

**40**  The defendants submitted that, unless the court can find that the conduct of Marion Dixon fell below a standard of care so obvious that no evidence was required to establish what the standard is, the court ought to dismiss. Ms. Dixon's conduct did not clearly fall below an obvious standard of care and therefore the defendants cannot be liable for the damage to the property resulting from the marijuana grow operation.

**41**  Ms. Dixon waited three months to tell the plaintiffs about the damage caused to their property by the grow operation as she believed she could convince Mr. Blanchard to repair the damage himself. She testified she believed this was reasonable because the plaintiffs had clearly expressed to her that they did not want to spend any money on the property, and thus she would save them worry and expense if the damage could be fixed without their knowledge. The house had been in a continual state of poor repair before the grow operation, and most recently used only for drywall storage. Ms. Dixon understood that the plaintiffs were planning to sell the property for development purposes in the near future.

**42**  It is not known whether the plaintiffs would have fixed the damage sooner if the damage had been revealed to them when Ms. Dixon became aware of it. They learned of the damage in late June 2003, and waited until February 2004 to take over the repair work from Mr. Blanchard even though he had stopped work in August 2003. The plaintiffs completed the repairs in March 2004.

**43**  I am satisfied it would be obvious to a lay person that Ms. Dixon had a duty to notify the plaintiffs when she first learned of the extent of the damage in April 2003. The plaintiffs should have had an opportunity to repair the extensive damage at the earliest possible date, in order that they could mitigate their losses and continue to collect rent from the house.

**44**  There is some disagreement about whether the rent was paid by Mr. Blanchard in March 2003. I find the defendants to be most persuasive on this point and conclude that the plaintiffs lost three months of rent before they were told of the damages.

**45**  I am satisfied that three months lost rent, or $2,400, is sufficient to compensate the plaintiffs in this case. The defendant Century 21 is liable for this amount, as Ms. Dixon was an authorized agent of Century 21, acting in her capacity as such. Common law principles dictate that a company is vicariously liable for the acts or omissions of its agents or employees, so long as the acts or omissions are sufficiently connected to the job: ***London Drugs Ltd. v. Kuehne & Nagel International Ltd.***, *[1992] 3 S.C.R. 299*, *(1992) 97 D.L.R. (4th) 261*.

**CONCLUSIONS**

**46**  The defendants are not liable, in contract or in tort, for the damages caused to the house on the property of the plaintiffs.

**47**  The defendant Century 21 South Island Realty Ltd. shall pay $2,400 to the plaintiffs as compensation for three months lost rent.

**48**  The parties are at liberty to make an application if they cannot agree on costs.

R.W. METZGER J.

**End of Document**

[***Mund v. Sovio, [2010] B.C.J. No. 334***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X10K-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

H. Hyslop J.

Heard: November 19, 2009.

Judgment: February 26, 2010.

Docket: S115685

Registry: New Westminster

**[2010] B.C.J. No. 334** | 2010 BCSC 252 | 82 C.C.L.I. (4th) 246 | 2010 CarswellBC 446 | 186 A.C.W.S. (3d) 1119

Between Jaswant Singh Mund, Plaintiff, and Dr. Olli Matti Sovio, Defendant

(80 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Application by the defendant physician Sovio to strike out the plaintiff Mund's statement of claim allowed — The plaintiff was injured in a 2007 motor vehicle accident; he received Part 7 benefits from ICBC until January, 2008 — In June, 2008 the physician examined him and made a report to ICBC — The plaintiff claimed the report was biased and false — There was no reasonable cause of action — The physician was not the plaintiff's physician, there was no contractual relationship, and there was no fiduciary duty or duty of care.**

**Health law — Health care professionals — Liability (malpractice) — *Negligence* — Duty of care — Existence of duty — Breach of fiduciary duty — Fiduciary relationship, elements — Professions — Health care — Doctors — Application by the defendant physician Sovio to strike out the plaintiff Mund's statement of claim allowed — The plaintiff was injured in a 2007 motor vehicle accident; he received Part 7 benefits from ICBC until January, 2008 — In June, 2008 the physician examined him and made a report to ICBC — The plaintiff claimed the report was biased and false — There was no reasonable cause of action — The physician was not the plaintiff's physician, there was no contractual relationship, and there was no fiduciary duty or duty of care.**

**Professional responsibility — Self-governing professions — Duties — Duty of care — Application by the defendant physician Sovio to strike out the plaintiff Mund's statement of claim allowed — The plaintiff was injured in a 2007 motor vehicle accident; he received Part 7 benefits from ICBC until January, 2008 — In June, 2008 the physician examined him and made a report to ICBC — The plaintiff claimed the report was biased and false — There was no reasonable cause of action — The physician was not the plaintiff's physician, there was no contractual relationship, and there was no fiduciary duty or duty of care.**

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| Application by the defendant physician Sovio to strike out the plaintiff Mund's statement of claim. The plaintiff was injured in a motor vehicle accident in 2007. The plaintiff received insurance benefits from the Insurance Corporation of British Columbia while recovering from the accident, including medical expenses and Part 7 benefits. The ICBC terminated the plaintiff's Part 7 benefits in January, 2008. In June, 2008 the plaintiff attended was examined by the physician, pursuant to the insurance regulations. The physician prepared a report in June, 2008. The plaintiff commenced an action against the physician, claiming that he made biased and false statements in his report to the ICBC and was opposed to his receiving further Part 7 benefits. The plaintiff claimed general and special damages, as well as punitive damages. The physician claimed that the statement of claim disclosed no reasonable cause of action. He argued that there was no duty of care or good faith and no contractual or fiduciary duty giving rise to liability.  HELD: Application allowed.  It was not in the physician's power to determine whether the plaintiff received Part 7 benefits. Where the physician was not the plaintiff's own physician, and there was no contractual or other relationship, there was no fiduciary duty or duty of care. Accordingly, the statement of claim was struck as disclosing no reasonable cause of action. |

**Statutes, Regulations and Rules Cited:**

Alberta Rules of Court, Rule 159(3)

British Columbia Supreme Court Rules, Rule 19(24)(a)

Insurance (Vehicle) Regulations, [*B.C. Reg. 447/83, s. 79*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VWW-WY31-JF75-M0RG-00000-00&context=), s. 98, s. 99, s. 103

Ontario Rules of Civil Procedure,

**Counsel**

Counsel for the Plaintiff: S.T. Cope.

Counsel for the Defendant: M.K. Kinch.

**Reasons for Judgment**

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| **H. HYSLOP J.** |

**1**   The defendant, Dr. Olli Matti Sovio, seeks to strike the plaintiff's, Jaswant Singh Mund's, amended statement of claim ("ASC") for failure to disclose a reasonable cause of action pursuant to Rule 19(24)(a) of the *Rules of Court* (the "*Rules*").

**BACKGROUND**

**2**  Mr. Mund was injured in a motor vehicle accident October 10, 2007. At all material times, Mr. Mund was an insured under the provisions of Part 7 of the *Insurance (Vehicle) Regulations*, [*B.C. Reg. 447/83, s. 79*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VWW-WY31-JF75-M0RG-00000-00&context=) (the "*Regulations*"). Under the *Regulations*, Mr. Mund was entitled to receive payment of medical expenses, rehabilitation costs and Part 7 benefits during his recovery from the motor vehicle accident.

**3**  Pursuant to s. 99 of the *Regulations* and as a result of a request by ICBC, Mr. Mund attended a medical examination conducted by Dr. Sovio on June 11, 2008. On June 11, 2008, Dr. Sovio produced a report pursuant to s. 99 of the Regulations (the "report").

**4**  The Insurance Corporation of British Columbia ("ICBC") paid Part 7 benefits to Mr. Mund until January 16, 2008.

**5**  Mr. Mund, in para. 10 of his ASC states that Dr. Sovio made remarks in his report that were biased, inflammatory and were false assertions, which are as follows:

1. the Plaintiff was "staying at home, not doing any exercise and appears to be content to carry on in this fashion";
2. "there is nothing to suggest that" the Plaintiff "should be disabled to this degree" and the Plaintiff's "medical care appears to be somewhat disjointed";
3. "legal matters" were interfering with the Plaintiff's case; and
4. the Plaintiff "has a history of [being] off work for an extended period of time in the past and seems content to continue with this role of disability at this time".

**6**  Mr. Mund alleges that ICBC, relying on the report, empowered Dr. Sovio to control Part 7 benefits which imposed on Dr. Sovio an obligation and duty jointly to both Mr. Mund and ICBC to assess Mr. Mund's alleged injuries "in an objective, fair and even handed manner" [paragraph 9 of the ASC].

**7**  Mr. Mund alleges that Dr. Sovio's "excessive and misguided advocacy against" Mr. Mund's entitlement to Part 7 benefits "warrants censure and condemnation by an award of punitive damages". Besides punitive damages, Mr. Mund claims general and special damages [paragraph 12 of the ASC].

**POSITIONS**

**8**  Dr. Sovio's position is the ASC should be struck out as the allegations are too general, no duty of care in law exists between Mr. Mund and Dr. Sovio, and merely alleging it is insufficient.

**9**  On the basis of the pleadings, Dr. Sovio claims there is no duty in contract, no duty of insurer-insured good faith and no duty of care in ***negligence***.

**10**  Dr. Sovio claims he has witness immunity.

**11**  In the alternative, Dr. Sovio states that if the ASC does disclose a reasonable cause of action, Dr. Sovio seeks leave to amend his amended statement of defence to respond to the cause of action found to exist by the court.

**12**  Mr. Mund's position is that the s. 99 medical examination is for the benefit of both ICBC and Mr. Mund, which supports the fiduciary duty alleged in the ASC.

**13**  Mr. Mund argues that the purpose of s. 99 of the *Regulations* is to adjust his claim not to acquire medical evidence to bolster ICBC's case.

**14**  Mr. Mund argues that when a person such as Mr. Mund is required to attend a medical examination this requires Dr. Sovio to deal with Mr. Mund "in an objective, fair, and even handed manner [paragraph 3 of Mr. Mund's outline].

**15**  Mr. Mund argues that a general duty of care arises in law by a person such as Dr. Sovio who ought to foresee a risk of harm; Dr. Sovio is in proximity to Mr. Mund who is at risk and policy reasons do require imposing a duty.

**ANALYSIS**

**16**  In applications pursuant to Rule 19(24)(a), the court must consider the facts alleged in the ASC to be true.

**17**  Evidence is not required to support the alleged facts (*Canadian Bar Assn. v. British Columbia*, [*2008 BCCA 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1R8-00000-00&context=)).

**18**  The test is set out in *Hunt v. Carey Canada Inc.*, *[1990] 2 S.C.R. 959* at para. 33:

[33] Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

**19**  Mr. Mund's ASC does not allege that Dr. Sovio intended anything or pursued the course of action intentionally. Nor does the ACS refer to malice on the part of Dr. Sovio toward Mr. Mund.

**20**  Mr. Mund does not allege that Dr. Sovio was incorrect in any of the conclusions that he reached in his report.

**21**  Mr. Mund does not allege that there is any contract between him and Dr. Sovio or that Dr. Sovio is Mr. Mund's doctor.

**22**  The only relationship alleged in Mr. Mund's ASC is in paragraph 7. In that paragraph he alleges that there is relationship between ICBC and Dr. Sovio. Paragraph 7 states that Dr. Sovio has done many reports for other insureds at the request of ICBC pursuant to s. 99 of the *Regulations* and as a result, Dr. Sovio should know that his findings and comments will determine whether or not the plaintiff will receive Part 7 accident benefits.

**FIDUCIARY DUTY**

**23**  Mr. Mund argues that once Dr. Sovio examines him, that a fiduciary or trust relationship is established between Dr. Sovio and Mr. Mund.

**24**  For this proposition, Mr. Mund relies on the case of *Parslow v. Masters*, [*[1993] 6 W.W.R. 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6X1-JB2B-S4TB-00000-00&context=). Ms. Parslow was in receipt of long-term disability payments pursuant to a disability policy of insurance. She was required to submit to medical examinations at the request of the insurance company. After the medical examination of Ms. Parslow by the defendant, Masters, the insurance company determined that the plaintiff was no longer disabled pursuant to the terms of the policy and terminated the benefits.

**25**  The plaintiff tried to obtain a copy of Dr. Masters' report and notes from both the insurance company and Dr. Masters, which were refused. Ms. Parslow brought an originating notice to obtain the report and notes relating to her examination by Dr. Masters.

**26**  The court in *Parslow* found a physician/patient relationship was created between Ms. Parslow and Dr. Masters. The court in *Parslow* found a "fiduciary obligation" based on the Supreme Court of Canada decision of *McInerney v. MacDonald*, [*[1992] 2 S.C.R. 138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-607J-00000-00&context=), [*93 D.L.R. (4th) 415*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-607J-00000-00&context=) and *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=).

**27**  In *Parslow*, Mr. Justice Hunter stated the following at para. 27:

Great-West contends that at no time did Masters assume or undertake responsibility for Parslow's interests as a patient nor did he expressly or by implication undertake to exercise any power over Parslow for her benefit or to assume responsibility for her interests. The assessment was completed for the benefit of Great-West.

**28**  In coming to the conclusion that there existed a fiduciary obligation between Ms. Parslow and Dr. Masters, Mr. Justice Hunter stated at para. 28:

The reported conclusion of the physician to the insurance company affects the interest of the insured person. The physician assumes the responsibility to carry out a proper examination and exercises the power over the patient to the extent that the medical report may impact on disability benefits to the patient. In some cases, the physician may even recommend a treatment program which a patient should undertake in an effort to rehabilitate and become re-employable. Accordingly, there is a fiduciary obligation to Parslow in respect of the contents of the medical report prepared for Great-West.

**29**  The facts in *Parslow* are not different from this case. ICBC, like the insurance company in *Parslow*, is entitled to have Mr. Mund examined by a physician of their choice. Both *Parslow* and Mund have remedies against their insurer. Mr. Mund is entitled to start legal action pursuant to s. 103 of the *Regulations*.

**30**  In *Parslow,* the court did not do a detailed analysis of *McInerney*, nor *Norberg*. In both *McInerney* and *Norberg*, there was a doctor/patient relationship in the sense that the patient sought to become a patient of the doctor and the doctor accepted the patient and their relationship. The situation in *McInerney* and *Norberg* do not relate to the situation of Mr. Mund and Dr. Sovio.

**31**  The ASC does not allege that Dr. Sovio is Mr. Mund's physician or that there is a doctor/patient relationship. Further, Mr. Mund does not allege that there rests a contract between Dr. Sovio and Mr. Mund. Nor does Mr. Mund allege that ICBC breached its contract by terminating Mr. Mund's Part 7 benefits after January 16, 2008.

**32**  In *Wong (Guardian ad litem of) v. Wong*, [*2006 BCCA 540*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X336-00000-00&context=), the Court of Appeal adopted the words of Mr. Justice Brooke in *Bellamy v. Johnson* [*(1992), 8 O.R. (3d) 591*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G3WR-00000-00&context=) (Ont. C.A.) when considering whether a plaintiff could bring in a recording device during a medical examination pursuant to Rule 30(1) of the *Rules of Court*. At p. 10, Brooke J.A. said:

However, it must be kept in mind that the quality of the examination contemplated by the rules is not dependent upon the confidence which is the basis of a **doctor/patient relationship**. It is, rather, dependent on the skill and integrity of the doctor in conducting the examination in a manner that will best facilitate discovery in the adversarial process.

**33**  Despite the powers that an insurer wields over a claimant, the court found in *Wong* that the relationship of the insured and insurer is not fiduciary.

**34**  Dr. Sovio's role and relationship with Mr. Mund cannot be greater than that of ICBC. It is not within the power of Dr. Sovio to determine whether Mr. Mund receives Part 7 benefits. The power and the exercise of that power is that of ICBC.

**35**  In *Warrington v. Great-West Life Assurance Co.*, [*[1996] 10 W.W.R. 691*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61VP-00000-00&context=), Madam Justice Newbury for the court stated at paras. 10 and 11:

To my mind, the insurer's obligation to pay benefits under the policy upon receiving such proof is virtually indistinguishable from any other contractual duty undertaken by a contracting party and it is a long stretch indeed to characterize its role in this regard as a fiduciary one, even where the insured is "vulnerable" in the sense that he is in dire need of benefits. In this connection, I respectfully agree with the comments of the Ontario Court of Appeal in a recent case that was not cited to us, Plaza Fibre Glass Manufacturing Ltd. v. Cardinal Insurance Co. [*(1994) 22 C.C.L.I. (2d) 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X24J-00000-00&context=). There, Robins, J.A. said for the Court:

The fact that a contract is one of utmost good faith does not however mean that it gives rise to a general fiduciary relationship. The relationship between insured and insurers is not akin to the relationship between, say, guardian and ward, principle and agent, or trustee and beneficiary. In these latter instances, the inherent character of the relationship is such that the law has traditionally imported general fiduciary obligations. The insurer-insured relationship is contractual; the parties are parties to an arms length agreement. The principle of uberrima fides does not affect the arms length nature of the agreement, and, in my opinion, cannot be used to find a general fiduciary relationship. The insurance contract, as noted above, imposes certain specific obligations on its parties. These obligations, however, do not import general fiduciary duties to each and every insurance relationship. Before such fiduciary obligations can be imported, there must be specific circumstances in the relationship that call for their imposition.

...

[11] At the risk of over-simplification, I reach the same conclusions here. Great-West had very little discretion or power with respect to the payment of the benefits to Mr. Warrington: it was bound by the policy to pay the benefits upon the requisite proof, i.e., proof satisfactory to a reasonable person, being presented to it. The insurer was not required, or authorized, to exercise any other judgment of the kind that would necessitate the operation of Equity on its conscience. As for Mr. Warrington and his employer, they placed in Great-West no more trust or confidence than a contracting party normally places on the other: they expected Great-West to do what it was contractually bound to do.

**36**  Dr. Sovio argues that the dissent of Madam Justice Wilson 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=), cited with approval *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [*[1989] 2 S.C.R. 574*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6519-00000-00&context=), and describes fiduciary obligation:

[60] Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

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.

**37**  I find that Dr. Sovio is not in a fiduciary relationship, nor in a doctor/patient relationship, nor is one created between Mr. Mund and Dr. Sovio as a result of the medical examination by Dr. Sovio of Mr. Mund.

**PURPOSE OF s. 99 OF THE *REGULATIONS***

**38**  In paragraph 2 of Mr. Mund's outline, Mr. Mund alleges that the purpose of s. 99 of the *Regulations* is to adjust the applicant's claim, not to acquire medical evidence to bolster an insured's case.

**39**  ICBC accepted Mr. Mund's claim for benefits. In this situation, s. 99's sole purpose is to permit ICBC to obtain medical information as to whether, in their opinion, Mr. Mund ought to continue to receive benefits.

**40**  Section 99 does not say how ICBC is to use Dr. Sovio's opinion, the weight it gives his findings, or how ICBC exercises its discretion.

***WORTHMAN V. ASSESSED INC.*,** [***[2006] O.J. No. 925***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDS1-F1WF-M28G-00000-00&context=)

**41**  Mr. Mund argues that there is a duty on the part of Dr. Sovio to deal with him in "an objective, fair, and even handed manner. He must be neutral and free of bias" [paragraph 3 of Mr. Mund's outline]. Mr. Mund relies specifically on *Worthman*, a case of the Ontario Court of Appeal.

**42**  Mr. Mund relies on other Ontario cases to support his position. The Ontario and British Columbia statutory schemes for the payments of benefits as a result of motor vehicle accidents are significantly different.

**43**  There is no expert evidence before me as to the Ontario statutory scheme or how it actually works. Dr. Sovio referred to *Lowe v. Guarantee Co. of North America*, [*[2005] O.J. No. 2991*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDR1-JSJC-X492-00000-00&context=) to explain the Ontario statutory scheme. In *Lowe*, the expressions "SABS" and "DAC" have the respective meanings "Statutory Accident Benefits Schedule" ("SABS") and "Designated Assessment Centre" ("DAC").

**44**  *Lowe* provides an explanation as to how Ontario SABS operates:

[12] The SABS specify four types of assessment that DACs may perform. In this case, the appellants were each referred for a medical and rehabilitation assessment. Section 38 of the SABS describes the circumstances in which such an assessment is required. In particular, ss. 38(12) of the SABS provides that in the event the insurer refuses to pay for any of the goods or services contemplated by a treatment plan prepared by the insured's health care professional, the insurer shall require the insured to be assessed by a DAC.

[13] Under the SABS, neither party selects the DAC that will conduct the assessment. Rather, s. 53(1) of the SABS requires that the assessment be conducted at the DAC nearest to the insured person's residence. Further, like the health care professional who prepares the treatment plan on behalf of the insured, under s. 53(2) of the SABS, the DAC must give notice of any conflict of interest in relation to the assessment.

[14] Section 43(4) of the SABS requires that the DAC assessor prepare a report and provide a copy of that report to each of the insurer, the insured person and the insured person's health practitioner. Section 43(6) of the SABS requires that the report include a statement of whether, in the assessor's opinion, an expense in relation to a medical or rehabilitation benefit "is reasonable and necessary for the insured person's treatment or rehabilitation".

[15] Importantly, s. 38(14) of the SABS requires an insurer to pay for any expense which a DAC assessor opines is reasonable and necessary, but provides that the insurer is not required to pay for the expense if that opinion is not given. Further, the preamble to s. 38(14) makes the DAC assessment of the payment obligation "[s]ubject to the determination of a dispute relating to the expense in accordance with sections 279 to 283 of the Insurance Act." Those sections provide for mediation, arbitration and litigation. In effect therefore, s. 38(14) makes the DAC assessment final and binding unless one of the parties chooses to dispute it.

**45**  As stated earlier, the difference is significant between that of Ontario and British Columbia.

**46**  In Ontario the assessor is not chosen by either the insured or the insurer, although in Ontario the insurer may be asked by the insured to be medically examined. In British Columbia, ICBC, the insurer, has the sole discretion to choose who they wish to examine the insured.

**47**  In Ontario, there are conflict of interest rules to which DAC's assessors must adhere. The DAC's assessors' professional qualifications must have minimum years of experience. There are guidelines with provisions of neutrality in the DAC assessment process. In the DAC's assessment process, assessors recommend proposed treatment and rehabilitation services to help the claimant recover any impairment following a motor vehicle accident. The insured is entitled to a copy of the DAC's report. Finally, the DAC's decision is final.

**48**  In British Columbia, ICBC may choose, pursuant to s. 99, the medical practitioner. The sole purpose of the s. 99 examination is that the medical practitioner examine the insured. It is entirely at the discretion of ICBC when, and if, there is an examination. There is no requirement that the medical practitioner provide a plan of care for the insured such as the Ontario DAC. The doctor's opinion is not binding on anyone; neither the insured nor the insurer. ICBC may use, for different claims, for different insureds, the same medical practitioner time and time again. ICBC may reject the medical practitioner's opinion in whole or in part. It is simply not a process in which the insured participates in other than to present himself or herself to the medical practitioner designated by ICBC.

**49**  If the insured's benefits are terminated, the insured may commence an action against ICBC for the benefits, at which time they may present their case based on their medical evidence and refute that which is brought by ICBC, including Dr. Sovio, should his evidence be proffered by ICBC.

**50**  Mr. Mund relies on *Worthman*. Pursuant to SABS, the insurer is entitled to have a claimant for benefits to be examined as "reasonably necessary" by a health professional. In *Worthman,* Mrs. Worthman was examined by Dr. Grant. A report was sent to the insurers and a copy was sent to Mrs. Worthman (this is required by SABS), together with a notice that the benefits would be terminated. A DAC was scheduled and Mrs. Worthman failed to attend. The matter was then referred to arbitration in accordance with the Ontario Insurance Act. Mrs. Worthman was eventually successful. Her medical witnesses were preferred over Dr. Grant.

**51**  Mrs. Worthman started an action against Dr. Grant and the insurer, claiming damages for bad faith, intentional interference with economic relations, injuries, falsehood, ***negligence***, malpractice and breach of duty of care. The allegations were solely based on Dr. Grant's report.

**52**  The application before the court in *Worthman* was brought by the defendants who alleged that Mrs. Worthman's claims were bound to fail, seeking a dismissal of the action. In *Worthman*, the court dismissed an application brought by the defendant insurance company to dismiss Mrs. Worthman's claim summarily based on disclosing no cause of action. The insurance company appealed. Mr. Justice Power for the Ontario Court of Appeal, in dismissing the appeal, stated:

[60] [17] In Campeau v. Liberty Mutual Insurance Co. [*[2001] O.F.S.C.I.D. No. 37*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5FB3-JHG1-FG12-60KH-00000-00&context=), (FSCO A00-000522) (Ontario Insurance Commission) Arbitrator, Lawrence Blackman had this to say about SABS:

IME (independent medical examinations) and DAC (Designated Assessment Centre) examinations are not defence medical examinations. They do not arise because the physical or mental condition of an adverse party in an existing legal proceeding is in question. They are legislatively mandated as part of a statutory scheme of first-party contractual rights and obligations, to clarify, as part of the normal adjusting process, whether an applicant has met the applicable entitlement requirements.

I find these comments to be instructive.

...

[70] [27] In my opinion, based on the record as it now exists, it is not clear that, when the insurer required the plaintiff to be examined, there was a lis or anticipated lis between the parties. There is, of course, always a possibility of a lis developing in a contractual or duty of care relationship.

[71] [28] I am very mindful of the ramifications of limiting the doctrine of privilege and/or immunity with respect to medical reports and of extending the duty of care to physicians who deliver reports concerning non-patients. However, it seems to me that the plaintiff should be given an opportunity to prove that some malfeasance was in place from the very beginning. This is the tenor of Ms. Worthman's complaint. As aforesaid, her complaint goes far beyond a mere allegation of ***negligence***. If her allegations are proven, surely it would be contrary to public policy to clothe the defendants with an absolute privilege or immunity.

[72] ... It will be particularly important for the trial judge in this case to examine the closeness, or proximity, of the relationship between the parties and, if there is a close proximity, to determine whether there are any considerations which ought to negate or limit the scope of the duty of care, the class of persons to whom it is owed, or the damages caused by the breach of duty. (See Anns v. Merton London Borough Council, [1978] A.C. 728 and Kamloops (City) v. Nielsen, [*[1984] 2 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2339-00000-00&context=)).

[73] [30] It is important to note that the Ontario Court of Appeal's decision in Lowe, supra, was released on July 15, 2005 (i.e. subsequent to the decision of Matlow J. under appeal and the order of MacFarland J. granting leave to appeal to the Divisional Court). Notwithstanding that the Court of Appeal's decision in Lowe was made in the context of r. 21 rather than r. 20 with which we are concerned, and that the role played by a DAC is broader than the role played by an expert under s. 65 of SABS, there are similarities and, therefore, serious issues to be tried concerning whether the manner in which the examination was conducted, the report that emanated from it, and whether the expert should or should not be subject to absolute privilege, witness protection, or a duty of care. I appreciate that the focus in this action is on the examination and report, not on Dr. Grant's testimony.

[74] [31] In the result, therefore, Matlow J. was correct in holding that "although many of the authorities cited seem to establish the principle that a doctor retained by a third party to examine and report on a person to the third person owes no legal duty to the person other than to avoid injuring her, it may well be that, on the facts of this case, the legal duty owed by the defendants to the plaintiff may have been broader in the context of the mechanism established for the resolution of contested claims for no-fault benefits by the Insurance Act. As well, it may be that the duty to avoid injuring the plaintiff extended to the avoidance of both psychological and economic injuries."

[75] [32] This is an important and an evolving area of law and, therefore, this action should not be determined on a summary judgment motion particularly where there are disputes between the parties with respect to material facts.

[My emphasis]

**53**  Although the facts here and those in *Worthman* have similarity in that the insurer may seek a medical examination of the insured, they arise under different schemes of insurance whose objectives may be similar in that the insurer provides benefits. But, the manner in which these objectives are legislated are quite different. *Worthman* relates to the Ontario scheme of insurance and cannot be transported to the B.C. insurance scheme.

**THE *ANNS* TEST**

**54**  Mr. Mund argues that he and Dr. Sovio are in such proximity that Dr. Sovio owed Mr. Mund a duty of care. This engages the *Anns* test. The *Anns* test is described by the Supreme Court of Canada in *Cooper v. Hobart*, [*[2001] 3 S.C.R. 537*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49J-00000-00&context=), [*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:

... the Anns analysis is best understood as follows. At [page551] 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. It may be, as the Privy Council suggests in Yuen Kun Yeu, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

**55**  Mr. Mund relies on *Milne v. Alberta (Workers' Compensation Board)*, [*[2008] A.J. No. 1282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93C1-JNCK-22TK-00000-00&context=), a decision of Master J.B. Hanebury of the Alberta Court of Queen's Bench. Before the Master was an application for summary dismissal of an action as having "no genuine issue for trial" [Alberta Rule 159(3)], against two doctors and the Workers' Compensation Board of Alberta. Neither of the defendant doctors had met or examined Mr. Milne.

**56**  The plaintiff, who had been injured in an industrial accident for which he sought benefits from the Board. In the process of the plaintiff's claim, he was required to attend a work hardening program and a pain management program. Mr. Milne, amongst other allegations, alleges that the doctors failed to diagnose his condition, misinterpreted test results and permitted him to be forced into a work hardening program which was not medically warranted and, in fact, further injured him. Eventually the plaintiff obtained medical treatment on his own behalf.

**57**  The Board dismissed his claim, as did a review panel on which they found that the plaintiff's symptoms were unrelated to the accident. The following paragraph describes the plaintiff's claims against the Board and the doctors:

[10] Mr. Milne alleges that the defendants used their power to injure the plaintiff physically, emotionally and financially while being responsible for his well-being. He alleges that they grossly abused their legal powers to divest him of his right to medical treatment and financial compensation. Their conduct was malicious; they breached their duty to act in good faith; they ignored the opinions of his physicians; and, caused Mr. Milne humiliation, distress and injury.

**58**  The doctors' defence was that they owed no duty of care to the plaintiff, they were independent medical advisors, and the conspiracy allegations were not substantiated. As well, there was a limitation defence. Master Hanebury concluded:

[54] Based on the decisions in Lowe and Worthman, I am not convinced that the law is clear that the doctors are protected from such claims. The earlier case law cited by the doctors' counsel involved factual situations considerably different than this one where there is a statutorily mandated scheme that proscribes the options and remedies open to an injured employee and involves his treatment and rehabilitation. Do the professionals utilized or employed pursuant to that legislative scheme owe a duty of care to the injured worker? There is no case law precisely on point and in my view, this question cannot be determined on a summary judgment application. It is a decision that must be made after a careful analysis of the Anns/Kamloops test and, if necessary, a consideration of important public policy factors. Therefore, this aspect of the claim of Mr. Milne cannot be summarily dismissed.

**59**  The basis of the plaintiff *Milne's* allegations are that the doctors participated in the treatment of Mr. Milne to which he was obliged to attend. The purpose of s. 99 of the *Regulations* was not so Dr. Sovio would treat Mr. Mund. Dr. Sovio did not treat Mr. Mund. Mr. Mund, in his ASC, does not state that the purpose of the s. 99 report is for treatment.

**60**  Dr. Sovio states in his written submission, as it relates to the second part of the *Anns* test, the following:

1. ... this Court can assume, taking the plaintiff's case at its highest, that there is basic foreseeability and proximity. It can be assumed on this application that the defendant would have been aware of the identity of the person he was assessing and that the assessment was in relation to insurance benefits.

**61**  Dr. Sovio argues that Mr. Mund's claim fails on the second arm of the *Anns* test in that any duty of care is negated by policy considerations.

**62**  The second arm of the *Anns* test is concerned with the effect of a duty of care on "other legal obligations, the legal system and society more generally". (*Elliott v. Insurance Crime Prevention Bureau*, [*2005 NSCA 115*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPX1-FCCX-6201-00000-00&context=)). The appellant's case failed in *Elliott* at this stage, for the following reasons:

[80] In the present case, two main policy considerations show that it would be unwise to recognize the duty of care proposed by the appellants. First, persons in the appellants' situation have their contractual remedy on the policy, which remedy includes, in a proper case, a claim for aggravated and punitive damages. While this remedy will not always be complete for persons in the appellants' situation, it is a substantial and meaningful remedy making the case for some new form of liability less compelling than it would absent such a remedy. Second, imposing the proposed duty would distort the legal relationships among the insurer, the insured and the investigators and could potentially undermine the ability of the insured and the insurer to properly deal with insurance claims. I will discuss each of these policy considerations in turn.

[81] The availability of an alternate remedy has been recognized by the Supreme Court of Canada as one policy consideration which may negate an extension of liability in ***negligence***: see, e.g. Cooper at para. 37; Odhavji, [*[2003] 3 S.C.R. 263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YX-00000-00&context=), at para. 60. This consideration figured prominently in the Mortensen case in which the court was unanimous that no duty of care should be imposed. Significantly, four of the five judges reached this result on the basis that policy considerations negated the prima facie duty they found to exist.

**63**  Dr. Sovio examined Mr. Mund at the request of ICBC pursuant to a regulatory obligation which ICBC is entitled to impose on Mr. Mund.

**64**  In *Elliott,* Mr. Justice Cromwell, as he then was, was concerned that the insurance investigators would have contractual obligations with the insured and then have imposed on them a duty of care to the insured in ***negligence***.

**65**  In *Elliott,* Mr. Justice Cromwell demonstrates the absurdity of the imposition of such a duty of care:

[91] This concern also operates in the opposite direction. If an expert retained by an insurer for purposes of administering the contract owes a duty of care to the insured, it is hard to see why a similar duty would not apply to experts retained by the insured for the purpose of persuading the insurer to pay. In short, I would find it difficult to confine the proposed duty of care to situations even roughly analogous to the very sympathetic circumstances of this case. This concern was noted by Richardson, J. in Mortensen when he observed that the duty of care contended for could not reasonably be confined to insurance investigators and that its "... ambit would be inherently expansive and unacceptably indeterminate": at 309. He said, and I agree, that it would be difficult to justify not extending the proposed duty of care to anyone who, in the course of a contractual engagement, carelessly investigates and reports on the conduct of a third party: at 309. I do not regard this concern as either speculative or trivial. For example, if this duty of care were recognized, why would it not apply to permit an insurer to sue the insured's family doctor who, on behalf of the insured, prepared a doctor's note in support of an application for insurance benefits? Such potential liability could well inhibit the preparation of routine medical letters and reports which are issued at nominal cost in the thousands every day for insurance and employment purposes. That such a result would be undesirable is, to me, self-evident.

[92] Liability in ***negligence*** of investigators to both the insured and the insurer would create problems of divided loyalties on the part of investigators. When investigating a fire, the relationship between the investigator and the insured is at least somewhat adversarial and becomes, as Casey, J. says, "a direct confrontation if arson is suspected": at 314. Citing the principle that one cannot serve two masters, he expressed the view that imposing a duty of care in relation to the insured might inhibit the investigators' ability to discharge their primary duty to the insurer. I agree with this concern.

**66**  The complainant in this case, Mr. Mund, is required under s. 98 of the *Regulations*, when making a claim for Part 7 benefits at the request of ICBC, to furnish a certificate or report of an "attending medical practitioner" as to the nature and extent of his injuries and the treatment and current conditions and prognosis of the injuries. The medical practitioner is someone that Mr. Mund chooses. This, together with s. 99 of the *Regulations*, demonstrates the relationship of claimants such as Mr. Mund and medical practitioners who provide medical information and opinions for claims made pursuant to Part 7. This is the dilemma that Mr. Justice Cromwell identifies in *Elliott*.

**67**  Mr. Mund has failed to disclose a reasonable claim on the second stage of the *Anns* test.

**WITNESS IMMUNITY**

**68**  Mr. Mund alleges that his medical examination, pursuant to s. 99, that "witness immunity gives way to the demand of neutrality and the avoidance of bias. When these features are breached the author becomes the subject of inquiry and claim" [paragraph 5 of Mr. Mund's outline].

**69**  In this case, it is still open for Mr. Mund to commence action against ICBC as he is still within the limitation period. Dr. Sovio could be a witness for ICBC and would either be discredited, accepted or other experts could be preferred. Witness immunity applies because the examination of Mr. Mund by Dr. Sovio was conducted pursuant to a statutory scheme that contemplates legal action being started by Mr. Mund against ICBC.

**70**  This was recognized in *McDaniel v. McDaniel*, [*[2009] B.C.J. No. 218*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B16V-00000-00&context=) as follows:

[37] There can be no doubt that Jack McDaniel was a potential witness in the British Columbia litigation. Paragraph 30 of Brian McDaniel's amended statement of claim says as much, and Ms. Carmichael deposed, and the chambers judge accepted that:

All communications that I had with the defendant Jack McDaniel was for the predominate purpose of determining whether he had any evidence relating to [the insurance action].

[38] Whether Jack McDaniel knew that he was a potential witness seems irrelevant given Ms. Carmichael's evidence and the background facts. In such circumstances, it is the occasion that attracts the immunity not the intention of the person providing the information.

**71**  In *Howatt v. Klassen*, [*[2005] O.J. No. 1381*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDP1-JSC5-M0T7-00000-00&context=), [*2005 CanLII 11191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDP1-JSC5-M0T7-00000-00&context=), Dr. Klassen was requested by the College of Physicians and Surgeons of Ontario to examine Dr. Howatt. That was the extent of the relationship between Dr. Klassen and the plaintiff, Dr. Howatt. The court concluded that Dr. Klassen acted as an agent and for an appointee of the college. In dismissing Dr. Howatt's action, the court stated:

[11] In any event, I agree with the submission that Dr. Klassen is protected by the common law doctrine of witness immunity, which protects individuals from civil suit based on their status as witnesses or potential witnesses at judicial proceedings. The case law establishes that this protection is absolute so that even allegations of bad faith are insufficient to exclude the application of the witness immunity doctrine.

**72**  A similar situation occurred in *N. (M.) v. Forberg*, [*[2009] A.J. No. 253*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93C1-DY89-M2PP-00000-00&context=). The court found a witness immunity applied to a psychologist who counselled children involved in a custody and access dispute. In proceedings between the parents of the children, the mother of the children asked the psychologist to give an opinion. The opinion was adverse to the plaintiff father, and the court found the psychologist owed no duty of care, no fiduciary duty to the father and concluded that witness immunity applied, stating the following at para. 57:

If professionals in the field of health care are exposed to the threat of law suits when they intervene on behalf of persons to whom they clearly owe a duty and have determined are vulnerable individuals, there will be a chilling effect on the willingness of health care providers to deliver their necessary assistance to the Court, and to be full and frank in their opinions when doing so.

**73**  Similarly, Dr. Sovio, in providing assessments pursuant to s. 99, must not be exposed to the threat of lawsuits for delivering his opinion, even if those opinions or actions are contrary to those of Mr. Mund.

**74**  Mr. Mund relied on *Reynolds v. Kingston (City) Police Services Board*, [*[2007] O.J. No. 900*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDX1-JX8W-M05Y-00000-00&context=). The plaintiff in *Reynolds* was charged with murder based on the coroner's opinion that Ms. Reynolds' child had been stabbed repeatedly. The coroner testified that the child's loss of blood was a result of 80 stab wounds made by a knife or pair of scissors. This evidence, given at the preliminary hearing, resulted in Ms. Reynolds being committed to trial on the charge of second degree murder. The coroner, after the autopsy and before the preliminary hearing, learned a pit bull terrier had been located in the dead child's home where the body was found. He testified at the preliminary hearing that the wounds were not caused by dog bites. A subsequent autopsy found otherwise.

**75**  Ms. Reynolds' claim against the coroner was based on negligent investigation, and in addition, misfeasance in public office alleging deliberate unlawful conduct in exercising his public function.

**76**  The coroner relied on the witness immunity rule within the Rules of Civil Procedure in Ontario, to strike out Ms. Reynolds' statement of claim on the ground it discloses no reasonable cause of action. The application was dismissed and the coroner appealed to the divisional court who allowed the appeal, [*[2006] O.J. No. 2039*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDT1-JSRM-63C6-00000-00&context=). Ms. Reynolds appealed; which appeal was allowed. The Ontario Court of Appeal found that Ms. Reynolds' claim against the coroner:

... in respect to his role as a public official investigating a suspicious death under the Coroners Act, and not to his role in testifying in her criminal prosecution.

**77**  D. Sovio argues that Ms. Reynolds' claims are in respect to a coroner as being a public official against his role in testifying at a criminal prosecution in a preliminary hearing and has no bearing on Dr. Sovio's position. Dr. Sovio is not a public official, but an expert retained by ICBC. His position is similar to that of Dr. Klassen in *Howatt* and Ms. Froberg.

**78**  Dr. Sovio, in his written argument, makes reference to defamation for which he claims privilege. Defamation is not plead in the ASC. Mr. Mund did not refer to defamation in his outline or in his counsel's oral argument.

**79**  For these reasons, Mr. Mund's ASC is struck out and the claim dismissed for failure to disclose a reasonable cause of action.

**80**  Dr. Sovio will have his party/party costs at Scale B.

H. HYSLOP J.

**End of Document**

[***Player v. Janssen-Ortho Inc., 2014 CCLG para. 25-521***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-0C71-JPGX-S1MP-00000-00&context=)

Canadian Commercial Law Guide

British Columbia Supreme Court

Before: Bracken J

Decision: June 20, 2014.

Docket No. 10-3561

***Canadian Commercial Law Guide*  > *Cases* > *2010s* > *2014***

**2014 CCLG para. 25-521** | [*[2014] B.C.J. No. 2123*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G046-00000-00&context=) | [*2014 BCSC 1122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G046-00000-00&context=)

Estate of Wade Robert Player, Desiree Marine Player, Estate of Daniel Charles Pollock and Elaine Mills Plaintiffs v. Janssen- Ortho Inc., Ranbaxy Pharmaceuticals Canada Inc., Ratiopharm Inc., Sandoz Canada Incorporated, and Teva Canada Limited Defendants

See commentary at [*CCLG para. 17-042*](https://advance.lexis.com/api/document?collection=analytical-materials-ca&id=urn:contentItem:5M6F-TD21-JX8W-M1BC-00000-00&context=).

**Case Summary**

**Product liability — Plaintiffs instituted class proceedings against manufacturers of prescription painkilling skin patches — Upon summary trial, Court concluded that evidence against two defendants inadequate and dismissed the action against them — Supreme Court Civil Rules, *BC Reg. 168/2009, r. 9-7*.**

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| **Facts:** The defendants, including Teva Canada Limited ("Teva") and Sandoz Canada Incorporated ("Sandoz"), manufactured, marketed, and distributed transdermal fentanyl patches in Canada (the "Patches"). The Patches were a form of prescription painkiller where the drug was delivered by a patch applied directly to a patient's skin. The plaintiffs applied for certification of a class action against the defendants. The plaintiffs alleged that: (a) the Patches could cause serious injuries in ordinary use, including respiratory depression and death; (b) the defendants' design of the Patches was negligent in that safer designs were available; and (c) the defendants failed to warn consumers of the risks associated with the Patches. The plaintiffs framed their action in ***negligence***, negligent misrepresentation, breach of warranty, breach of fiduciary duty, and breach of the *Food and Drugs Act*, the *Competition Act*, the British Columbia *Sale of Goods Act*, and the British Columbia *Business Practices and Consumer Protection Act.* Prior to the certification hearing, Teva and Sandoz applied for an order dismissing the proceedings against them on a summary trial basis.  HELD: The application was granted.  In most Canadian provinces, a pre-certification class proceeding is treated as an individual action by the named plaintiffs only so that to succeed, those named plaintiffs must themselves have direct causes of action against each defendant (see *Ragoonan Estate v. Imperial Tobacco Canada Ltd.* [*(2000), 51 OR. (3d) 603*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B52M-00000-00&context=) (Sup. Ct. J.), and *Hughes v. Sunbeam Corp. (Canada) Ltd.* [*(2002), 61 O.R. (3d) 433*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGY5-M380-00000-00&context=) (CA)). However, in British Columbia, it is not necessary that a representative plaintiff have a cause of action against each defendant, as long as the potential class members as a group have such a cause of action (see *MacKinnon v. Instaloans Financial Solutions Centres (Kelowna) Ltd*., [*2004 BCCA 472*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2X8-00000-00&context=)). As such, if there were evidence that Teva and Sandoz had breached a duty of care to Canadian users of the Patches, the claims against Teva and Sandoz would continue to the certification hearing. The Court noted that the defendants had a duty to take reasonable care and produce a "reasonably safe" product, which required a risk-utility analysis. Factors to consider in such balancing included the utility of the product, the risk of inherent injury, the availability of and potential for a safer design and whether same remained reasonably priced, and the ability of the plaintiff to avoid injury via careful use. The plaintiffs had had a full opportunity to present evidence supporting their claims. Some of the expert evidence tendered by the plaintiffs, while admissible, was accorded little weight on the key issue of whether the Patches were unsafe. The expert evidence presented by Teva and Sandoz was admissible and credible. There was insufficient evidence to connect the representative plaintiffs' claims to the Patches manufactured by Teva and Sandoz, and the evidence fell short of demonstrating defective design by Teva or Sandoz. There was no failure to warn, misrepresentation, breach of fiduciary duty, or non-compliance with referenced legislation. The action by the plaintiffs against Teva and Sandoz was dismissed. |

**Counsel**

E.F.A. Merchant, QC, and D. Clarke for the plaintiffs; D. Neave and R. Reinertson for Janssen-Ortho Inc.; S. Maidment and L. Parliament for Ratiopharm Inc. and Teva Canada Limited; O. Ilnyckyj and C. Rajotte for Sandoz Canada Incorporated.

**Reasons for Judgment**

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| **J.K. BRACKEN J.** |

**INTRODUCTION**

**1**  In this proposed class action against five corporate defendants, two of the defendants, Teva Canada Limited ("Teva") and Sandoz Canada Incorporated ("Sandoz"), seek an order dismissing the action against them on a summary trial prior to a certification hearing.

**2**  The claim in question involves transdermal fentanyl patches, a form of prescription painkiller where the active opioid, fentanyl, is delivered by a patch applied directly to the patient's skin. The defendants, including Teva and Sandoz, manufacture, market and distribute transdermal fentanyl patches in Canada. The plaintiffs say that fentanyl patches are defectively designed, such that they cause serious harm in ordinary use, and seek to certify a class action against all of the defendants.

**3**  For the reasons set out below, I find that this matter is suitable for determination on summary trial. Based on my conclusions of fact and law, the action of the plaintiffs against Teva and Sandoz is dismissed.

**BACKGROUND**

**The Plaintiffs**

**4**  Wade Robert Player died on August 10, 2007, at the age of 34. Not long before his death Mr. Player had suffered severe injuries in a motor vehicle accident and as a result had a prescription for pain management via a transdermal fentanyl patch. He was wearing a fentanyl patch at the time of his death, although there is some uncertainty as to the brand of patch Mr. Player was using that day. A coroner's report concluded that Mr. Player died as a result of fatal respiratory depression due to prescription drug interaction. Desiree Player is Mr. Player's widow.

**5**  Daniel Charles Pollock had a prescription for transdermal fentanyl patches, which he used to treat chronic back pain. He died on June 26, 2008, at the age of 63. The post-mortem examination determined that he died of acute mixed/combined drug intoxication. He had morphine, oxycodone, and fentanyl in his system at the time of death. Elaine Mills is his widow.

**Litigation History**

**6**  On September 1, 2010, Ms. Player commenced an action against the defendants on behalf of herself, her husband's estate, and the proposed class. Ms. Player is the proposed representative plaintiff for the resident subclass, described as all persons resident in British Columbia, including their estates, who used fentanyl patches between December 20, 1991 to the date of certification and all persons who assert a derivative claim on account of a family relationship to the deceased.

**7**  Ms. Mills joined the action on August 22, 2011, as the proposed representative plaintiff for the non-resident subclass, which includes residents of other Canadian provinces or territories.

**8**  The plaintiffs then applied for certification of the matter as a class action. At the same time, Teva and Sandoz advised they wished to apply for an order directing a summary trial of the claims against them pursuant to Rule 9-7 of the *Supreme Court Civil Rules*. I held a sequencing hearing in order to determine the order in which the applications should proceed. In oral reasons for judgment given on October 14, 2011, I ordered that the summary trial could proceed prior to the certification hearing.

**Basis for Summary Trial Application**

**9**  As noted above, all of the defendants in the proposed class action manufacture, market and distribute transdermal fentanyl patches. However, according to the defendants, they actually manufacture two very distinct products. Teva and Sandoz both manufacture "matrix" drug-in-adhesive patches, where the active drug is suspended in a semi-solid state in the adhesive of the patch. The other defendants manufacture "reservoir" style patches, which have a reservoir of liquid/gel fentanyl that is released into the patient's bloodstream through a rate-controlling membrane.

**10**  Teva and Sandoz in this application ask that the court dismiss the plaintiffs' claims in respect of their particular transdermal fentanyl patch products. They say the plaintiffs' claims are over-inclusive and that their matrix style patches do not cause harm as alleged.

**11**  The remaining defendants took no position on this application. Although counsel for Janssen-Ortho Inc. and Ranbaxy Pharmaceuticals Canada Inc. attended as observers, only the plaintiffs and Teva and Sandoz participated in the summary trial application.

**Summary Trial or Summary Dismissal?**

**12**  At the hearing of this matter, the plaintiffs made an initial submission that this process was not a summary trial but rather an application for "summary dismissal", which Mr. Merchant described as a type of summary judgment where Teva and Sandoz were required to establish that "their product could not have caused any harm."

**13**  Teva and Sandoz submit that the matter was clearly understood to be a summary trial pursuant to Rule 9-7. In fact, the plaintiffs themselves referred to the process as a summary trial in an application for document discovery they filed April 26, 2012. It appears that as of that date, at least, they understood that this matter would proceed pursuant to Rule 9-7, with the onus and procedures as set by that Rule. I agree with Teva and Sandoz that this hearing was always intended and understood to be a summary trial of the plaintiffs' action against Teva and Sandoz, and I will proceed on that basis.

**ISSUES**

**14**  The plaintiffs allege that transdermal fentanyl patches can cause serious injuries in ordinary use, including respiratory depression and death. They say that there is a safer alternative design of patch available, and that as such the defendants' design is negligent. Further, they say that the defendants failed to warn consumers of the risks associated with use of their products. In this action brought under the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50*, they claim in ***negligence***, negligent misrepresentation, breach of warranty, and breach of fiduciary duty. They also claim that, in marketing and selling a defective product to consumers, the defendants are in breach of the *Food and Drugs Act*, [*R.S.C 1985, c. F-27*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9X1-JN6B-S1KB-00000-00&context=), 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=), the *Sale of Goods Act*, *R.S.B.C. 1996, c. 410*, and the *Business Practices and Consumer Protection Act*, *S.B.C. 2004, c. 2*.

**15**  There are two preliminary issues that must be addressed prior to any determination of the merits of these claims. First, the court must determine the correct scope of inquiry in a summary trial for a pre-certification class proceeding. As the parties have not yet gone to certification, there is no "class" of litigants before the court. Only the named plaintiffs are parties to this matter at this point. Generally speaking, in an individual action, only facts relating to the named plaintiffs could be considered. However, the plaintiffs say that the status of this matter as a proposed class action changes matters, and that the Court should consider the claims of the entire proposed class. Before proceeding, then, I must determine whether this court should consider facts relating to potential class members, or only those relating to the named plaintiffs.

**16**  Second, the court must determine whether this matter is suitable for determination by way of a summary trial. The plaintiffs say it is not, on the basis that a full trial is required for a full appreciation of the facts. Teva and Sandoz say that I can find the necessary facts in the evidence as tendered and that it can be fairly and justly dealt with by way of a summary trial.

**17**  If the matter is found suitable for summary trial, Teva and Sandoz (collectively, the "applicant defendants") request judgment on the following issues:

1. Are the applicant defendants strictly liable to the plaintiffs?
2. Did the applicant defendants breach a duty of care to the plaintiffs by distributing a product that was defectively designed?
3. Did the applicant defendants breach a duty of care to the plaintiffs by failing to provide a reasonable warning of the risks associated with transdermal fentanyl patches?
4. Did the applicant defendants make any negligent misrepresentation to the plaintiffs with respect to the use of their transdermal fentanyl patch products?
5. Did the applicant defendants breach any express or implied warranty owed to the plaintiffs in respect of their transdermal fentanyl patches, either at common law or by operation of the *Sale of Goods Act*?
6. Did the applicant defendants owe a fiduciary duty to the plaintiffs, and, if so, did they breach that duty?
7. Did the applicant defendants engage in any unlawful, unfair or deceptive trade practices within the meaning of the *Competition Act*?
8. Did the applicant defendants make any false or misleading representations regarding their transdermal fentanyl patch products, contrary to s. 9 of the *Food and Drugs Act*?
9. Did the applicant defendants breach any of the provisions of the *Business Practices and Consumer Protection Act*?

**18**  I will begin by discussing the scope of inquiry in a pre-certification class proceeding, as it is necessary to conclude that point before reviewing the evidence. For the reasons set out below, I have concluded that in British Columbia, the Court should consider the facts applicable to the members of the proposed class in addition to those concerning the individual plaintiffs. With that in mind, I will then review and assess the evidence presented by the parties. I then turn to the question of whether this matter is suitable for summary determination. Finally, I will apply the law to the facts I as I find them following my review of the evidence.

**SCOPE OF INQUIRY IN A PRE-CERTIFICATION CLASS PROCEEDING**

**19**  In most Canadian provinces, a pre-certification class proceeding is treated as an individual action: see *Ragoonan Estate v. Imperial Tobacco Canada Ltd.* [*(2000), 51 O.R. (3d) 603*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B52M-00000-00&context=) (Sup. Ct. J.), and *Hughes v. Sunbeam Corp. (Canada) Ltd.* [*(2002), 61 O.R. (3d) 433*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGY5-M380-00000-00&context=) (C.A.). Those decisions establish that there must be a representative plaintiff with a cause of action against each defendant. Where the named plaintiffs have no personal or direct cause of action against a defendant, or the defendant can successfully establish a defence to the individual plaintiff's claim, the action must be dismissed.

**20**  That is not the case in British Columbia. In *MacKinnon v. Instaloans Financial Solutions Centres (Kelowna) Ltd.*, [*2004 BCCA 472*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2X8-00000-00&context=) at para. 33, our Court of Appeal said as follows:

I think it is also clear that an action commenced under the *Class Proceedings Act* is, even before the certification application, more than just "any old action": it is an action with ambition.

**21**  In *MacKinnon* the proposed class action involved allegations that payday loan companies in the province were charging a criminal rate of interest. A number of the defendant companies applied to have the claims against them struck out on the basis that they disclosed no cause of action, as Mr. MacKinnon, the representative plaintiff, had only borrowed money from (and thus only had a cause of action against) the other defendants. The court refused to dismiss the claim against the applicant defendants, concluding that it was not necessary that the representative plaintiff have a cause of action against each defendant: "while the Act requires a cause of action against each named defendant, that cause of action must be held by [potential] class members, not necessarily the representative plaintiff" (para. 51). An application to strike a claim must be "considered in the context of its stated ambition to be a class proceeding" (para. 38).

**22**  Subsequent cases have applied the principles from *MacKinnon* in the context of other rules of court. In *Birrell v. Providence Health Care Society et al.*, [*2006 BCSC 1814*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X34N-00000-00&context=) at para. 9, aff'd [*2009 BCCA 109*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3XS-00000-00&context=), on an application to add plaintiffs, both the chambers judge and the Court of Appeal took into account the potential prejudice to the proposed class members if the court refused the application. The chambers judge commented that, following *MacKinnon*, "a proposed class proceeding is subject to the ordinary *Rules of Court*, but those rules are to be applied in the context of considering its potential future as a class action" (para. 9). The Court of Appeal held that although the ultimate limitation period had expired for the proposed representative plaintiffs in their claim against the hospital defendants, they should still be added "as parties to the class action ... in order to preserve any cause of action members of the putative class may have that is not time-barred against the hospitals" (para. 29).

**23**  The plaintiffs in this case submit that *MacKinnon* applies to alter the ordinary approach to summary trials under Rule 9-7. They say that the court cannot narrow its evidentiary focus to the circumstances surrounding the deaths of the named plaintiffs, but must instead consider the claims of the proposed class as a whole.

**24**  In Alberta, when this same issue arose, the court held that the chambers judge did "not have to engage in an investigation into possible worlds which might contain class members whose claims might not be proscribed. We need only consider the facts of these two [named] Plaintiffs" (*Kowch v. Gibraltar Mortgage Ltd.*, [*2013 ABQB 317*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93D1-FBN1-24KR-00000-00&context=) at para. 45). Alberta does not follow the *MacKinnon* line of authority, however. I think the situation here must be different.

**25**  It is clear that in British Columbia, a pre-certification class proceeding cannot be dismissed solely on the basis that the representative plaintiff does not have a claim against any particular defendant. In my view, on that basis, the plaintiff is correct to say that the court on this summary trial hearing must go beyond the evidence relating to the claims of the individual plaintiffs, and consider any properly admissible evidence relating to the claims of potential class members. This could take the form of evidence from proposed class members themselves, or expert opinion evidence establishing that Teva or Sandoz's products are defective in their design and thus in breach of a duty of care to Canadian consumers.

**26**  A summary trial pursuant to Rule 9-7 is a true trial of the action, in the sense that "judgment may be granted in favour of any party, regardless of which party has brought the application," so long as the court concludes that it can find the necessary facts to decide the issues and is of the view that it would be just to decide the issues in that manner: *Gichuru v. Pallai*, [*2013 BCCA 60*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M38N-00000-00&context=) at para. 23. That statement is complicated somewhat by the extended evidentiary focus just discussed, however.

**27**  Obviously, I cannot issue judgment against Teva and Sandoz on the basis of evidence concerning persons who are not parties to the action; doing so would violate the rules of natural justice and the foundational principles of our adversarial system of justice. Pre-certification class action proceedings cannot be used as a vehicle for persons who are not parties to the proceeding to prosecute a claim against the defendants: see *Birrell* (S.C.) at para. 11. Thus, I can only issue judgment in favour of the plaintiffs if they are able to prove their claims as individuals. The question is, then, what role can evidence related to potential class members play in a summary trial?

**28**  Considering the principle articulated in *MacKinnon*, and the law applicable to Rule 9-7, I conclude that evidence relating to the proposed class can be considered in determining whether it would be unjust to decide the issues on the application. If the plaintiffs fail to prove the claims of the individual plaintiffs, but there is evidence that Teva and Sandoz have breached a duty of care to the Canadian users of their transdermal fentanyl patches, I should refuse to issue judgment on the summary trial and allow the claim against Teva and Sandoz to continue to the certification hearing.

**REVIEW OF THE EVIDENCE**

**29**  The evidence tendered in this matter consisted of affidavits from Desiree Player and Elaine Mills, the plaintiffs; a number of affidavits from legal assistants and associates employed by the parties' counsel; and extensive expert opinion evidence, that I will discuss in more detail below. The majority of these deponents were cross-examined and transcripts of those examinations were provided to the court. For the reasons given above, I will review all of the evidence, not just that related to the claims of the individual plaintiffs.

**30**  Before setting out the evidence presented in the affidavits, I will briefly lay out the law of products liability in Canada. Although I intend to discuss the law in more detail later in the judgment, some comment on the law of negligent design and failure to warn is necessary to put the evidence in context.

**31**  There is no question that all the defendants in this matter owe a duty of care to the end users of their product. They have a duty to take reasonable care in the design, manufacture and distribution of transdermal fentanyl patches, so as to eliminate any unreasonable risk or foreseeable harm inherent in the use of that product. To escape liability, they must produce a "reasonably safe" product.

**32**  Determining whether something is "reasonably safe" requires the court to undertake a risk-utility analysis. Factors to consider in this balancing include the utility of the product, the risk of injury inherent in the product, the availability of a safer design, the potential for designing or manufacturing the product so it is safer but remains functional and reasonably priced, and, among others, the plaintiff's ability to avoid injury with careful use of the product. Much of the conflicting evidence in this case focuses on two of these factors: first, the risks inherent in the use of transdermal fentanyl patches; and, second, the availability of a safer design.

**33**  Even where the design itself is not negligent, so long as there is some danger associated with the use of the product, the manufacturer and distributor of that product has a duty to warn those who use the product about those dangers. The warnings must be reasonably communicated and must clearly describe any specific dangers arising from the ordinary use of the product.

**Evidence of Named Plaintiffs and Proposed Class Members**

**Death of Robert Player**

**34**  In September 2006, Mr. Player was in a motor vehicle accident where he suffered a severe head injury. Beginning in December 2006, he was prescribed fentanyl for pain relief. Mr. Player's treating physician also prescribed a number of other drugs following the injury, including a sedative, an anticonvulsant, an anti-inflammatory, an antidepressant, and a drug for neuropathic pain.

**35**  At the time, Ms. Player was in training as a registered nurse. She was responsible for applying Mr. Player's fentanyl patches. She says she did so according to the instructions, and that she was always careful to remove the old patch before applying a new one. She was also responsible for organizing and administering his other medications.

**36**  On August 9, 2007, Ms. Player was going to be away from home overnight and so arranged for Mr. Player to spend the night at her mother's house. She did not return to her mother's home until late in the afternoon on August 10. Mr. Player was last seen alive by a family member around 6:30 a.m. that morning, asleep on a sofa. When Ms. Player arrived around 3:00 p.m., she discovered Mr. Player lying dead on the same sofa.

**37**  Ms. Player provided a copy of the coroner's report issued following Mr. Player's death. The report lists the cause of death as fatal respiratory depression due to a prescription drug interaction. A toxicology examination revealed the presence of Fentanyl, Trazodone, Carbamezepine, Gabapentin, Celecoxib, Citalopram, and Olanzapine in Mr. Player's bloodstream. The report notes that all seven of these drugs are respiratory depressants, and concludes that "[t]he combined effect of these medications caused hypoventilation, or respiratory depression." The investigative findings in the report indicate that several prescription medications were found by Mr. Player's body and that several doses were missing, suggesting that he may have taken extra doses of some of his medications prior to his death.

**38**  During cross-examination, Ms. Player admitted that Mr. Player had accidentally over-medicated on a number of occasions prior to his death, but said that as the majority of the medications were in blister packs, it was not possible to determine whether he had over-medicated on the day of his death. She also acknowledged that while Mr. Player had prescriptions for six of the seven drugs found in his system, he did not have a prescription for Trazodone, a sleeping pill. He instead had a prescription for Zoplicone, likewise a sleep aid. Ms. Player herself did, however, have a prescription for Trazodone. She said that she thought Mr. Player had probably found the Trazodone at her mother's house and taken it in error, thinking it was one of his own medications. I note that the toxicology examination shows that Mr. Player did not have any Zoplicone in his bloodstream at the time of his death.

**39**  According to Ms. Player, Mr. Player had used both ratio-FENTANYL and Duragesic brand patches during the course of his treatment. As noted above, ratio-FENTANYL is a matrix drug-in-adhesive style patch manufactured by Teva, while Duragesic is a reservoir patch manufactured by one of the other defendants. Ms. Player was not certain which patch Mr. Player was using when he died, but deposed that she believed it was "most likely" ratio-FENTANYL. She did not provide any basis for this belief. Nor did she provide prescription records or any other supporting documentary evidence that might have established the brand of fentanyl patch used by Mr. Player in August 2007.

**40**  Ms. Player stated that she had read the information leaflet and warnings included with the fentanyl patches used by Mr. Player and understood that there were risks associated with the use of fentanyl. In particular, she noted that she and Mr. Player felt a "great deal of apprehension" over a warning that those sleeping in the same bed with a person using a fentanyl patch could be injured or even die, if the patch detached and adhered to the other person's skin.

**41**  However, Ms. Player also said that at the time of Mr. Player's death she was not aware that fentanyl could cause respiratory depression, or that the patches could release more of the active drug than intended. She was also not aware that mixing fentanyl with a sedative, such as a sleeping pill, could be fatal. In her view, she was not accurately informed of the risks associated with the use of fentanyl. She said that if she had been aware of the dangers, she would not have allowed Mr. Player to use fentanyl patches.

**42**  During cross-examination, Ms. Player reviewed the patient information provided with transdermal fentanyl patch products and agreed that it did mention the risk of respiratory depression. She stated that she could not recall if she had read that section of the information leaflet at the time of Mr. Player's death. She also acknowledged that the leaflet advises that fentanyl may have potentially harmful interactions -- including drowsiness, depressed breathing, low blood pressure or coma -- when mixed with other medications, particularly sleeping pills or other sedatives. Ms. Player testified that she did not understand from the leaflet that depressed breathing could cause death.

**The Extended Coroner's Report**

**43**  As noted above, Ms. Player attached a copy of the coroner's report to her affidavit. She did not include a copy of the autopsy report or toxicology report completed following his death. Both documents were instead tendered by the applicant defendants, who, it appears, received these additional documents when they requested a certified copy of the full coroner's report from the coroner's office. It is not clear from the evidence whether Ms. Player received either document from the coroner's office.

**44**  These documents provide a number of further details from Mr. Player's post-mortem examination. The autopsy report indicates that at the time of death, Mr. Player was wearing two fentanyl patches, one on each arm. Ms. Player stated in cross-examination that she would not have put a second patch on Mr. Player without removing the first one. She believes he must have put the second patch on himself.

**45**  The report does not suggest that the first patch was still active when Mr. Player put the second patch on. Nor does it suggest that the use of two patches resulted in a fentanyl overdose. The toxicology report includes a somewhat cryptic comment that suggests otherwise, as it says "[b]lood level of fentanyl as found after regular application of patches." Neither party presented any evidence from the forensic toxicologist, post-mortem examiner or the coroner and there was no expert opinion tendered interpreting the coroner's report or the additional documents.

**46**  The plaintiffs objected to the admission of the autopsy and toxicology reports on a number of bases. They say that they were deliberately withheld by the applicant defendants until the last possible moment, and then sprung upon Ms. Player at cross-examination in a form of prohibited "trial by ambush"; that they were filed too late, after the agreed deadline for filing evidence; and that they were inadmissible hearsay. At the summary trial the reports were filed as exhibits to an affidavit from Andrew Aguilar, a lawyer with counsel for Teva. In the affidavit Mr. Aguilar indicates that he received the report from the coroner's office.

**47**  According to the plaintiffs, the reports could not be received for the proof of their contents unless the coroner swore an affidavit. Even if the coroner did so, the plaintiffs submit that the resulting affidavit would also be inadmissible as the coroner is not a doctor and cannot give an opinion as to cause of death.

**48**  As the plaintiffs point out, in a summary trial deponents must swear to evidence from personal knowledge, not evidence based on information and belief. The plaintiffs rely on *Huron-Perth Children's Aid Society v. C.H.*, [*2007 ONCJ 744*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFV1-JGHR-M1BP-00000-00&context=), where the court stated that a party seeking to rely on hearsay evidence in an affidavit should explain why the person who tendered the information could not swear an affidavit of their own and be made available for cross-examination. Further, in *British Columbia (Public Guardian and Trustee of) v. Egli*, [*2003 BCSC 1716*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0MN-00000-00&context=), this court held that medical records expressing an opinion as to the mental capacity of a patient were inadmissible for the truth of their contents where the person giving the opinion did not provide an affidavit.

**49**  In submissions on this matter, the plaintiffs also addressed the evidentiary value of the original coroner's report, which, as I have indicated, was filed as an attachment to Ms. Player's affidavit. They say that they did not submit it as proof of the contents of that report, but only in support of the evidence of Ms. Player. According to the plaintiffs, the report is only relevant to show that Mr. Player was taking fentanyl at the time of his death, and that therefore his claim to be a member of the potential class is not baseless. They say that it is not, and cannot be, evidence that Mr. Player died or was otherwise injured because he was taking fentanyl.

**50**  Given the context, that submission is somewhat surprising. In her affidavit Ms. Player deposes that Mr. Player's cause of death was fatal respiratory depression. She also says that he died while using fentanyl patches for pain relief. This is not sufficient to establish -- nor does it even suggest -- that Mr. Player's death was caused by his use of fentanyl transdermal patches. If the coroner's report is not tendered for the truth of its contents, there is no admissible evidence to link Mr. Player's death with his use of fentanyl.

**Conclusion on Evidence Relating to Mr. Player**

**51**  In the circumstances, I cannot place any reliance on the details of Mr. Player's death as evidence of the plaintiffs' claims. The plaintiffs have not put forward any admissible evidence establishing fentanyl as a cause of Mr. Player's death and the resulting injuries to his estate and Ms. Player. They relied on Ms. Player's affidavit, which establishes the fact of his death and the fact that he was using fentanyl at the time. The affidavit does not permit me to conclude that Mr. Player was using a matrix-style patch at the time of his death, as at best, Ms. Player can only say, without corroborating evidence, that it was "most likely" the ratio-Fentanyl patch.

**52**  The affidavit included a coroner's report that lists the cause of death as fatal respiratory depression due to a prescription drug interaction. It appears that fentanyl was one of the drugs in Mr. Player's system at the time of death, but as the plaintiffs themselves submitted, there is no expert evidence that would allow me to determine what role, if any, fentanyl played in his death. In addition, I accept that a coroner's report, without some expert interpretation, cannot prove cause of death. Evidence from the toxicologist, post-mortem examiner, or an expert interpreting the autopsy and toxicology findings would be necessary to prove causation.

**53**  The best that can be said on the facts of Mr. Player's death is that at the time of his death he was wearing two fentanyl patches and using other drugs and that death *likely* resulted from an interaction of the drugs found in his system upon post-mortem examination. This sort of evidence cannot be dispositive at a summary trial. As I have said, a summary trial is a true trial of the action. The onus remains with the plaintiff and the rules of evidence apply as they do at a full trial.

**54**  I conclude that the evidence concerning Mr. Player's death is not sufficient to prove it was more likely than not that Mr. Player died as a result of his use of a matrix fentanyl patch manufactured by either Teva or Sandoz. Therefore, the evidence does not support the claim by the Estate of Robert Player or Ms. Desiree Marine Player against Teva or Sandoz. Given this conclusion, there is no need for me to comment further on the admissibility of the additional two reports.

**Death of Daniel Pollock**

**55**  Daniel Charles Pollock, whose estate and widow, Elaine Mills, are also named as plaintiffs, died while using fentanyl transdermal patches. However, as Dr. Mills acknowledges in her affidavit, Dr. Pollock was prescribed and used the Duragesic fentanyl patches, which utilized the reservoir design. While Dr. Pollock's injuries are relevant to the claim against the other defendants, they do not have any bearing on the question of whether the matrix-style patches manufactured by Teva and Sandoz cause injuries as alleged. As a result, I will not say any more about Dr. Mills' evidence.

**Reported Injuries to Members of the Proposed Class**

**56**  Ruel Mugot, a legal assistant employed at Merchant Law Group LLP, deposed that he spoke via telephone with eight potential class members in the proposed fentanyl class action. It appears that these individuals were identified after they entered their contact information into an online database that plaintiffs' counsel has access to respecting fentanyl litigation.

**57**  Mr. Mugot says that each of the individuals he spoke with identified themselves as a current or former fentanyl patch user, or as a family member of a person who had died while using fentanyl patches. During his conversations with these individuals Mr. Mugot asked them to identify the brand and dosage of fentanyl patch used, the dates of use, and any adverse events experienced while using the patches. He also asked them whether they, or their relative, had ever misused or misapplied fentanyl patches. He deposed that "[e]very individual with whom I spoke indicated that in their case the fentanyl patches had always been used as directed."

**58**  Melissa Coghill, a legal researcher at Merchant Law Group, also deposed that she spoke by telephone with 24 potential class members. She repeated the same questions used by Mr. Mugot and stated that all the respondents had all indicated that their fentanyl patches had always been used as directed.

**59**  The persons interviewed by Mr. Mugot and Ms. Coghill reported the following adverse events:

1. twelve people reported that their relatives died while using fentanyl patches;
2. five people reported dermal irritation, defined as skin rashes, hives, or open sores;
3. thirteen people reported that they or their relatives suffered cognitive impairment, defined as including dizziness, drowsiness, nervousness, hallucinations, anxiety or depression;
4. eighteen people reported experiencing respiratory difficulties, such as respiratory arrest, difficulty breathing, weak or shallow breathing, or shortness of breath; and
5. two people did not report any adverse events.

**60**  A number of the people interviewed could not recall what brand or dosage of fentanyl transdermal patch they or their relative had used. The others reported use of a variety of brands, including patches manufactured by both Teva and Sandoz.

**61**  The applicant defendants object to the admissibility of this evidence, on the grounds that it is hearsay. While the affidavits list the names of the persons interviewed, none of those people provided affidavits of their own and were as a result not available for cross-examination. They say that the plaintiffs could, and should, have provided evidence directly from the potential class members.

**62**  At a summary trial, evidence must be based on personal knowledge, not on information and belief: see *L.E.W. v. United Church of Canada*, [*2005 BCSC 564*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0JH-00000-00&context=) at para. 7. The plaintiffs acknowledged that in their own submissions with regards to the coroners' report.

**63**  I find that the evidence of potential class members is not admissible as proof to support the plaintiffs' claims upon this summary trial. However, bearing in mind the principle established in *MacKinnon, v. Instaloans, supra* the evidence can be considered and may be a factor in determining whether it is just to determine this matter on a summary trial. However, I agree with Teva and Sandoz that it would have been possible for the plaintiffs to provide affidavits from these proposed class members themselves. As such, given the hearsay nature of the information provided, it is only entitled to minimal weight, even for this limited purpose.

**Adverse Event Reports**

**64**  Ms. Coghill also swore an affidavit in which she says that she examined publicly available data about adverse events experienced by the users of fentanyl transdermal patches in Canada. In particular, she examined the Canada Vigilance Adverse Reaction Online Database, a site maintained by Health Canada. The reports in the database are submitted to Health Canada by health professionals, consumers, or drug manufacturers and distributors. Health Canada issues a number of caveats about the use of the reports, stating that the reported clinical data is often incomplete and that the reports cannot be used to establish that the health products in question caused the reported reaction.

**65**  Ms. Coghill acknowledged that the reports cannot establish a causal link between a drug and a specific adverse event, but stated that they do indicate a temporal relationship between the use of a drug and a reported adverse advent. In the case of fentanyl users, reported adverse events included respiratory difficulties, cognitive impairment, dermal irritation, and death. Other reports indicated that the patient complained that the drug was ineffective for its prescribed purpose.

**66**  Again, Teva and Sandoz oppose the admission of this evidence. They point out that the reports are double hearsay: Health Canada simply reports the information provided by other parties. The plaintiffs in their own submissions regarding the admissibility of the autopsy report relied on *Rosetim Investments Inc v. BCE Inc*, [*2011 SKQB 253*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K751-F016-S4H6-00000-00&context=), where the court ruled that reports downloaded from the Internet were inadmissible because the affiant had no personal knowledge of the contents and there was no way to establish the reliability of the reports. That principle seems equally applicable here.

**67**  Further, the applicant defendants argued that even absent the concern about hearsay, no weight for any purpose can be given to the adverse event reports as they contain incomplete or misleading information. Both Teva and Sandoz sought to demonstrate that the reports do not contain all of the relevant information regarding the alleged adverse event. Teva provided a record of their own submissions to Health Canada corresponding to two vigilance reports that listed "death" as an adverse event and indicated that the patient had been using a Teva fentanyl patch. In both cases Teva's records indicate that the deaths were associated with drug abuse. In one, Teva received information from a police officer that a woman was found dead with a fentanyl patch in her mouth. She did not have a prescription for the product. Similarly, in the other incident, police reported a death involving suspected drug abuse; the decedent did not have a prescription for fentanyl.

**68**  Sandoz also provided its own adverse event case files for two vigilance reports listing "death" as an adverse event in association with use of a Sandoz fentanyl product. In one case the reporting doctor indicated that the patient died of prostate cancer and that the reported opioid toxicity cleared up prior to death. In addition, the reporting pharmacist indicated that while the patient was taking fentanyl, it did not appear that fentanyl played any role in the opioid toxicity, which was registered as a reaction to Sandoz Opium and Belladonna. It was not clear what brand of fentanyl the patient was using.

**69**  In the second case, the patient presented at a hospital with confusion and delirium and was found to be wearing two Sandoz Fentanyl patches, which she had unintentionally left on for 7 days. The patient's delirium resolved after treatment in the hospital; she died approximately five days later from metastatic cervical cancer. There was no evidence that the death was in any way related to the patient's use of fentanyl.

**70**  These examples highlight the danger of relying on the Health Canada reports, either as evidence of injuries caused by fentanyl transdermal patches or as of risks associated with those products. I agree with Teva and Sandoz that no weight can be given to this evidence as proof of the plaintiffs' claims or in considering whether the case is appropriate for determination on summary trial.

**EXPERT AND SCIENTIFIC EVIDENCE**

**71**  The parties to this summary trial application filed extensive evidence. The plaintiffs relied on an expert opinion from Dr. Bozena Michniak-Kohn, an American scientist specializing in the area of transdermal and topical drug delivery. She is currently a tenured professor of pharmaceutics at Rutgers University and she is the Director of the Center for Dermal Research and the Laboratory for Drug Delivery of the New Jersey Center for Biomaterials.

**72**  Teva provided affidavits from Paul Stojanovski, the Executive Director of Quality and Compliance at Teva, and W. Bruce Valliant, Director of Pharmacovigilance with Teva. Pharmacovigilance is an umbrella term that describes a company's drug safety practices, including the detection, assessment, monitoring and prevention of adverse drug affects. Sandoz similarly provided affidavits from Nathalie Fortier, their Drug Information and Pharmacovigilance Manager, and Jo-anne Soltesz, Manager of the Regulatory Competency Centre for Sandoz. Generally speaking, the evidence they provided dealt with the regulatory regime governing pharmaceutical products in Canada, the quality control and assurance practices at each company, and their respective pharmacovigilance records.

**73**  Teva also provided two expert opinions. Dr. Brenda Lau, a licensed British Columbia physician with a specialty in pain medication, provided an opinion on the utility of fentanyl transdermal patches and the risks associated with their use. Dr. Lau works at Surrey Memorial Hospital and St. Paul's Hospital and is the Chair of the Regional Pain Services Division, where she oversees the development of pain management services for hospitals in the Fraser Health Authority.

**74**  Dr. Marianna Foldvari provided an affidavit as an expert in the area of transdermal drug delivery systems. She is a professor of pharmaceutical sciences at the University of Waterloo and the Canada Research Chair in Bionanotechnology and Nanomedicine. She provided her opinion with regards to the design of Teva's matrix transdermal fentanyl patches relative to the risks associated with their use.

**75**  Sandoz provided an expert opinion from Dr. Philippa Hawley, a licensed physician specializing in the area of pain management and palliative care. She currently does clinical work at the British Columbia Cancer Agency, based in Vancouver. Beginning in 1997, she initiated and developed the Cancer Agency's Pain and Symptom Management/Palliative Care Program, a clinical program providing medical services to patients with a cancer history who present with pain as their primary problem. She is currently the Provincial Medical leader of that program. She estimates that between 2011 and 2013 the clinic has treated 900-950 patients, of whom she has personally treated between one-third and one-half. She is also the head of the Division of Palliative Care at the University of British Columbia. Dr. Hawley provided an opinion with regards to the role of transdermal fentanyl patches in cancer pain management and the risks associated with transdermal fentanyl use.

**76**  As will become apparent in the review of the scientific evidence, there were a number of conflicts between the expert opinions. Each expert provided response affidavits addressing their concerns with the other opinions. The parties also challenged the admissibility and weight to be given to some of the opinions. I have attempted to clearly set out the information provided and highlight the points of conflict and concern, although this task was made more difficult by the "she said - she said" nature of the battling affidavit evidence. I have left the questions of admissibility and weight for discussion following the review of the scientific evidence.

**Fentanyl and the Pharmaceutical Context**

**Fentanyl Transdermal Patch Technology in Canada**

**77**  Fentanyl is a member of the opioid family. It is a potent drug and, along with morphine, hydromorphone, oxycontin, methadone and tapentadol, is categorized as a "strong opioid." In Canada it is authorized for use for the treatment of moderate to severe pain. It is only available by prescription.

**78**  Unlike the other strong opioids, fentanyl is fat soluble, and as a result can permeate a patient's skin. It can therefore be administered transdermally, in the form of a patch. Generally speaking, these transdermal patches are designed to release a constant flow of fentanyl into the patient's bloodstream over a 72-hour period.

**79**  Transdermal fentanyl patches have been available in Canada since 1991, when Health Canada granted Janssen-Ortho Inc. authorization for the sale of Duragesic brand patches. Duragesic manufactures "reservoir" type transdermal fentanyl patches. As an innovator drug, Duragesic was initially protected by patent, so that no other companies were permitted to sell transdermal fentanyl patches prior to 2006. Once the drug entered the "off-patent" period, a number of other companies applied for authorization to release generic versions of the product.

**80**  Among the pharmaceutical companies that successfully received Health Canada authorization for sale of generic transdermal fentanyl patches were Ratiopharm Inc., Novopharm Ltd., and Sandoz. Ratiopharm manufactured the ratio-FENTANYL patch, Novopharm the Novo-Fentanyl patch, and Sandoz the Sandoz Fentanyl patch. Health Canada authorized the sale of ratio-FENTANYL in July 2006, Novo-Fentanyl in August 2008 and Sandoz Fentanyl in June 2009.

**81**  As a result of corporate mergers, Teva is now the successor company to both Ratiopharm and Novopharm. The ratio-FENTANYL patch is still available in the market but the Novo-Fentanyl patch has subsequently been rebranded as the TEVA-Fentanyl patch.

**82**  All the patches manufactured by Teva and Sandoz are matrix drug-in-adhesive style patches. As I will discuss in more detail below, generic drugs are not required to match the innovator products exactly. They only need to be "bioequivalent," so that the same level of active ingredient is released from the generic product at the same rate as it is released from the innovator product. The generic versions may therefore differ from the innovator product in their delivery mechanisms or other design elements.

**The Regulation of Pharmaceuticals in Canada**

**83**  Health Canada is the independent federal agency responsible for regulating the sale, safety and efficacy of drugs in Canada. In particular, the Health Products Food Branch ("HPFB") is responsible for the regulation of pharmaceuticals. A drug cannot be sold in Canada until it receives market authorization from the HPFB, which requires that an applicant organization demonstrate a drug's safety and efficacy in accordance with Health Canada regulations.

**84**  The process for demonstrating drug safety and efficacy is a complicated one, particularly where the drug is an "innovator", or the first of its kind. I summarize it here as follows:

1. The applicant must conduct pre-clinical studies, which involve in vitro (test tube) and in vivo (animal) testing for the performance of the drug and any potential toxic effects.
2. The applicant may then apply to HPFB for authorization to conduct a clinical trial on human subjects. The purpose of the clinical trial is to verify the pharmacological effects of the drug, identify any adverse events, study the absorption, distribution, and metabolism of the drug, and ascertain its safety and efficacy. The HPFB regulates the design of clinical trials and ascertains that they do not expose participants to any undue risk. The clinical trials for innovator drugs are performed both with healthy volunteers and with the patients who are the target subjects for the drug.
3. If the clinical trial indicates that the drug has a therapeutic value that outweighs any risks associated with its use, the applicant can file a New Drug Submission ("NDS") with HPFB. This form contains information about the product's safety, efficacy and quality, relying on the results of the pre-clinical and clinical trials. It also details the production method for the drug and its packaging and labelling, including the product monograph. The HPFB reviews this information and, if satisfied that the benefits of the drug outweigh the risks, issues a Notice of Compliance and Drug Identification Number, both of which are required prior to any sale in Canada.
4. The approval process for generic drugs is streamlined, as it relies on much of the data put forward in the original NDS. The applicant for a generic drug files an Abbreviated NDS ("ANDS") with the HPFB. The ANDS is focused on demonstrating that the generic drug is bioequivalent to the innovator drug. Bioequivalence, as discussed above, assures that the same level of active ingredient is released from the generic product at the same rate as from the innovator product. HPFB proceeds on the assumption that so long as the drugs are bioequivalent, the generic drug has the same safety profile as the innovator drug. As a result, no further safety and efficacy testing is required.
5. The manufacturers of generic drugs conduct clinical studies in testing for bioequivalence. The company administers the proposed generic drug to a group of healthy volunteers and also administers the innovator drug to the same group of volunteers. From there, the company can sample how quickly each drug enters the bloodstream and how much total drug enters the bloodstream over the dosage period. Unlike the innovator drug, generic drugs are not tested in clinical trials with diseased or injured patients.

**85**  As discussed, both Teva and Sandoz manufacture generic versions of Duragesic, the innovator product. They were granted authorization for sale after establishing bioequivalence with that product.

**86**  Dr. Foldvari reviewed the ANDS for both ratio-FENTANYL and Teva-Fentanyl, which included records of the bioequivalence studies conducted for both drugs. In Dr. Foldvari's opinion, both Teva patches were tested for safety and efficacy in accordance with all applicable industry standards. She deposed that the studies in question were done in accordance with Good Clinical Practice ("GCP"), an international ethical and scientific quality standard used in designing, conducting, recording and reporting clinical trials on human subjects. Health Canada, like other national drug regulators, has adopted GCP as the required standard for use in clinical trials.

**Quality Control for Teva and Sandoz Patches**

**87**  Both Teva and Sandoz provided information about their manufacturing and quality control processes. Ratio-FENTANYL matrix patches are manufactured in Germany, while Novo-Fentanyl and the subsequent TEVA-fentanyl matrix patches are manufactured in Florida. Sandoz Fentanyl patches are manufactured in Germany.

**88**  Mr. Stojanovski and Ms. Soltesz, who monitor quality control and regulatory compliance at Teva and Sandoz respectively, said that the drug manufacturers are required to test the products for compliance with Health Canada specifications as well as with each company's own quality control specifications. In this process the manufacturers take representative samples from each lot and test them for potency, purity, and content uniformity. The manufacturers then issue Certificates of Analysis, which certify that the patches in each lot meet the chemical composition specifications approved by Health Canada. They also issue a Certificate of Manufacture, which certify that the patches in the lot were manufactured in accordance with Health Canada's approved manufacturing processes. These materials are reviewed by quality assurance staff upon arrival at Teva's and Sandoz's Canadian facilities.

**89**  Mr. Stojanovski deposed that as far as he is aware, neither Ratiopharm, Novopharm nor Teva has ever released a fentanyl patch in Canada that was non-compliant with Health Canada quality control specifications. Similarly, Ms. Soltesz states that she is not aware that any non-compliant Sandoz Fentanyl patch has ever been released into the Canadian marketplace.

**Evidence on Negligent Design Claim**

**Medical Utility of Transdermal Fentanyl Patches**

**90**  According to Dr. Lau, who specializes in pain medication, opioids are "the cornerstone therapy for moderate to severe tissue injury pain." Fentanyl, and in particular the patch dosage form, provide a number of unique benefits in use for pain management. First, fentanyl is up to 100 times more potent than morphine, another common opioid, so that effective pain relief requires lower concentrations of the active drug, thus reducing side effects and improving patient tolerance. Dr. Lau notes that fentanyl is the preferred strong opioid for use in patients with renal failure as many of the other drugs can have adverse effects on the kidneys. In addition, she states that fentanyl does not cause histamine release and is the preferred opioid for use in those who are susceptible to hypotension from histamine effects. As it can be delivered via patch, it is the only opioid treatment for severe pain in patients who cannot tolerate drugs taken by oral, intravenous or rectal administration. "Accordingly," Dr. Lau states, "there are certain categories of patients for which fentanyl is the only opioid available to physicians for the management of severe pain."

**91**  Dr. Hawley provided a similar opinion, stating that transdermal fentanyl patches have "a unique and very valuable place in the management of cancer pain," particularly with patients who have digestive or swallowing difficulties. She noted that the patch dosage form also allows for treating physicians or caretakers to control the risk of abuse and monitor drug compliance more easily than with injection or oral-dose medications. She indicates that fentanyl is currently the only publicly-funded transdermal opioid available in Canada.

**92**  Both doctors agreed that transdermal fentanyl patches have a number of practical benefits. Transdermal patches provide a constant dose over a period of time, thereby maximizing pain relief and avoiding patient overdose by diminishing the effect of erratic or inconsistent dosing. A patch also provides a benefit to pain sufferers because it can be used at home, rather than in a hospital setting, as it is easy to administer. Dr. Hawley states that the benefits of fentanyl patches for patients and caregivers include a reduction in opioid-induced constipation; reduction in caregiver burden due to reduced frequency of administration; sleep improvements from stable dose flow at night; improved patient independence with less need for medication assistance; and improved patient confidence, self-esteem and dignity, as a result of the other listed benefits. In a palliative context, she notes that a reduced caregiver burden allows patients to rely on hospice care, which is inexpensive in comparison with a hospital bed in a palliative care unit.

**Risks with Use with Fentanyl Transdermal Patches**

**93**  Dr. Lau and Dr. Hawley agreed that fentanyl use, as with all opioids, carries a risk of respiratory depression. However, both doctors opined that serious injury or death from opioid-induced respiratory depression would be "extremely unlikely" as long as the transdermal fentanyl patches were properly prescribed and applied. In Dr. Lau's experience, overdose and respiratory depression "almost invariably" result from a patient using a patch incorrectly or from errors in prescription. Like Dr. Lau, Dr. Hawley opined that "[i]f transdermal fentanyl is prescribed and used appropriately, I would not expect to see any serious respiratory issues associated with its use." She bases this conclusion on her own clinical practice. She estimates that of 3,000 patients seen between 2001 and 2011, she prescribed fentanyl for 15%. She included data from the Vancouver Centre Palliative Care Database showing the incidence of fentanyl patch use among patients at the clinics since 2005 varied between 12-18%. She is not aware of any episodes of respiratory depression due to transdermal fentanyl occurring in any cancer patients at the BC Cancer Agency.

**94**  Dr. Lau and Dr. Hawley defined "appropriate" use or prescription of transdermal fentanyl patches as follows:

1. The patch should not be applied to broken or altered skin, used while damaged, exposed to a heat source, or applied by a patient who has a fever. All of these factors may result in an accelerated rate of drug release.
2. The patch must be used by a patient with a prescription and in accordance with the instructions as to application. Intentional misuse or abuse, as where the patient applies additional patches, consumes the patches orally, or uses the patches without a prescription, can result in overdose.
3. The patient should not use the patch in conjunction with certain other drugs, particularly other opioids or sedatives, as the interaction may lead to a dangerous increase in the risk of respiratory depression. A risk of drug interaction can arise where the patient fails to inform the prescribing physician of other medications they are taking or the physician fails to adequately monitor or assess the potential for drug interactions.
4. The patient should be exposed to fentanyl through the use of gradual dose titration, a process where the dose of the chosen opioid is started low and slowly increased, allowing the patient to develop tolerance to the respiratory depressant effect. The prescribing doctor is meant to monitor the patient while the appropriate dosage is determined. A patient who is exposed too quickly to too much fentanyl may be susceptible to respiratory depression.
5. The patch can only be prescribed for use by a patient who is opioid-tolerant. In Dr. Hawley's view, fentanyl cannot be safely used as a first-line opioid (i.e. with patients who are opioid-naïve). She notes that physicians are aware of this limitation on the safe use of fentanyl products.

**95**  Dr. Hawley noted that the potential for respiratory depression with opioid use is well-known in the medical community. She deposed that a qualified and reasonably competent physician would, in prescribing transdermal fentanyl patches, advise the patients of the risks of respiratory depression or overdose. A physician would also rely on strategies for managing or mitigating the risk of respiratory depression, such as the gradual does titration described above.

**96**  Dr. Michniak-Kohn disagreed with this view. In her opinion, fentanyl transdermal patches are dangerous in ordinary use, as individuals who use them appropriately may still die with lethal levels of fentanyl in their blood.

**97**  In giving this opinion, Dr. Michniak-Kohn relied on FDA adverse event reports, reports regarding deaths and injuries in Canada associated with use of transdermal fentanyl patches, and her experience as an expert in transdermal fentanyl litigation in the United States.

**98**  However, as the applicant defendants pointed out, many of these source documents do not appear to support Dr. Michniak-Kohn's conclusion. While the sources do suggest that fentanyl is dangerous, after reviewing their content I am not persuaded that they establish that fentanyl is dangerous in ordinary use. One source, the Canadian Adverse Reaction Newsletter, relies on the Health Canada adverse reaction reports discussed above. As such the article is already based on incomplete information. In addition, the adverse reactions listed appear to be the result of intentional drug abuse or overdose, misuse or misapplication of the patch, prescriptions to opioid-naïve patients, inappropriate dose titration, or reactions between fentanyl and other drugs, such as sedatives. The article concludes by saying that the safe use of fentanyl is contingent on "its use according to the conditions recommended in the Canadian product monograph."

**99**  Similarly, Dr. Michniak-Kohn cites an American article for the claim that "[m]any deaths have been reported after a single patch application in ordinary use." However, the article in fact says that "rare deaths have been reported after just a single patch application" and all those cases specifically discussed involved patients who were opioid-naïve. The other deaths discussed in the article involve individuals who did not have a fentanyl prescription or who were administered fentanyl without gradual dose titration.

**100**  I will discuss Dr. Michniak-Kohn's reliance on evidence tendered in American fentanyl litigation in more detail below. At this point I will simply note that Dr. Michniak-Kohn did not provide any documentation relating to her involvement in that litigation.

**The Availability of a Safer Design**

***Matrix Patches versus Reservoir Patches***

**101**  Dr. Foldvari gave the opinion that matrix patches (and in particular, Teva's patches) are "state of the art, leading technology" in the transdermal administration of fentanyl. She is of the opinion that there is no extant safer alternative delivery mechanism for the administration of fentanyl.

**102**  In her view, the safety profile for a matrix-style patch is superior to a reservoir-style patch. She deposed that the design of the matrix patch protects against the sudden or inadvertent release of large amounts of active drug, known as "dose-dumping," and the consequent risk of overdose. In her view, a reservoir patch allows for dose-dumping because any issue with the structural integrity of the patch itself can allow the patch to "dump" the entire dose out of the patch unexpectedly.

**103**  Dr. Foldvari provided a comparison of the key features of reservoir patches and drug-in-adhesive matrix patches. Although noting that the two products are considered bioequivalent by Health Canada, and therefore deliver a statistically similar amount of active drug over the same period of time, she states that there are "significant, functional differences" between the two types of patch, including:

1. Control of drug release: In a reservoir patch the release of the drug is controlled by a rate-controlling membrane. If the membrane is pierced or damaged, the drug may flow freely from the patch, potentially resulting in overdose. The drug in a matrix patch is controlled by the components of the matrix itself and a concentration gradient between the patch and the skin. The drug moves from an area of high concentration (the gradient) to an area of low concentration (the skin). Because there is no membrane, there is no risk of drug release due to membrane damage. There is no concentration gradient controlling release in the reservoir-style patch.
2. State of the drug: the active drug in a reservoir patch is in a gel form in the reservoir compartment. If the reservoir or the membrane between the reservoir and the skin is cut, torn or punctured, the drug may leak out of the patch resulting in an overdose. In a matrix patch, the drug is dissolved in the matrix and kept in a semi-solid state. It cannot leak, even if the patch is cut, torn or punctured.
3. Stability of active drug: The stability of the fentanyl in a matrix patch remains constant. In a reservoir patch, the stability is dependent on the protective backing; where it is removed or damaged, components of the drug formulation, such as ethanol, may evaporate and change the chemical composition of the drug formula in the reservoir.

**104**  According to Dr. Foldvari, the risks inherent in the use of a matrix fentanyl patches are shared by all transdermal fentanyl patches. In her opinion, it is not possible to design a patch that prevents drug abuse or deliberate misuse, or one that can deliver active drug at a constant rate to both normal and compromised skin. She also says it is not possible to design a patch that is unaffected by exposure to heat.

**105**  It appears that the risks inherent in reservoir-style patches have, on at least one occasion, led to a recall for those products. In February 2008, Health Canada issued a recall notice for fentanyl patches marketed and distributed by Janssen and Ranbaxy. According to an advisory released by Health Canada, 25 mcg/hr Duragesic patches were recalled "because they may have a cut along one side of the patch which could result in leaking of the fentanyl gel from the patch." Teva was not subject to the recall notice in February 2008 (the Sandoz product had not yet come to market). Indeed, Mr. Valliant, Teva's Director of Pharmacovigilance, says that no matrix-style fentanyl patches have ever been recalled in Canada.

**106**  In her affidavit Dr. Hawley agreed with Dr. Foldvari on this point, stating that the safety profile for transdermal fentanyl patches is increased with use of a matrix-style design, as compared with a reservoir-style design, because there is no risk of gel leakage.

***Matrix Patches with Rate Control Membrane***

**107**  Dr. Michniak-Kohn acknowledges that there is no danger of drug leaking from a matrix patch if it is torn or cut. However, in her opinion, there is a safer alternative design available. According to Dr. Michniak-Kohn, there are more than two categories of transdermal fentanyl patch designs available on the market. In addition to the reservoir and matrix products, there are patches that she describes as "matrix with rate control membrane." She notes that specific brands may vary in a number of other ways, including through the use of permeation enhancers, the amount of fentanyl in the patch, the size of the patch, the type of adhesive, and the composition of the gel.

**108**  In Dr. Michniak-Kohn's opinion, "a fentanyl patch that has both a matrix and rate-control membrane is superior to a patch without such a membrane," and that, as a result, there is an alternative design of a patch safer than those manufactured and marketed by Teva and Sandoz.

**109**  According to Dr. Michniak-Kohn, examples of a matrix transdermal fentanyl patch with a rate controlling membrane are commercially available in Europe, under the brand names Matrifen and Fentadur, and in the United States, from Mallinckrodt Inc.

**110**  In her opinion, adding a rate control membrane to a matrix patch "significantly reduces [the] risk" of unintended or accelerated drug release where the patch is applied to broken or altered skin. Without the rate control membrane, if a patch is applied to compromised skin, she says that "delivery of fentanyl at a rate much higher than the labeled dose is likely to occur."

**111**  In support of this opinion, Dr. Michniak-Kohn cited Suneela Prodduturi *et al*, "Transdermal Delivery of Fentanyl from Matrix and Reservoir Systems: Effect of Heat and Compromised Skin" (2010) 99:5 Journal of Pharmaceutical Sciences 2357.

**112**  The article itself begins by indicating that there are, generally speaking, two types of transdermal drug delivery via adhesive patch: matrix, or drug-in-adhesive, systems; and reservoir, or membrane-controlled systems. I note that the article says nothing about the possibility of a matrix system with a rate-controlled membrane. The article notes that:

matrix and reservoir systems have different characteristics, especially with regard to dosage form design and drug release ... which makes direct comparison difficult.

**113**  The purpose of the study was to assess the robustness of the two design forms when exposed to variations in skin condition (elevated temperature or compromised skin). The experiments were conducted using human cadaver skin samples, some of which were "tape stripped" to compromise the epidermal surface, and then again using synthetic membranes. The authors concluded that in conditions of compromised or highly variable skin, "a matrix FTS (Fentanyl Transdermal System) may be more affected than a reservoir FTS." The authors also note that "[i]n conditions of misuse or abuse such as elevated temperature or application of heat, either of these systems may cause an overdose."

**114**  In Dr. Michniak-Kohn's opinion, matrix patches without a rate control membrane also result in greater variability in drug absorption rates, and "are more likely to lead to fatal overdoses than are matrix patches with a rate control membrane." She says that with matrix patches, only a user's skin controls the absorption, leading to great variability in absorption rates. She indicates that the data on Duragesic shows that the rate-control membrane accounted for over 50% of the rate control, so that fentanyl delivery across the skin without the membrane would encounter only half the resistance and double the delivery on average. The applicant defendants challenged this statement, pointing out that Dr. Michniak-Kohn did not cite any study, or provide any data, to support that conclusion.

**115**  Dr. Foldvari also disagreed with this view. She states that it is inaccurate to say that it is only the user's skin controlling absorption with the matrix patch. In her view, the bioequivalence studies required by Health Canada for the matrix patches demonstrated that the matrix patches delivered a statistically similar amount of drug to patients over the same period of time as a reservoir patch. Teva's bioequivalence studies particularly tested the effect of skin variability, by using a direct cross-comparison of both products on the same volunteers, and found that the products released the active drug in an equivalent manner regardless of the patient's individual skin permeability.

**116**  Dr. Michniak-Kohn did depose that she has provided expert opinions in numerous American court cases involving transdermal fentanyl patches. She says that in each case she gave the same opinion that she presents here: that a matrix patch without a rate control membrane is more dangerous than a matrix patch with a membrane. She says that in those cases she assessed autopsy records for 48 individuals who died while using the Mylan patch, a matrix patch available in the United States (but not available for sale in Canada). According to Dr. Michniak-Kohn, there was no reported misuse or abuse of the patches in the cases and in each, post-mortem levels of fentanyl in the bloodstream were significantly higher than the concentration the patches were intended to deliver. She says that in each case the deaths were "all ruled to have been caused by fentanyl and they had higher levels than the patch should have produced."

**117**  She states the records provided in those cases supported her opinion that the monolithic matrix patches, without a rate-controlling membrane, were responsible for the decedent's deaths. Again, Dr. Michniak-Kohn did not provide records from these cases. Nor did she provide the court with any decisions released by U.S. courts.

**118**  During cross-examination Dr. Michniak-Kohn acknowledged that she herself has not conducted any studies comparing the performance of monolithic matrix patches with matrix patches with a rate-control membrane.

**119**  Dr. Foldvari responded to Dr. Michniak-Kohn's opinion. To begin, she challenges Dr. Michniak-Kohn's classification of transdermal fentanyl patch design into three categories, with one described as a "matrix with a rate control membrane." Dr. Foldvari deposes that the classification of fentanyl patches is subjective and that any category grouping does not mean that the patches in the category have identical characteristics, mechanisms, or designs. Further, she says it would be more appropriate to describe the Fentadur, Matrifen and Mallinckrodt products as using a "modified reservoir design." She says the fentanyl in each is contained in a reservoir, with the release controlled by a physical membrane as opposed to the form of physico-chemical control used in a drug-in-adhesive patch like those manufactured by Teva and Sandoz.

**120**  She provided a copy of the patent for the Fentadur product manufactured in the United States by Lavipharm. Based on her review of the technology in the patent, she states that the rate-control membrane is essential to the proper functioning of the patch. Without the membrane, the transfer of fentanyl from patch to skin would be too variable for safe use. She deposes that the rate control membrane is not, as Dr. Michniak-Kohn states, a secondary or supplementary safety device, but rather an essential element of the safe operation for that form of patch. Dr. Foldvari's review of the in vitro and in vivo testing of the Teva patches indicated that the matrix patches achieved effective rate control without a membrane.

**121**  Nor does Dr. Foldvari agree that these patches offer a superior safety profile to a drug-in-adhesive matrix patch. In her view, there is no evidence that a rate control membrane reduces the risk of accelerated absorption, particularly when used on compromised skin. She notes that there is no scientific study supporting this position and states that a higher delivery rate may occur regardless of the presence of a rate control membrane. Dr. Foldvari concludes her response by stating that there is simply no scientific evidence that the patch brands identified by Dr. Michniak-Kohn are safer than matrix patches, or that they are less likely to produce an overdose when applied to compromised skin.

***Buprenorphine and Butrans Patch***

**122**  Dr. Michniak-Kohn also gave the opinion that Butrans, another opioid pain patch, is as effective as fentanyl in treating pain but does not present the same risk of death due to respiratory depression. The active drug in Butrans, buprenorphine, has a "ceiling effect", where elevated levels of the drug in the bloodstream have the effect of preventing respiratory depression, rather than causing it. Butrans patches have been approved for sale in Canada since 2010. In her opinion, buprenorphine provides a safer alternative transdermal opioid formulation when compared with fentanyl.

**123**  Both Dr. Lau and Dr. Hawley disagreed with this conclusion. Dr. Lau indicated that she was familiar with the Butrans patch and had prescribed it in her pain management practice. However, she emphasized that Butrans does not provide a replacement or alternative for fentanyl products, as Butrans is only approved by Health Canada for the management of moderate pain, while fentanyl patches are approved for the management of severe pain. In her clinical experience, Dr. Lau has not found buprenorphine to be generally preferable to fentanyl; in her opinion, the Butrans patches are not as effective as the available fentanyl patches. She also notes that some of her patients have had adverse reactions to Butrans (rashes, sedation, constipation, nausea) but were able to better tolerate fentanyl. On that basis, she gave the opinion that the buprenorphine patch did not provide a viable alternative for the use of transdermal fentanyl products.

**124**  Dr. Hawley agreed with Dr. Lau, giving the opinion that Butrans is not a viable substitute for fentanyl transdermal patches as it is not approved in Canada in dosages sufficient to address severe pain. She also noted that it is not publicly funded and is therefore unaffordable for many patients.

**Evidence on Duty to Warn**

**125**  In Canada, pharmaceutical companies are prohibited from communicating drug information to patients without Health Canada approval of the form and content of that communication. This information is contained in the "product monograph," a document that describes the properties, claims, indications and conditions for use of the drug, along with any other information that may be required for the optimal, safe and effective use of the drug. The monograph contains separate sections with information for health professionals and consumers. The information provided to consumers is reproduced in a patient information leaflet, which Teva includes with every package of fentanyl matrix patches sold in Canada. Sandoz also includes a patient information leaflet with every box of Sandoz Fentanyl.

**126**  For generic drugs, Health Canada requires that the consumer information portion of the monograph match the form and content of the monograph for the innovator drug. Only warnings which are included with the innovator's product may be included with the generic drug's consumer information. A generic manufacturer may not unilaterally add warnings to its consumer information, or change the wording of the existing warning. The warnings for the innovator drug and the generic drugs are, as a result, identical.

**127**  Health Canada, as a part of its oversight of the pharmaceutical industry, will direct changes to a drug's product monograph from time to time. As indicated by Ms. Soltesz, this is only done where the manufacturer of the innovator drug comes forward with a recommendation for a change. The generic companies cannot change warnings without Health Canada's approval.

**128**  The Teva and Sandoz provided copies of all the product monographs issued for ratio-FENTANYL, TEVA-fentanyl, and Sandoz Fentanyl from launch until the date of summary trial. Both defendants also provided copies of their patient information leaflets.

**129**  With regard to the risk of respiratory depression, a review of the Teva product information leaflets shows that, with some variation, the leaflets provide the following warning:

**When [fentanyl] should not be used:**

**Because life-threatening decreases in breathing rate could occur, ratio-FENTANYL should not be used:**

1. for the relief of pain following surgery.
2. for the relief of pain which is only mild, or expected to last less than several weeks.
3. if you have acute or severe bronchial asthma.
4. If you are having difficulty in breathing.

For the same reason, do not start on ratio-FENTANYL unless you have already been taking a strong opioid medication.

**130**  Two of the later leaflets, produced for NOVO-FENTANYL between 2008-2010, instead say that:

"Fentanyl is a very strong opioid narcotic pain medicine that can cause serious and life-threatening breathing problems. Serious and life-threatening breathing problems can happen because of an overdose or if the dose you are using is too high for you" [emphasis in original].

The leaflet advises patients to seek emergency medical help immediately

if

they have trouble breathing, experience slow or shallow breathing or a

slow

heartbeat, have severe sleepiness, feel faint, dizzy, or confused, or

have a

seizure or hallucinations.

**131**  The leaflets also address the potential for abuse, and advise patients to dispose of leftover and discarded patches by flushing the patch down the toilet, not to damage or chew the patch, and not to let anyone else use the patch. Patients are also advised that they should not exceed the dose recommended by their doctor.

**132**  A number of the experts reviewed the product information provided by Teva and Sandoz and provided opinions as to the accuracy and comprehensiveness of the included warnings. Dr. Lau gave the opinion that all of the risks associated with the use of fentanyl transdermal patches are reflected in Teva's product monographs. In her opinion, the patient information leaflets "comprehensively addresses all of the known patient safety risks relating to fentanyl patches of which the patient should be made aware" (emphasis in original). In particular, she opines that the leaflet "reasonably warns of the risk of life-threatening decreases in breathing rate."

**133**  Dr. Lau also states that the patient information adequately addresses the risk of accelerated drug release through the provision of instructions designed to mitigate the potential for inadvertent acceleration of the drug release rate. The leaflets advise the patient to apply the patch to a dry, non-hairy portion of the body, and in particular, to apply to the chest, back, flank or upper arm; to clip (not shave) the hair close to the skin, in order to avoid the risk of cuts; not to put the patch on skin that is excessively oily, burned, broken out, cut, irritated or damaged in any other way; not to clean the skin in the application area with soaps, oils, or lotions which may irritate the skin; and warns not to use soap, alcohol or other solvents to remove the patch because they may increase the drug's ability to go through the skin. The leaflets state that patients should remove one patch before applying the next one and should apply the new patch in a different location on the skin, as Dr. Lau notes that applying a new patch to the same area may increase the risk of acceleration. The leaflets also state that patients should not expose the patch to sources of heat and should not be used if the patient develops a fever.

**134**  Finally, Dr. Lau gave the opinion that the leaflets reasonably address the risk of interactions between fentanyl and other drugs, as the patient is warned not to use the patch while using certain other medications or consuming particular substances. The patient is advised to inform the physician if taking any other medications, while a list headed "interactions with this medication" indicates that medications such as tranquilizers and sleeping pills may, in combination with the fentanyl patch, "cause drowsiness, depressed breathing, low blood pressure and possibly coma."

**135**  Dr. Hawley reviewed the product monographs issued by Sandoz in 2009-2010 and gave the opinion that they adequately identify the risks of fentanyl use for physicians, pharmacists and patients. She also reviewed the patient information leaflet and again deposed that the leaflet clearly and accurately explains the risks of use with the Sandoz Fentanyl patch, including the statement that "Fentanyl is a very strong opioid narcotic pain medicine that can cause SERIOUS AND LIFE-THREATENING BREATHING PROBLEMS."

**ASSESSMENT OF THE EVIDENCE**

**136**  As already noted, Dr. Foldvari, Dr. Hawley and Dr. Lau all disagreed with various aspects of Dr. Michniak-Kohn's opinion. The applicant defendants also challenged the admissibility of much of Dr. Michniak-Kohn's evidence. In their submission, she provided opinions on matters outside her area of expertise, misrepresented or overstated the factual basis for her opinion, and acted as an advocate, rather than a neutral or objective party. Essentially, they say that Dr. Michniak-Kohn's opinion is not reliable, as she has not performed any studies or tests to measure and compare the safety and performance of the two types of patch, or provided any data or studies that provide direct support for her conclusion.

**Matters Outside the Witness' Area of Expertise or Lacking a Reliable Factual Basis**

**137**  The applicant defendants particularly challenged Dr. Michniak-Kohn's ability to give evidence that relies on the interpretation of post-mortem fentanyl blood levels. In her affidavit she indicated that "[e]xperts in forensic toxicology and forensic pathology have expressed the opinion that post-mortem fentanyl levels can be relied upon as an estimate of the fentanyl level in the decedent's blood at the time of death." She says she relied on post-mortem blood levels in reaching conclusions as to the safety of the matrix patches in the Mylan fentanyl litigation. However, as she admitted on cross-examination, she herself is not qualified as an expert in forensic toxicology or pathology.

**138**  On cross-examination the applicant defendants confronted Dr. Michniak-Kohn with evidence given by toxicologists in the U.S. Mylan proceedings she referenced. In the transcripts, the toxicologists indicate that post-mortem fentanyl levels are not a reliable indicator of the level of fentanyl in the blood at time of death or the drug release rate of the fentanyl patch in question. Dr. Michniak-Kohn then acknowledged that reliance on post-mortem fentanyl levels in determining cause of death is somewhat controversial, as there are studies that suggest it is reliable and studies that suggest it is not. She did continue to state her opinion that the evidence in the Mylan litigation, including the post-mortem fentanyl levels, established that the patches had caused injuries in ordinary use by releasing the drug at an accelerated rate.

**139**  In her affidavit, Dr. Lau deposed that the difficulties in correlating ante-mortem and post-mortem drug levels are well-recognized in the scientific community -- she provided a number of studies discussing these difficulties -- and stated that accurate interpretation requires an individualized approach with communication with the decedent's physician and other medical professionals. In Dr. Lau's opinion, there was nothing in Dr. Michniak-Kohn's report, curriculum vitae, or the exhibits to her affidavit that suggest she has any proper basis for offering an opinion regarding the significance of post-mortem drug levels in determining cause of death.

**140**  Dr. Lau also challenged Dr. Michniak-Kohn's ability to give an opinion as to the suitability of a particular medication (i.e. Butrans) for use in a clinical setting. She points out that Dr. Michniak-Kohn is not a licensed physician (a fact that Dr. Michniak-Kohn acknowledges) and is not qualified to prescribe opioids or treat patients for pain.

**141**  On cross-examination Dr. Michniak-Kohn admitted that she is aware that buprenorphine cannot be used as an alternative for fentanyl with every patient. She clarified that her view on Butrans is that it is "possibly safer than fentanyl and could be an alternative." She says:

... in certain cases I am sure Buprenorphine can be used. Because I read in my literature search that that could be an alternative. ... So I am not the only one looking at Buprenorphine as a possible alternative.

**142**  The applicant defendants say that Dr. Michniak-Kohn mischaracterized some of the studies she relied on. I have already noted some of these concerns above, with regards to sources Dr. Michniak-Kohn relies on to establish that fentanyl may cause death with ordinary use. In addition, the applicant defendants say that the Prodduturi article referred to above does not actually support the conclusion that a matrix patch is more affected by variations in skin permeability than a patch with a rate-controlling membrane. It says that the matrix patch *may* be more affected, but also acknowledges that the experiments in the study were not sufficient to indicate whether the rate control membrane could prevent an overdose in the case of heat damage to the patch.

**143**  Dr. Foldvari in her affidavit also says that the findings in the article are not statistically significant as the variability in the results obtained was high enough that conclusions could not safely be drawn without a larger sample size.

**144**  Finally, the applicant defendants point out that Dr. Michniak-Kohn has herself has not conducted any tests to determine how the matrix patches performed in relation to patches with an additional membrane, or how the patches might perform with the addition of another membrane. Indeed, she acknowledged that she was not aware that anyone has done direct head-to-head safety testing comparing monolithic matrix patches and matrix patches with a rate-controlling membrane.

**Dr. Michniak-Kohn as an Advocate**

**145**  In Canadian courts expert witnesses are required to be neutral and objective, rather than advocating for a party or position. Indeed, pursuant to Rule 11-2 of the British Columbia *Supreme Court Civil Rules*, affidavits from experts must contain a statement noting that they understand that their duty is to assist the court, rather than to act as an advocate for any party.

**146**  The applicant defendants say that Dr. Michniak-Kohn misunderstood her role as expert and acted as an advocate for the plaintiffs, in particular by selecting materials she felt supported her position while purposely omitting sources that did not support her conclusion. In cross-examination, Dr. Michniak-Kohn agreed that she did not put in all the materials available to her but stated that "everything is available in the public domain and I had to support the argument I was presenting."

**147**  The applicant defendants particularly point to Dr. Michniak-Kohn's reliance on a letter from Alza, a US pharmaceutical company, to the FDA, where Alza alleges that patches lacking a rate-controlling membrane may release significantly more fentanyl than those that have one. Alza's letter also argued that patches without a rate-controlling membrane may perform differently than products with a membrane when applied to compromised skin, and as such should be treated as different dosage forms. Dr. Michniak-Kohn provided this letter as an exhibit in support of her opinion that a matrix patch without a rate-control membrane is not as safe as one that has a membrane.

**148**  As Dr. Foldvari points out in her response affidavit, Alza, as the manufacturer of a Duragesic-brand reservoir patch, has a direct interest in promoting its own product over matrix style patches. In her view, it is not proper scientific technique to rely on material with such an obvious bias. Further, she provided a copy of the FDA response where the agency rejects Alza's argument. In it, the FDA finds that Alza has not provided any reliable data to show that a matrix system was less safe than a patch with a rate-controlling membrane. The FDA noted that while there may be some variability in skin permeability among individuals that can affect the rate of absorption, there was no data showing that a physical control (the membrane) provides a superior protection against variations in absorption rate than a chemical (matrix) control.

**149**  Dr. Michniak-Kohn acknowledged on cross-examination that she was aware that there was an FDA reply, but did not think it necessary to include in her affidavit as, in her view, the FDA simply took the position that Alza had not provided sufficient data to accept their conclusion, rather than directly dismissing Alza's point of view. When asked why she included the Alza letter in her affidavit, she responded that it demonstrated that "the main company that was and is involved in transdermal patches ... also had concerns about the rate controlling membrane." Once again, Dr. Michniak-Kohn appears to have been selective in placing material before the court that support her opinion while omitting contradictory material.

**Conclusion on Dr. Michniak-Kohn's Evidence**

**150**  In cross-examination Dr. Michniak-Kohn clarified a number of aspects of her initial opinion. Although in her affidavit she states that the matrix with a membrane is a safer product, in her cross-examination she appeared to add a caveat, repeating that the matrix patch with a rate controlling membrane *may* be a safer product. Noting that she had not done any comparisons in the laboratory, she said that the literature suggests "that if we did those studies, we *may* get some very favourable results." She also stated that, in essence, her message is that the existing designs can be improved, and that the addition of a "rate controlling membrane would potentially improve the design of those patches ... Obviously, it is always a 'may' because ... we haven't done the clinical trials on it."

**151**  Asked whether there is any peer-reviewed literature that addresses the risk of overdose when a patch does not have a rate controlling membrane, she responds:

... we know that rate controlling membranes control permeability of drugs. That is well-known in the scientific literature. So if you are trying to make a matrix patch more safer ... if you add this rate controlling membrane, it should help. ... if you added that extra layer, I think it is not high science to say that it would prevent some problems with those patches.

She says that there is no need to do comparison testing because it is obvious that adding another barrier to release -- an additional fail-safe --

increases the safety profile.

**152**  The opinion of Dr. Michniak-Kohn is not that the matrix patch manufactured and distributed by Teva and Sandoz is unsafe. Rather, she is of the opinion that if a membrane was added to the patch it *might* be safer. No tests have been conducted to support her opinion and thus her opinion is speculative. The evidence of Dr. Foldvari is that patches sold in Europe and the United States which Dr. Michniak-Kohn claims offer a matrix patch with an additional membrane are not a third category of patch that is safer, but rather a patch in which the membrane is a necessary feature of the patch to control the rate of release of fentanyl.

**153**  I find that Dr. Michniak-Kohn is qualified to give expert opinion evidence on some aspects of this case, however she is not qualified to give opinion evidence on the appropriateness of drugs that could be used in substitution for fentanyl. I also find that in the areas where she is qualified, her opinion that the matrix patches manufactured by Teva and Sandoz are unsafe lacks a proper factual foundation. Finally, she has chosen to ignore evidence that contradicts her opinion and has taken on the role of advocate for the opinion she is advancing contrary to Rule 11-2(1) of the *Supreme Court Civil Rules*.

**154**  I find that while her evidence is admissible, it is of little weight on the critical issue of whether the matrix patches manufactured by Teva and Sandoz are unsafe when used in accordance with the manufacturers' directions.

**Other Challenges to Expert Evidence**

**155**  The plaintiffs challenged the evidence given by Drs. Foldvari and Hawley. They say that Dr. Hawley's assessment of the patches was overly focused on their value for money, in particular the cost savings associated with the use of transdermal fentanyl patches.

**156**  The plaintiffs say the form of Dr. Foldvari's affidavit -- in which she appears to express an opinion as to whether the applicant defendants met the legal standard of care -- undermines her neutrality and also deprives the court of the ability to assess credibility or make the necessary factual findings. They say she relies too much on Health Canada approvals and bioequivalence studies in establishing safety, rather than focusing on the question of whether the products in question are reasonably safe or could cause harm in the manner alleged. They also say that her answers in cross-examination regarding the role of bioequivalence in establishing safety were revealing, as she refused to say that the bioequivalency studies established that the products were equally safe.

**157**  The plaintiffs also say that Dr. Foldvari, as an expert in transdermal delivery systems, should have responded to questions on cross-examination about the potential for increasing the safety profile of a matrix patch with the addition of a rate-controlling membrane. Asked whether two safety features would be better than one safety feature, she responded that adding another rate-controlling mechanism to a patch would not be "rational," as it would suggest that the first rate-control mechanism was not adequately tested or sufficiently well-designed.

**158**  The defendants' experts provided clear and well supported opinions. They have deep knowledge and are experienced in their respective areas of expertise. Drs. Hawley and Lau are practising physicians in the field of pain control and have first-hand experience in the administration and monitoring of pain control using fentanyl. They acknowledge placing reliance on Health Canada regulation and approvals of fentanyl products manufactured by Teva and Sandoz. They did not present as advocates for any product and they gave opinions on products that have been approved for use in Canada by Health Canada. The products apparently favoured by Dr. Michniak-Kohn, Matrifen and Fentadur, have not been approved for use in Canada.

**159**  I find the expert evidence presented by Teva and Sandoz to be admissible and credible.

**SUITABILITY FOR SUMMARY TRIAL**

**160**  Rule 9-7 of the *Supreme Court Civil Rules* permits any party to an action to apply to the court for judgment, either on an issue or generally, by way of a summary trial. The Rule, like its predecessor, Rule 18A, is meant to expedite the early resolution of cases by allowing parties to put forward their evidence via affidavits and other written materials, rather than by *viva voce* testimony.

**161**  Not all matters are suitable for determination by this process. As set out in Rule 9-7(15)(a), the court may not grant judgment in a summary trial where the judge is unable to find the facts necessary to determine the issues, or is of the opinion that it would be unjust to decide the issues summarily.

**162**  The leading case on summary trial, *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, [*[1989] B.C.J. No. 1003*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-FJDY-X23K-00000-00&context=) sets out a number of factors for the court to consider in determining whether it would be unjust to grant judgment at summary trial:

The chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

**163**  Subsequent cases have identified a number of additional factors, including the cost of the litigation, the time needed for summary trial, whether credibility is a critical factor in the determination of the dispute, and whether the application would result in "litigating in slices": see *Dahl v. Royal Bank of Canada*, [*2005 BCSC 1263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1DT-00000-00&context=) at para. 12, aff'd on appeal [*2006 BCCA 369*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3D8-00000-00&context=); and *Gichuru* at para. 31.

**164**  In addition, as noted in *Dahl* at para. 13, the court should not issue judgment if doing so would require findings of fact that could embarrass the court at the hearing of any subsequent issues, as may happen where there are overlapping issues or multiple defendants. See also *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, [*2002 BCCA 138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1HX-00000-00&context=).

**165**  In *Gichuru* at para. 35, the Court of Appeal affirmed that the onus on summary trial remains with the plaintiff, even where the defendant has brought the application. All parties must come to the summary trial hearing "prepared to prove their claim, or defence" (para. 32). In other words, there is no "respondent's veto" at summary trial: the respondents -- in this case, the plaintiffs -- cannot argue that the matter is unsuitable for summary disposition on the basis that they have put forward insufficient evidence to prove their case (see *Everest Canada Properties Ltd. v. Mallmann*, [*2008 BCCA 275*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G34D-00000-00&context=) at para. 34).

**Positions of the Parties**

**166**  The plaintiffs argue that the proceedings involve complex factual issues that require full examination for discovery and a conventional trial in order to provide the court with a full appreciation of the facts. They submit that these matters are not suitable for summary trial, due to the complexity of the case and the fact that conflicts in the evidence on the central issue will require the court to assess credibility. They also say that it is inappropriate to use a summary trial process in the context of a pre-certification class proceeding, as resolving the issues prior to certification is inconsistent with the goals and principles of the *Class Proceedings Act*.

**167**  Teva and Sandoz point to a number of British Columbia cases where the court has issued judgment under Rule 9-7 in a pre-certification class proceeding. They also submit that conflicts in the evidence and credibility issues are not an absolute bar to proceeding summarily: *MacMillan v. Kaiser Equipment Ltd.*, [*2004 BCCA 270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3JG-00000-00&context=) at para. 22. Even if there are conflicts in the evidence, provided there is sufficient admissible evidence to allow the judge to find the necessary facts, summary trial may still be appropriate. Finally, they say that there are no conflicts in the evidence, and that the plaintiffs have failed to meet their onus, as, in their submission, the affidavits tendered by the plaintiffs are not admissible as proof of their claims.

**Summary Trials and Pre-Certification Class Proceedings**

**168**  At the summary trial hearing a major portion of the plaintiffs' submissions were concerned with the idea that a summary trial is *prima facie* inappropriate for determining issues in a proposed class action. As Teva and Sandoz point out, relying on *The Consumers' Association et al. v. Coca-Cola Bottling Company et al*, [*2006 BCSC 863*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1H2-00000-00&context=), aff'd [*2007 BCCA 356*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3PJ-00000-00&context=), and *Dahl*, there are examples of British Columbia courts hearing pre-certification summary trials on the issue of ultimate liability. However, the plaintiffs' submissions raise a question as to whether the status of this matter as a proposed class proceeding is a factor to consider in determining whether it is suitable for summary determination.

**169**  Section 40 of *Class Proceedings Act* expressly provides that the *Supreme Court Civil Rules* apply to class actions, both pre- and post-certification. There is therefore no statutory bar on this court issuing judgment under Rule 9-7 for a matter brought under the *Class Proceedings Act*. However, as discussed above, the rules may alter in application in order to recognize the class proceedings context.

**170**  For the reasons set out below, I conclude that the status of this matter as an "action with ambition" is not in itself a factor that would render it unjust to issue judgment. The factors set out in *Inspiration Management* and the subsequent case law provides sufficient safeguards against injustice, just as they do in an ordinary action.

**171**  To begin, I do not accept the plaintiffs' argument that summary trial is not suitable because determining the case prior to certification would be inefficient. The plaintiffs argued that, because the decision would not be binding on the proposed class, judgment against the plaintiffs would simply result in another member of the class stepping forward to pursue the claim on behalf of the class.

**172**  It is true that if this Court issues judgment against the plaintiffs and dismisses the claim against Teva and Sandoz, that decision only binds the named plaintiffs. As noted in Michael Eizenga *et al*, *Class Actions Law and Practice* 2d ed. (Markham: LexisNexis Canada, 2008):

Motions brought before the certification motion, even where successful, may not mean an end to the litigation for the defendant. The determination will not bind the potential class members, and another class proceeding may be commenced.

**173**  In some cases this might be a reason to deny the application for a summary trial; see for example *Sharrock v. Moneyflow Capital Corp.*, [*2010 BCSC 1219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-2178-00000-00&context=). In *Pausche v. B.C. Hydro et al.*, [*2000 BCSC 1556*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1G1-00000-00&context=), the court refused to issue judgment on a limitations issue argued at a pre-certification summary trial, noting that to do so could lead to a "pyrrhic victory for the defendants" as a new action might immediately be begun by another representative plaintiff "who was not susceptible to the limitations defence" (para. 22). However, as Bauman J. (as he then was) pointed out in *Pausche*, the application did not concern an issue common to all members of the proposed class. The same is true of *Sharrock*, where the applicant defendants advanced a defence unique to the representative plaintiff.

**174**  In cases where the application concerns the defendant's liability to the class a whole, the concern about a replacement plaintiff is practically, if not legally, alleviated: *Martin v. Astrazeneca Pharmaceuticals PLC*, [*[2009] O.J. No. 3847*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF81-JTGH-B4F3-00000-00&context=) (S.C.J.), noting that summary determination would likely have "the practical effect of leading to an abandonment of the claims of other class members, an early settlement or a narrowing of the issues to be tried" (para. 17).

**175**  Although Teva and Sandoz have made submissions regarding the named plaintiffs, their application for dismissal is based on the position that they are not in breach of any duty in law to the users of their matrix transdermal fentanyl patches they produce. If they succeed on summary trial, it is difficult to imagine that any new representative plaintiff would step forward to re-argue these issues.

**176**  As Teva and Sandoz point out, there are a number of decisions where this court issued judgments under Rule 9-7 in pre-certification class proceedings. In *Dahl*, the plaintiffs brought a proposed class action against a number of defendant banks, alleging a failure by the banks to disclose the amount they charged to consumers using their credit cards. The banks applied under Rule 18A for dismissal on a number of the statutory claims, arguing that they had properly disclosed the amounts in question as interest charges. The court found that the matter was suitable for summary trial. The court also rejected the plaintiffs' argument that there were significant overlapping issues arising out of the issue proposed for summary determination and the issues that remained to be determined in the case.

**177**  *Consumers' Assn. of Canada* involved a claim by the named consumers' association on behalf of all consumers who had purchased beverages in the province after 1997. The plaintiffs claimed that the deposits for recyclable beverage containers collected from consumers were to be held in trust until refunded to the consumer, and alleged that the various corporate defendants (beverage manufacturers and Encorp, the not-for-profit agency in charge of beverage returns and recycling) had in fact converted $70 million in deposit funds to their own benefit. The court held that the matter was suitable for summary disposition, as the claims were not factually complex, there were no significant credibility issues, and the ample affidavit evidence addressed what few questions of fact arose in the matter.

**178**  In addition to *Dahl* and *Consumers' Assn. of Canada*, the following decisions also involved a summary proceeding, either under Rule 9-7 or Rule 18A, in a pre-certification class proceeding:

1. *Pfeiffer v. Pacific Coast Savings Credit Union*, [*2000 BCSC 1472*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2KP-00000-00&context=), var'd on other grounds, [*2003 BCCA 122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S20H-00000-00&context=). Both parties applied for judgment under Rule 18A, the defendant seeking dismissal and the plaintiff seeking judgment on three substantive issues. The case involved the interpretation of a mortgage contract. The plaintiff was successful at summary trial and received an individual award, with the court directing that the hearing of the certification application be heard at a later date. The Court of Appeal disagreed with the chambers' judge's interpretation of the contract and reduced the award substantially, but did not disagree with the decision to issue judgment on summary trial.
2. *Royster v. 3584747 Canada Inc. dba Kmart Canada Ltd. et al*, [*2001 BCSC 153*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G132-00000-00&context=). This proposed class action involved the wrongful termination of Kmart employees following the closure of a particular branch of the store. The court found that the employer had given reasonable notice, in the form of working notice and pay in lieu of notice, and dismissed the claim following the summary trial.
3. *Azevedo v. Legal Services Society (British Columbia)* [*(1998), 49 B.C.L.R. (3d) 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S220-00000-00&context=) (C.A.). On a summary trial the court found in favour of the defendant and dismissed the claim; the Court of Appeal upheld the decision. The plaintiff lawyer had brought a proposed class action on behalf of all lawyers who had acted on behalf of legal aid clients, alleging that the Society had breached the terms of a contract by refusing to pay certain hold backs from legal fees. The court found that there was no promise to repay the hold backs in the contract.
4. *Blackman v. Fedex Trade Networks Transport & Brokerage (Canada), Inc.*, [*2009 BCSC 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3MK-00000-00&context=). The plaintiff alleged that the defendants were in breach of the *Business Practices and Consumer Protection Act* in the manner in which they charged customs brokerage fees to their customers. The parties agreed that the matter was suitable for disposition at summary trial; the court found in favour of the defendants and dismissed the action.

**179**  I note that in each of these cases the application concerned issues common to all members of the proposed class. I conclude that the "binding" concern raised by the plaintiff is not sufficient, in itself, to find that it would be inappropriate to issue judgment under Rule 9-7.

**180**  In addition, regardless of any potential inefficiency, there are legitimate policy reasons to allow for summary determination in proposed class actions. In *Consumers' Assn. of Canada*, addressing a similar argument from the plaintiffs, the court said as follows:

[35] The fact that this is a potential class action does not militate against the use of pre-trial applications generally, or this R. 18A application specifically, as the plaintiff argues. The *Class Proceedings Act* at ss. 4 and 11 sets out a sequence which trifurcates the proceeding into certification, trial of common issues, and trial of individual issues. One probably unintended consequence of class proceedings statutes has been the transformation of certification proceedings from preliminary step to battleground; in some senses, the certification proceeding is the trial ... That being the case, I view pre-trial interlocutory applications in an appropriate case as potentially streamlining an increasingly cumbersome process, particularly in cases where the pleadings are lacking in merit, yet may meet the low threshold for certification.

As stated in *Kowch* at para. 14, "[i]t is not a principle of class action law that weeds should be allowed to ripen and grow, instead of being

nipped in the bud."

**181**  Further, if the matter has no merit, allowing it to continue to certification will undoubtedly cause prejudice to Teva and Sandoz. Where the court can find the necessary facts through the summary process, it promotes efficiency to issue judgment at the pre-certification stage.

**182**  I am bolstered in this conclusion by the recent decision of the Supreme Court of Canada in *Hryniak v. Mauldin,* [*2014 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X252-00000-00&context=). In that decision, Karakatsanis J. began her judgment delivered for the Court in this way:

[1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

[2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

...

[4] In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

**183**  While the court acknowledged that the inappropriate use of summary procedures will likely result in delays and increased costs, the view expressed resonates in an action like this one where the process is likely to be long and expensive.

**184**  No doubt Teva and Sandoz have the ability to fund this litigation, but money is not the only cost associated with a class action that calls into question the safety of a product such as fentanyl. Upon certification public notices stating that the drug is the subject of a class action and alleging the drug is unsafe and can cause death in ordinary use is likely to alarm anyone who is using or perhaps even prescribing fentanyl. On the evidence presented, the consumers of fentanyl are most likely to be people who are seriously ill and who use the drug to control serious chronic pain. That is, of course, of no consequence if there is evidence to justify the action. However, if the evidence is insufficient to support the action then the consequences associated with involvement in an extensive and expensive class action are very serious.

**185**  Although I find that a pre-certification class action is not inherently unsuitable for summary determination, it is not a simple matter to determine whether this particular matter is suitable for summary determination. There are a number of factors -- the complexity of the factual issues and the voluminous nature of the filed materials, for example -- that suggest that it would not be appropriate to issue judgment. On the other hand, as the defendants point out, there are difficulties with the admissibility and weight of the plaintiffs' evidence, and the onus remains with the plaintiffs. If the plaintiffs have failed to put forward sufficient evidence to make their case, it may be that refusing judgment would be tantamount to allowing a respondent's veto.

**Complexity, Conflicting Evidence and the Need for Full Appreciation**

**186**  The matter is not directly analogous to any of the previous summary trials held in pre-certification class proceedings. Those cases all concerned questions of contract or statutory interpretation. They involved few, if any, disputed facts, and could be determined on the basis of a minimal evidentiary record.

**187**  That is not the case here. This matter requires the court to make findings of fact concerning pharmaceutical design and drug safety. The complexity of that endeavour is perhaps best demonstrated by the fact that the parties filed more than 5,000 pages in materials for this application, including affidavits, exhibits, submissions and case authorities.

**188**  The summary trial procedure is not well suited to factually complex cases. In *Chu v. Chen*, [*2002 BCSC 906*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2VY-00000-00&context=), this court indicated that a case involving copious or voluminous affidavit materials may not be suitable for summary disposition. I note that in that case, the court refused to grant judgment when faced with less than 900 pages in materials. See also *Simon Fraser Student Society v. Canadian Federation of Students*, [*2009 BCSC 1081*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-623J-00000-00&context=) at paras. 17, 21; again, the court found that, due to the sheer volume of material before the court, issuing judgment would prove "difficult, elusive and not necessarily fair or just" (para. 22).

**189**  The complexity in this case is exacerbated by the fact that the central issue -- the question of negligent design and the availability of a safer alternative product -- turns on conflicting expert opinion evidence. The experts disagreed about the relative safety and utility of the fentanyl transdermal patch products, the relevance and correct interpretation of scientific studies, and even, at some points, about the correct terminology to be applied to fentanyl drug dosage forms.

**190**  Where there are conflicting affidavits it may not be possible for the judge to find the necessary facts. In *Inspiration Management* the court said that generally speaking, the chambers judge should not decide issues of fact or law "solely on the basis of conflicting affidavits even if he prefers one version to the other" (para. 55). Certainly, in some cases the court may resolve the conflict or find the necessary facts by looking to other admissible evidence. However, where there is a "head on" conflict in the evidence regarding an important issue, and the court cannot resolve the issue without assessing the deponents' credibility, it will not be suitable for summary determination: *Jutt v. Doehring* [*(1993), 82 B.C.L.R. (2d) 223*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-23K9-00000-00&context=) (C.A.) at para. 13.

**191**  Teva and Sandoz say that there is, in fact, no conflict in the evidence here because the plaintiffs' expert evidence is inadmissible or, if admissible, should receive little to no weight. I note that in *British Columbia (Director of Civil Forfeiture) v. Nguyen*, [*2011 BCSC 1792*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1DF-00000-00&context=), the court commented that before a judge will find that a conventional trial is required to resolve conflicts in the evidence, the conflicts must be rooted in admissible evidence.

**192**  While the materials filed in this trial are extensive, two key issues are reasonably straightforward:

1. Is there evidence to connect the matrix patches manufactured by Teva and Sandoz to the deaths of Mr. Player or Mr. Pollock? and
2. Is there sufficient evidence presented to establish that the Teva or Sandoz patches are defectively designed?

**193**  As already discussed, there is no evidence to connect either the Teva or Sandoz matrix patch to the death of Mr. Pollock. As to Mr. Player, the only evidence presented is that Mr. Player died as a result of respiratory depression and that fentanyl was one of several drugs that can cause fatal respiratory depression.

**194**  On the evidence, it is not known whether Mr. Player was using a fentanyl patch manufactured by Teva or Sandoz. There is no evidence available on that issue and the evidence that is available is not sufficient to conclude that Mr. Player died as a result of his use of fentanyl patch manufactured by Teva or Sandoz or that his death was caused by fentanyl. The best that can be said is that fentanyl was among several other drugs in Mr. Player's system that can cause fatal respiratory depression. The evidence is not sufficient to prove it was more likely than not that Mr. Player died as a result of fentanyl use.

**195**  As to the evidence respecting defective design, again, the evidence falls short. As already stated, I am not able to give the evidence of Dr. Michniak-Kohn sufficient weight to support a finding of defective design. At best, her evidence is that there is another design or designs that might be safer. The alternate patches identified by Dr. Michniak-Kohn are Fentadur, Matrifen and Mallinckrodt's Fentanyl Transdermal system. None have been approved for use in Canada by Health Canada and all three are described as a "modified reservoir" design. Dr. Foldvari said in her evidence that the additional membrane in those patches is an essential feature necessary to control the delivery of the drug and that it is not an additional safety feature.

**196**  Dr. Foldvari's opinion is well documented and there is no evidence to show that the patches have any problem with the delivery rate of the drug that could cause injury or death in ordinary use. I accept the opinion of Dr. Foldvari that there is no known safer alternative to the matrix patches produced by Teva and Sandoz.

**197**  Despite the volume of material, I do not find this action to be so complex that it would not be appropriate to deal with it on summary trial with respect to the defendants Teva and Sandoz.

**198**  There are comments in the law, as in *Ho v. Ho*, [*2013 BCSC 559*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G2BV-00000-00&context=), that the court should be hesitant to grant judgment on a summary trial where a party has not yet had an opportunity to conduct examinations for discovery and where there appears to be an issue that requires exploration by way of examinations or production of documents. Similarly, the court should be reluctant to resolve factual issues on a summary trial application in the absence of admissible evidence where the evidence "may well be tendered in admissible form at the subsequent trial" (*Farallon Mining Ltd. v. St. Eloi*, [*2012 BCSC 264*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6219-00000-00&context=) at para. 31). However, in this case, the parties have conducted full examinations for discovery and cross-examinations of the respective experts. The evidence has been fully developed. The plaintiffs had a full opportunity to present evidence supporting their claims.

**Overlapping Issues and the Potential for Embarrassment**

**199**  Where only a few of the defendants apply for dismissal in a complex, multi-party ***negligence*** case, the summary trial judge may be asked to "cross a legal minefield, not knowing where to step to avoid making decisions with unforeseen consequences or unintended results": *Privest Properties ltd. v. Foundation Co. of Canada*, [*[1990] B.C.J. No. 1349*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M0S0-00000-00&context=) (S.C.).

**200**  In my view that is not a concern in this matter, as the issues to be determined need not actually overlap with those involved with the claim against the other defendants. The products at issue in this summary trial are sufficiently distinct in their design, so as to explain why any finding of fact in this matter may not match the finding of fact in subsequent proceedings involving the other defendants.

**201**  I have tried to limit my comments on the facts to avoid making any findings about fentanyl transdermal patches that might be construed as applying directly to the reservoir-style products manufactured by the other defendants. To be clear, nothing I have said or will say in this judgment is intended as a comment on whether those products are reasonably safe or not, or whether those defendants have breached a duty of care to their consumers. Although some of the evidence dealt with the safety profile of the reservoir-style product, none of the parties had argued that those products represented a safer alternative design. As such there is no need to reach any conclusion on their comparative safety or design. Similarly, although the evidence on failure to warn dealt with a product monograph shared by all the fentanyl transdermal patches, my conclusions on that point are limited to the duty to warn as it applies to Teva and Sandoz's matrix fentanyl transdermal patch products. as the other products rely on an alternative design, the same warning materials may lead to a different conclusion on the standard of care.

**202**  In my view, the crux of this case was the claim that a matrix patch with a rate-controlling membrane represented a safer alternative design than that used by Teva and Sandoz. I can reach a conclusion on that point without foreclosing any future submissions that may arise in subsequent proceedings between the plaintiffs and the other defendants.

**Conclusion on Suitability for Summary Trial**

**203**  In a summary trial, as in any trial, the plaintiffs carry the obligation to prove their claims through admissible evidence. The rules of court and applicable case authority establish that provided the facts can be found and it would not be unjust to decide the matter on summary trial, the court can issue judgment: see *Inspiration Management Ltd.*, and Rule 9-7(15) of the *Supreme Court Civil Rules*.

**204**  As Levine J.A. stated in *Harrison v. British Columbia (Children and Family Development)*, [*2010 BCCA 220*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-630S-00000-00&context=) at para. 40:

[40] The trial judge was required to grant judgment if the evidence adduced on the R. 18A application provided the facts necessary to decide the issue of liability, and it would not have been unjust to do so. It is not a question of whether a full trial could conceivably "turn something up" or produce a different result. Rather, as stated by McEachern C.J.B.C in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* [*(1989), 36 B.C.L.R. (2d) 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-FJDY-X23K-00000-00&context=) at 215 (C.A.).

Anything might happen at a trial and one can never say that the result will always or inevitably be the same. If the chambers judge can find the facts, then he must give judgment as he would upon a trial unless for any proper judicial reason he has the opinion that it would be unjust to do so.

The test for Rule 18A, in my view, is the same as on a trial. Upon the facts being found the chambers judge must apply the law and all appropriate legal principles. If then satisfied that the claim or defence has been established according to the appropriate onus of proof he must give judgment according to law unless he has the opinion that it will be unjust to give such judgment.

**205**  On the evidence before the court, I am satisfied that it is possible to find the necessary facts to decide this case on summary trial. The essential facts and issues are not as complex as the considerable material placed before the court may suggest. There are conflicts in the expert evidence, but on my findings that the opinion evidence of Dr. Michniak-Kohn is not of sufficient weight to support the allegations made by the plaintiffs, there is no credible evidence to support the plaintiffs' claim.

**206**  There was a significant body of evidence placed before the court on the summary trial and the expert evidence has been thoroughly canvassed. There is no suggestion that the plaintiffs were not able to present all of the scientific evidence available. The same is true of Teva and Sandoz. The evidence that has been presented allows a full appreciation of the facts that are essential to the determination of the plaintiffs' action.

**207**  Class actions are a powerful tool. They allow an action to proceed where an individual plaintiff would find the cost of an action prohibitive as well as in actions where the research and investigation is not within the ability of a single plaintiff. However, it is not a tool where simply making an allegation against a defendant or group of defendants is sufficient. There must be evidence to warrant the expense of a full trial.

**208**  In this case the evidence against Teva and Sandoz is not sufficient to warrant such an expense. The plaintiffs' expert has damaged her credibility by acting as an advocate. But perhaps more importantly, even if I accepted it, taken at its best her evidence is that Teva and Sandoz marketed a product that was defective because it did not utilize a membrane as was used in Fentadur, Matrifen and Mallinckrodt's fentanyl products. Leaving aside the fact that none of those products were approved for use in Canada at the relevant times, the expert evidence that I do accept is that those products are a different reservoir type design and not a safer matrix design.

**209**  I conclude that this matter is suitable for summary determination. I turn now to discuss the application of the law to the facts.

***NEGLIGENCE***

**210**  The law in Canada provides guidance as to the factors for consideration in deciding if a product is unsafe for consumers in ordinary use. See: *More v. Bauer Nike Hockey Inc.*, [*2010 BCSC 1395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2V5-00000-00&context=), at paras. 195 and 202, aff'd by [*2011 BCCA 419*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62JK-00000-00&context=), *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=). The law was nicely summarized by Nation J. in *Daishowa-Marubeni International Ltd. v. Toshiba International Corp.*, [*2010 ABQB 627*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93C1-JCBX-S0KR-00000-00&context=) at paras. 37-40 where she said:

[37] The manufacturer, who has the knowledge that the absence of reasonable care in the design and manufacture of its product may result in injury to the consumer's life and property, owes a duty to the consumer to take that reasonable care: *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) at p. 599.

[38] The duty of reasonable care in design rests on the principle that the manufacturer should use reasonable care to eliminate any unreasonable risk or foreseeable harm ...

[39] Claims in negligent design require the court to balance the risk inherent in the product as designed, considering its utility and cost, against the risks inherent in a safer, alternate product or design. One has to look at the utility of the product, the nature of the product in terms of the likelihood it will cause injury, the availability of a safer design, the potential for designing and manufacturing the product so it is safer but remains functional and reasonably priced, the ability of the plaintiff to have avoided injury with careful use of the product, the degree of awareness of the potential danger that can be attributed to the plaintiff and the manufacturer's ability to spread any costs related to improving the safely of the design.

[40] The law does not impose strict liability on manufacturers, the onus does not require that they produce items that are accident proof or incapable of doing harm. The manufacturer is not the insurer of anyone who suffers injury while using or misusing a product.

**211**  The onus is on the plaintiff to show that the item as designed was not reasonably safe as there was a substantial likelihood of harm and it was feasible to design the product in a safer manner: *Tabrizi v. Whallon Machine Inc.* [*(1996), 29 C.C.L.T. (2d) 176*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1M3-00000-00&context=) (B.C.S.C.).

**212**  It is clear from the evidence that Teva and Sandoz each complied with the appropriate regulatory standards in manufacturing their respective fentanyl matrix patches. The evidence of Drs. Hawley and Lau attest to the utility or usefulness of fentanyl in pain management and that there is no suitable alternative available. Dr. Lau said that the fentanyl transdermal patch is the only effective transdermal patch available approved for the treatment of moderate to severe pain. Even Dr. Michniak-Kohn acknowledged in cross-examination that fentanyl was required for some patients.

**213**  Dr. Michniak-Kohn's evidence is that Teva and Sandoz manufactured defective products when different design choices would have made their products safer. But the evidence of Dr. Foldvari is that the products referred to, Fentadur, Matrifen and the fentanyl patch manufactured by Mallinckrodt Inc., are really modified reservoir patches where the so-called additional membrane is necessary to control the release of the drug rather than an additional membrane to provide extra safety benefits.

**214**  I find that the matrix patches manufactured by Teva and Sandoz satisfy the requirements as required by the law in Canada. There is no satisfactory evidence to show that there is a safer alternative design or that an alternate design of the fentanyl patches was available and could have been used but for the ***negligence*** of Teva and Sandoz.

**FAILURE TO WARN**

**215**  The plaintiffs submit that Teva and Sandoz failed to provide an adequate warning to consumers of the dangers associated with the use of fentanyl. They rely on *Hollis v. Dow Corning Corp.*, [*[1995] 4 S.C.R. 634*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3MF-00000-00&context=) at paras. 20 - 23. In that case the court said:

[20] It is well established in Canadian law that a manufacturer of a product has a duty in tort to warn consumers of dangers inherent in the use of its product of which it has knowledge or ought to have knowledge. This principle was enunciated by Laskin J. (as he then was), for the Court, in *Lambert v. Lastoplex Chemicals Co.*, [*[1972] S.C.R. 569*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B021-00000-00&context=), at p. 574, where he stated:

Manufacturers owe a duty to consumers of their products to see that there are no defects in manufacture which are likely to give rise to injury in the ordinary course of use. Their duty does not, however, end if the product, although suitable for the purpose for which it is manufactured and marketed, is at the same time dangerous to use; and if they are aware of its dangerous character they cannot, without more, pass the risk of injury to the consumer.

The duty to warn is a continuing duty, requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered; see *Rivtow Marine Ltd. v. Washington Iron Works*, [*[1974] S.C.R. 1189*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B087-00000-00&context=), at p. 1200, per Ritchie J. All warnings must be reasonably communicated, and must clearly describe any specific dangers that arise from the ordinary use of the product ...

**216**  The court went on to note that the rationale for the duty placed upon manufacturers can be traced to the well-known case of *Donoghue v. Stevenson*. As manufacturers who produce and distribute the drugs have a significantly greater knowledge of the potential dangers of their products than consumers of the drugs, the manufacturers bear a duty to warn to correct the imbalance of knowledge between manufacturers and consumers so as to allow an informed choice.

**217**  The higher the danger associated with the ordinary use of the product the greater is the burden upon manufacturers. A general warning will not be sufficient. A warning must be sufficiently detailed to allow the consumers of the drug and their professional advisors a full indication of the specific dangers that can arise from the use of the product: *Lambert v. Lastoplex Chemicals Co.*, [*[1972] S.C.R. 569*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B021-00000-00&context=). The standard is necessarily a high one for pharmaceutical products that people ingest, often when affected by serious illness. What is required is that accurate and understandable information be communicated.

**218**  Fentanyl is not a product that can be purchased at a store. It is a product that is only to be used when authorized by prescription and then only when the consumer has been conditioned to opioid drugs through a period of titration under the supervision of a qualified physician.

**219**  The product at issue in *Hollis* was breast implants. The defendant failed to include a warning in its product monograph respecting the possibility of unexplained ruptures of its product, a hazard it knew existed. In *Lambert* the product was a highly inflammable lacquer/sealer the defendant knew could be ignited by an open flame such as a pilot light in a furnace.

**220**  The plaintiffs say that fentanyl is a highly dangerous drug that can cause decreased heart rate and fatal respiratory depression and there is a duty to provide "clear, complete and current" information to users of the drug. The plaintiffs submit the warning provided in this case were inadequate.

**221**  Fentanyl is a drug that is only used under the supervision of a physician. Thus, there is a "learned intermediary" standing between the consumer of the drug and the manufacturer. The principle respecting a learned intermediary was stated in *Hollis* this way:

[28] ... Generally, the [learned intermediary] rule is applicable either where a product is highly technical in nature and is intended to be used only under the supervision of experts, or where the nature of the product is such that the consumer will not realistically receive a direct warning from the manufacturer before using the product. In such cases, where an intermediate inspection of the product is anticipated or where a consumer is placing primary reliance on the judgment of a "learned intermediary" and not the manufacturer, a warning to the ultimate consumer may not be necessary and the manufacturer may satisfy its duty to warn the ultimate consumer by warning the learned intermediary of the risks inherent in the use of the product.

**222**  Teva and Sandoz submit that the product monographs relevant to this action were "clear, complete and current." They are in identical form to the warnings of the innovator drug that have been approved by Health Canada. The Teva monograph that is reproduced in the evidence clearly advised physicians that fentanyl should only be prescribed by physicians knowledgeable about "...the continuous administration of opioids and the management of patients receiving potent opioids for treatment of pain and in the detection and management of respiratory depression..." Teva submits that the prescribing physician is able to assess the dangers of the drug with respect to the particular patient. It argues the physician has a duty to know the potential dangers of the medication prescribed to a patient and to exercise independent judgment about the product with respect to the patient: *Buchan v. Ortho Pharmaceutical (Canada) Ltd.*, [*[1986] O.J. No. 2331*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-FGJR-23VM-00000-00&context=) at para. 24; [*(1986), 54 O.R. (2d) 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-FGY5-M307-00000-00&context=) (C.A.).

**223**  Part I of the Teva product monograph is directed to physicians. It warns of all of the risks associated with fentanyl that are relevant to the allegations in this case. In particular, it warns of potential deaths from hypoventilation and states "...caution must be exercised and patients carefully observed for untoward reactions."

**224**  As noted above, Dr. Hawley reviewed the product monographs and said that in her opinion the product monographs are clear and that upon reviewing them the risks of fentanyl use can be readily understood by physicians, pharmacists and patients. She said the monographs addressed all of the risks associated with the use of fentanyl. Her evidence was unchallenged and there is no evidence to contradict her opinion.

**225**  The plaintiffs note that the adequacy of the warnings in the product monographs is a legal question for the court. That is so, but the evidence of Dr. Hawley and Dr. Lau can inform that decision and be of assistance in reaching a conclusion. Whether a product monograph respecting a pharmaceutical product is clear, complete and current, is not likely a decision a court could make in the absence of medical evidence. In this case, I accept the evidence of Drs. Lau and Hawley and rely on it in assessing the adequacy of the warnings in the product monograph.

**226**  As to the warnings in the patient monograph Ms. Player said that she was aware that only one patch should be worn at a time and acknowledged that she and her husband had reviewed the patient information received with the fentanyl patches he was using.

**227**  The product monographs that contain warnings to physicians and patients included with the Sandoz and Teva matrix patches are required to be and have been approved by Health Canada. Dr. Hawley's evidence is that the monographs outline the risk of respiratory depression. She also testified that the risks fentanyl use outlined for patients in the monograph are clear and accurate and reasonably understandable by patients.

**228**  Dr. Hawley also said that in her opinion the information in the patient monograph provides clear instructions on how to safely apply the patch and provides a reasonable warning about the dangers of not following the instructions. Her opinion is not contradicted by any other evidence.

**229**  I find that the product monographs distributed to physicians and pharmacists as well as the product monograph in the form of a package insert for patients contain clear, accurate and understandable warnings that are sufficient to satisfy the test set out in *Hollis* at para. 20. I therefore find that Teva and Sandoz are not liable on the ground of failure to warn of the risks of using fentanyl.

**ADDITIONAL GROUNDS OF LIABILITY**

**230**  The plaintiffs also advance several other grounds of liability. As is common, their action is cast in the broadest possible terms. Given my findings and conclusions on the product liability and failure to warn portions of the action, I do not find it necessary to deal extensively with the remaining categories of the claim.

**Misrepresentation**

**231**  The plaintiffs claim that Teva and Sandoz misrepresented their products to consumers and say that had the true facts been known, the plaintiffs and other consumers would not have used fentanyl or would have ceased using it upon becoming aware of the true facts. The plaintiffs have issued a general pleading on this point and have not particularized the precise misrepresentations alleged. However, it is my finding that there was no misrepresentation of the facts made by either Teva or Sandoz in their product monographs. I find that the nature of the product and the risks of use were clearly stated in a readily understandable way and that there was appropriate advice given through the monographs and the advice of intermediary professionals. There is no evidence to support a claim of misrepresentation and the action on that head of damage is dismissed.

**Competition Act**

**232**  The plaintiffs' next claim is that Teva and Sandoz engaged in unlawful, unfair and deceptive trade practices that are proscribed by the *Competition Act*. Teva and Sandoz submit that there is no evidence to support any claim under the *Competition Act*. Given my findings respecting the matrix patches manufactured and distributed by Teva and Sandoz, it follows that there is no evidence that either Teva or Sandoz are liable for a violation of the *Competition Act* or that there is any causal connection between the matrix patches and any loss or damage by the plaintiffs.

**Other Statutes**

**233**  I have reached the same conclusion respecting the *Food and Drugs Act*, the *Business Practices and Consumer Protection Act*, and the *Sale of Goods Act*. These claims rest on a necessary finding that Teva or Sandoz breached the provisions of the statutes by manufacturing and distributing a dangerous product even under ordinary use. Upon my findings the claims must fail and they are dismissed. Likewise, there is no evidence that Teva or Sandoz breached any warranty under the sale of goods or any express or implied warranty that might arise as part of a collateral contract.

**Breach of Fiduciary Duty**

**234**  The plaintiffs also claim that Teva and Sandoz breached a fiduciary duty owed by drug manufacturers to consumers of fentanyl. Teva and Sandoz submit that the evidence in this case does not support a claim for breach of fiduciary duty. A similar submission was made by plaintiffs' counsel and rejected in *Wuttunee v. Merck Frosst Canada Ltd.*, [*2007 SKQB 29*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-F1P7-B39Y-00000-00&context=). At paras. 60-63 of *Wuttunee* the court said:

[60] The plaintiffs acknowledge their claim based on a breach of fiduciary duty is novel to the extent they seek to extend the fiduciary relationship extant between doctor and patient to drug manufacturer and their targeted consumers. They submit that courts should acknowledge the high degree of inequality between manufacturers of drugs and doctors is comparable to the one between a doctor and a patient to the extent that drug manufacturers are subject to a fiduciary duty to make full disclosure of any deficiency in their product to doctors in their capacity as agents for patients and to consumers directly. They further argue that, without the extension of fiduciary duty, current remedies are limited to "recoverable damages" which are inadequate in the instant case.

[61] The position of Merck in response may be summarized as follows:

1. Fiduciary duty exists where the defendant is in a position of power *vis-à-vis* the plaintiff. No such power exists in the instant case. See: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [*[1989] 2 S.C.R. 574*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6519-00000-00&context=) at pp. 598-600; *Norberg v. Wynrib,* [*[1992] S.C.J. No. 60*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGK1-F8D9-M17G-00000-00&context=) *supra*;

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|  | (b |  | A fiduciary is subject to strict obligations otherwise unknown at law and is expected to act in a manner consistent with the best interests of the beneficiary and Merck is not subject to such an obligation; |  |

1. There are no reported decisions opining that a manufacturer or distributor of a controlled drug owes a fiduciary duty to the consumer of its products; therefore, no cause of action based on a fiduciary duty is available against it;
2. The plaintiffs' proposed subrogation by way of a fiduciary duty is inconsistent with the concept of fiduciary duty to the extent that it contemplates the duty owed to one person being imputed for the benefit of another.

[62] *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005) summarizes the law regarding fiduciary relationships generally at pp. 41-42 as follows:

Several relationships, in addition to the relationship between trustee and beneficiary, have been generally recognized as giving rise to fiduciary obligations. These include the relationship between partners, directors and corporations, solicitors and clients, and agents and principals. While these relationships are generally recognized as giving rise to fiduciary obligations, they do not invariably do so. Although there are categories that are generally recognized as giving rise to fiduciary obligations, the situations in which fiduciary relationships can arise are not closed. Identifying these situations can be difficult as there is no widely accepted definition of what gives rise to a fiduciary relationship. However, 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=), [*42 D.L.R. (4th) 81*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23F8-00000-00&context=)], Wilson J. suggested the following indicia of a fiduciary relationship that have been accepted as a "rough and ready guide:"

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 fiduciary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[Citations omitted.]

[63] Based on the facts pled, the absence of any case authority or jurisprudential writing positing that a fiduciary relationship arises in circumstances akin to those in the instant case, and the additional reasons advanced by Merck, I conclude the plaintiffs have no arguable cause of action based on breach of fiduciary duty owed them by Merck. While it is important not to foreclose the extension of the fiduciary duties in appropriate circumstances, more than what is before the Court is required to warrant an extension of fiduciary relationships in the manner advocated by the plaintiffs, including detailed pleadings and a comprehensive brief of law in support thereof.

**235**  Teva and Sandoz take the same position as the defendants in *Wuttunee*, and rely on *Frame v. Smith* to say the claim should be dismissed. The plaintiffs' invite the court to reconsider *Wuttunee* in light of recent developments in the law. However, the law in Canada is found in *Frame v. Smith* and not *Wuttunee*; it is not open to me to "reconsider" the law as set out by the Supreme Court of Canada. While I accept the categories of fiduciary relationship are not closed there is no evidence before me upon which I can find that Teva or Sandoz had any scope for the exercise of discretion or power that either defendant could exercise to affect the plaintiffs' legal or practical interests. Further, there is no evidence that either of the plaintiffs or a potential member of the proposed class was vulnerable to or at the mercy of the exercise of the discretion or power. I agree with the court's finding at para. 63 of *Wuttunee,* and dismiss the claim for breach of fiduciary duty.

**Strict Liability**

**236**  The plaintiffs say the defendants in this case are strictly liable to the plaintiffs. Teva and Sandoz argue that courts in Canada have rejected the doctrine of strict liability in products liability cases. I agree with that submission. The law in Canada is as stated in *Daishowa-Marubeni International Ltd*.

**CONCLUSION AND SUMMARY**

**237**  The action of the plaintiffs is dismissed as against Teva and Sandoz. I find that Teva and Sandoz did not breach any duty of care to the plaintiffs by selling a product that was defectively designed.

**238**  I find that the product monographs to physicians, pharmacists and consumers contained information about the risk of using fentanyl patches manufactured and distributed by Teva and Sandoz contained information that was clear, complete and current and that Teva and Sandoz did not breach any duty of care by failing to provide a reasonable warning to the plaintiffs.

**239**  Given my finding that the patches manufactured by Teva and Sandoz were not defectively designed, I find that there was no negligent misrepresentation to the plaintiffs respecting the Teva and Sandoz matrix patches.

**240**  I also find that there was no breach of statute by Teva or Sandoz respecting the sale and distribution of their respective transdermal matrix fentanyl patches.

**241**  The action by the plaintiffs against Teva and Sandoz is dismissed. Costs may be spoken to if necessary.

J.K. BRACKEN J.

**End of Document**

[***R. v. Tom, [2007] B.C.J. No. 2064***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1DH-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

Macaulay J.

Heard: May 28 - June 1, June 4 - 7 and 11 - 15,

August 27 - 31, and September 21, 2007.

Judgment: September 21, 2007.

Victoria Registry No. 132269-5

**[2007] B.C.J. No. 2064** | 2007 BCSC 1407 | 75 W.C.B. (2d) 582

Between Regina v. Ellen Marie Tom and Lenard Tom

(117 paras.)

**Case Summary**

**Criminal law — Offences — Offences against person and reputation — Assault — Aggravated assault — Common or simple assault — Criminal *negligence* — Failure to provide necessaries — Trial of accused for child abuse of 19-month-old child — Child sustained extensive bruising, a burn mark on inner thigh and subdural haemorrhage while under care of parents — Father admitted shaking and hitting child — Father convicted of simple assault by hitting child on the head and shaking child — Mother acquitted on all counts — Medical evidence inconclusive as to cause of child's burn and subdural hemorrhage — Crown failed to prove that either parent failed in their duty in a manner that showed wanton or reckless disregard for child's' safety and any permanent endangerment of health.**

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| --- |
| Trial of accused for child abuse of 19-month-old child -- Crown alleged accused father committed aggravated assault by shaking child and that both parents were criminally negligent by failing to protect child from bodily harm, failed to provide necessaries of life to child and assaulted child -- Child sustained extensive bruising, a burn mark on inner thigh and subdural haemorrhage while under care of parents -- Child was developmentally delayed -- Physician noted child's injuries and that child appeared malnourished -- Mother claimed child sustained injuries in fall and when being hit with a toy by sibling -- Mother admitted lying about how child sustained burn -- Father admitted shaking and hitting child -- HELD: Father convicted of simple assault by hitting child on the head and shaking child -- Mother acquitted on all counts -- Medical evidence inconclusive as to cause of child's burn and subdural hemorrhage -- Father caused at least some of the bruising visible on child's upper facial and temple area by hitting the child -- Insufficient evidence that shaking caused subdural hemorrhage -- Shaking constituted an assault -- Insufficient evidence to determine how child sustained burn -- No direct evidence that either parent assaulted child and thus caused burn -- Mother's lie about burn could also be consistent with innocence -- No justification for father's conduct in hitting child on the head -- Crown failed to prove that either parent failed in their duty in a manner that showed wanton or reckless disregard for child's' safety -- Taking into account defence expert evidence that child did not appear malnourished or to have suffered permanent injury, Crown failed to prove any permanent endangerment of health. |

**Counsel**

Counsel for the Crown: N. Jensen.

Counsel for Ellen Marie Tom: C. Massey.

Counsel for Lenard Tom: A. Tam.

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| **MACAULAY J.** |

**1**   In July 2005, Nicholas Tom was 19 months old and living with a foster parent. His biological parents, Ellen Tom and Lenard Tom, lived nearby. Nicholas has two older brothers: Ancil and Leonard. In July 2005, Ancil was 5 and Leonard was 2. Both were in foster care as well but lived with a different foster parent than Nicholas. A fourth brother, Dominic, was an infant at the time and lived with his parents in Victoria. The parents are accused of abusing Nicholas.

**2**  The Crown alleges that between July 10 and 16, 2005, the parents committed various criminal offences against Nicholas while he and his two older brothers were staying in the parents' home on an extended visit. At the conclusion of the Crown's case, I found that there was no evidence against Ms. Tom on Count 1 and, as a result, Count 1 now only concerns Mr. Tom. Both accused are charged on the remaining three counts.

**3**  Apart from time and place as set out above, the allegations are as follows:

Mr. Tom:

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|  | Count 1: |  | did commit aggravated assault of Nicholas Tom by shaking Nicholas Tom, contrary to Section 268(2) of the *Criminal Code*; |  |

Both accused:

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|  | Count 2: |  | did by criminal ***negligence*** cause bodily harm to Nicholas Tom by omitting to perform their duty to protect Nicholas Tom from bodily harm, contrary to Section 221; |  |
|  | Count 3: |  | did fail to perform their legal duty to provide necessaries of life to Nicholas Tom, a child under the age of sixteen years, by failing to protect him from physical harm, failing to provide him proper sustenance, and failing to seek medical attention for a burn to his leg, contrary to Section 215(2)(a); and |  |
|  | Count 4: |  | in committing an assault upon the complainant, Nicholas Tom, did cause bodily harm to the complainant, to wit: a burn and bruises, contrary to Section 267(b). |  |

**4**  I have considered the whole of the admissible evidence respecting each charge against each accused in reaching my conclusions. Having done so, I am satisfied that the Crown has proven the included offence of assault *simpliciter* against Mr. Tom under each of Counts 1 and 4. I am not persuaded that the Crown has proven any of the remaining allegations, or any applicable included offences, against either accused beyond a reasonable doubt. My reasons follow after some introductory remarks.

**5**  There is no doubt that Nicholas sustained extensive bruising, a burn mark on his left inner thigh and a subdural haemorrhage, all while he was under the care of his parents at their Victoria home during the time as alleged by the Crown. It is less clear whether it is safe to conclude, as the Crown urged, that the parents caused all the bruising; that the mother intentionally caused the burn; and finally, that the father caused the subdural haemorrhage by shaking the child. The essential difficulty is the lack of evidence respecting the mechanisms of injury. To the extent that the evidence discloses possible causes, some are inconsistent with guilt. Accordingly, I am left with reasonable doubt.

**6**  This means that we may never know the truth of what happened to Nicholas. That is very unfortunate but the object of this trial is limited to determining whether the Crown proved beyond a reasonable doubt that the accused committed the various serious criminal acts that they have been accused of. Some of what I say will appear critical of the Crown experts who satisfied themselves that the mother and father were responsible and then presented those conclusions to the Court as part of medical diagnoses. I do not doubt the sincerity of the doctors' underlying belief but, as I will point out, their methodology was seriously flawed.

**7**  At the time of the events, the accused parents were young and living together, but not married, in spite of the same last names. Ms. Tom, for example, was only 21 in July 2005. By that time, she had already had four children, two of whom, Nicholas and his younger brother, were born premature.

**8**  Nicholas was born in December 2003. He had special needs, required open heart surgery before being released from hospital, and ultimately spent the first two months of his life in hospital. He and his mother did not bond during that time and Nicholas went directly from the hospital into foster care.

**9**  The foster parent is Mary Wharton, with whom Nicholas has now lived since his release from hospital as an infant. As a result, Nicholas has never lived full-time with his parents or his siblings.

**10**  Before July 2005, all contact between Nicholas, his parents and siblings occurred during access visits. Ms. Wharton testified that access was sporadic throughout 2004 and into 2005 with anticipated visits frequently cancelled without notice. On May 31, 2005, the parents, with the concurrence of the Ministry of Children and Families, signed a Family Plan that was intended to govern the gradual integration of the family into a single unit by October 2005. In spite of that, access continued to be sporadic throughout June.

**11**  It is apparent from the evidence that the prospect for successful integration of the family depended on the parents complying with the plan to the satisfaction of the Ministry. Failing compliance, there was always the risk, known to both parents, that the Ministry would cancel the reintegration and perhaps remove the children from the care of the parents entirely. In the agreement, the parents agreed to ensure the safety of their home by taking certain steps including purchasing stair gates.

**12**  Mr. Tom had a history of angry behaviour although none directed towards the children. He specifically agreed in the Family Plan to continue anger management counselling.

**13**  As part of the reintegration process, the nature and extent of the visits changed in early July. Nicholas stayed with his parents at their home from July 4 through to the morning of July 7. He then returned to their home for another visit commencing July 11 and remained there until Friday, July 15, when Ms. Wharton picked up Nicholas after Ms. Tom had taken him to a doctor's office. The two older siblings also stayed at the home during the latter part of the second visit. This effectively brought the whole family unit together and it must have been very stressful for everyone.

**14**  Ms. Wharton described Nicholas' stage of development and appearance before the visit commencing July 11. According to her, the child's motor skills were delayed and his verbal abilities were lacking. Nicholas was just starting to walk by holding himself up on furniture. She described Nicholas as quiet but very alert and aware. I accept those aspects of her evidence.

**15**  Ms. Wharton also testified that Nicholas had gained weight regularly although he had not been weighed for a few months at the time of the events. She estimated his weight before the visit at about 25 pounds and claimed to do so simply from carrying him. According to her, she could estimate Nicholas' weight within about two pounds. I view this evidence with scepticism.

**16**  Ms. Wharton has known that there are questions in this case about Nicholas' weight gain or loss before and after the time in question. She agreed in cross-examination that her own estimate could be off by a few pounds and that she had relied to some extent on information from doctors about Nicholas' previous weight. I cannot dismiss the possibility that her estimate of weight is unintentionally reflective of the recorded weights at the doctor's office. Unfortunately, there is reason to doubt the accuracy of one of those weights.

**17**  According to the electronic clinical records at the office of Nicholas' family doctor, Dr. Lenser, Nicholas weighed 23 pounds on May 30, 2005; 20 pounds, 10 ounces on July 15, 2005; and 24 pounds, 10 ounces on July 25, 2005. In addition, Dr. Papp weighed Nicholas at 23 pounds, 11 ounces on July 19.

**18**  Dr. Papp is a family doctor but saw Nicholas as part of a multidisciplinary team for identifying and supporting the health needs of children who may have been abused or neglected. Her immediate superior, Dr. Zinkiew, is a paediatrician.

**19**  Dr. Papp testified that Nicholas was underweight on July 15, probably due to liquid dehydration, and rapidly gained weight by July 19. According to her, the degree of dehydration on July 15 could have led to a need for hospitalization.

**20**  In identifying dehydration as the cause of weight loss, Dr. Papp did not conduct any readily available medical tests but instead relied on information received from Ms. Wharton respecting the amount of fluid the child drank after being returned to her care. In cross-examination, she agreed that the rapid weight gain was the largest factor in reaching her conclusion. The strength, or legal weight, I give to her opinion accordingly depends on the accuracy of the recording of the July 15 weight.

**21**  When asked in cross-examination about the physical signs associated with dehydration, Dr. Papp was unable, at first, to point to any apparent physical signs of dehydration in the photos of Nicholas taken on the evening of July 15. Later in cross-examination, she suggested that one photo showed a cracked or chapped upper lip. I did not find that evident and to the extent the photos are reliable, they appear to show a healthy, well hydrated child.

**22**  Dr. Zynkiew testified to the same effect as Dr. Papp. She considered the recorded weight for July 15 to be a very significant factor. She would not have expected any weight loss over the preceding six weeks and opined that Nicholas should have weighed about 25 to 25 1/2 pounds on July 15 if he was following a normal growth pattern. She further opined that the pattern of weight loss followed by rapid weight gain raises concerns about possible neglect due to inadequate food and drink.

**23**  Neither Dr. Papp nor Dr. Zynkiew appeared to consider the possibility that the recorded weight for July 15 was inaccurate. I find that curious in that the other three weights show a slow but steady weight increase for the period May 31 through July 25. As well, neither doctor adequately addressed the likelihood of such a dramatic loss of weight occurring in five days or such an increase of weight occurring between July 15 and 19, even assuming the accuracy of the recorded weight for July 15.

**24**  Dr. Ferguson, also a paediatrician, testified for the defence. His qualifications and practical experience in investigating suspected cases of child abuse are more extensive than those of the Crown experts. Dr. Ferguson has been the director of the Child Protection Centre, Children's Hospital, Winnipeg, since 1989. In Manitoba, Dr. Ferguson testifies only for the Crown on cases of alleged child abuse. Leaving aside his qualifications and experience, I prefer Dr. Ferguson's opinions because he expressly limited his analysis to medical concerns.

**25**  According to Dr. Ferguson, malnourishment would not account for a weight drop from 23 pounds to 20 pounds, 10 ounces over a five day period. Accordingly, assuming the July 15 weight was accurately recorded, he opined that some unknown weight loss likely predated the five day period.

**26**  The doctor also opined that it is impossible for a child to lose that weight over five days due to dehydration. He recounted the physical symptoms that would have been readily apparent to a medical practitioner. He also reviewed the photographs and found no signs of malnutrition or dehydration.

**27**  It is apparent from Dr. Ferguson's evidence that Nicholas would have presented on July 15 as a very ill child if he had lost the weight due to dehydration and would likely have required hospitalization to be resuscitated.

**28**  Dr. Ferguson also testified that it would be impossible for a child to gain three pounds one ounce in five days. All these factors led him to doubt the accuracy of the weight measurements.

**29**  Dr. Wilson also testified for the defence. He is a general practitioner who saw Nicholas at a clinic on July 16 at the request of the foster parent who was concerned about potential abuse. Dr. Wilson never weighed the child but did not notice any signs of dehydration.

**30**  This brings me to the evidence of Dr. Lenser respecting Nicholas' visit to her office on July 15. According to the doctor, Ms. Tom was concerned that Nicholas' growth was slow although the doctor had not had any previous concerns in that regard. Dr. Lenser could not recall whether she weighed Nicholas on July 15 or asked an assistant to do so. Dr. Lenser's practice was to note the weight if she did it herself or to record the information received from an assistant if the assistant did it and then dictate the information for a staff member to later create the electronic chart. Any original notes were destroyed once she completed her dictation. This process presents a possibility of error in the transcription process although all medical staff received training in the importance and methodology of maintaining clinical records.

**31**  Dr. Lenser observed some bruising on Nicholas' face but no other signs of medical concern. She did not observe signs of severe dehydration or malnourishment at the time.

**32**  In addition to the evidence discussed above, Dr. Ferguson also identified the potential for error in the weighing process associated with different scales and types of scales, as well as different handlers, and whether or not the child was clothed. As it is not possible to determine who weighed Nicholas on July 15, it is impossible to determine whether there were mistakes in the process or the communication of the result.

**33**  Based on Dr. Ferguson's evidence, which I found more deserving of weight than that of either Dr. Papp or Dr. Zinkiew, I cannot discount the possibility that the recorded weight for July 15 was inaccurate. That significantly detracts from the weight that I give to the evidence of the experts who testified for the Crown respecting the presence of malnourishment or severe dehydration associated with the period July 11 to 15.

**34**  I have not overlooked the evidence of Ms. Wharton that Nicholas appeared different when she saw him on July 15. She described his face as all sunken in; he no longer had chubby cheeks; and finally, his eyes were blank and lifeless. I cannot reconcile that evidence with the content of the photos taken the same day nor with the evidence of Drs. Lenser and Wilson. Once again, I have concluded that Ms. Wharton has perhaps unconsciously coloured her evidence to support the Crown theory of the case.

**35**  The theory of the Crown was developed very early on. Dr. Papp's initial contact was with Ms. Wharton and a social worker when they brought Nicholas to see her on July 19. Dr. Papp arranged to photograph and carefully recorded all the apparent bruises on the child's body as well as the burn on the inner thigh. She also noted marks on the back which were never photographed. She quickly became concerned that the constellation of injuries was consistent with being intentionally inflicted although she appeared to give little or no consideration to the possibility that one or both of the older siblings might have inflicted some or all of them. Instead, Dr. Papp focused on disproving what she understood to have been the mother's explanation for the injuries. By so limiting her investigation, she made a mistake.

**36**  Dr. Papp's error in methodology was to focus on disproving the mother's explanations rather than fully considering the potential for other medical causation theories, including whether the siblings intentionally inflicted some of the injuries or accidental trauma led to the injuries or some of them. For example, the doctor appeared to equate disproving the mother's explanation respecting the cause of the burn with proof that the mother intentionally caused it.

**37**  Dr. Ferguson, unlike Dr. Papp and Dr. Zynkiew, was not able to eliminate other possibilities on the evidence presented. For example, some of the bruising could have resulted from accidental falls. The patterned scrape injuries were typical of toy marks. A two and one-half year old sibling is capable of leaving bruises on a 19 month old. As I will return to later, there are innumerable potential accidental causes in the home for the particular burn pattern.

**38**  Unfortunately, Dr. Papp also took on the role of an advocate during her testimony. In chief, she sometimes did not answer direct questions including how she could determine that a particular bruise near the nose was intentionally inflicted. When pressed, she consistently returned to the mantra of the constellation of injuries. At other times, she relied on the inconsistency between the constellation and the mother's explanation as she understood it. I was left with the impression that she thought an accused has an obligation to explain away the evidence. In cross-examination, she was unnecessarily combative and often still refused to answer direct questions about individual marks other than by reference to the constellation. She refused to concede that two side by side photos taken to demonstrate similarities were potentially misleading when the camera was set at a different focal length in each. Her refusal was unreasonable and reinforced my impression that the doctor lacked the necessary objectivity to assist the Court.

**39**  Where the opinion evidence of the Crown experts, Drs. Papp and Zinkiew, is at odds with that of Dr. Ferguson described above, I prefer the evidence of the latter for the reasons I have already indicated.

**40**  Absent an adequate medical basis for concluding that one or both parents intentionally caused the bruising and scrapes or symptoms of malnourishment or dehydration, I must turn to and examine the statements of the two parents. I will also discuss their statements and other evidence relating to the cause of the burn and the subdural haematoma in this part of my reasons.

**41**  Mr. Shulte was the first social worker to respond to Ms. Wharton's concerns. He attended the Tom home in the evening of July 15 and asked Ms. Tom to explain the marks on Nicholas. She told him that one of the older boys threw a toy at Nicholas striking him above the bridge of his nose. She also said that Nicholas had fallen on two occasions at the park when his father was helping him learn to walk. As to the burn mark, Ms. Tom said that, on the day previous, while Nicholas and his younger brother were asleep in the living room area, she placed a cup of hot tea on the coffee table and then went upstairs to fold laundry. While upstairs, she heard Nicholas cry, came down and found that he had spilled the tea on himself. She applied a cold compress to the burn and stated that the burn did not seem to bother Nicholas later that evening.

**42**  Mr. Tom was in the room during part of the conversation with the social worker but never participated in it. It is not clear on the evidence whether he was there when Ms. Tom described Nicholas falling at the park. The statement is only admissible against Ms. Tom in the circumstances.

**43**  Ms. Wharton had made a note on July 14 that Ms. Tom called her to tell her that Nicholas had burned his leg. Ms. Tom gave Ms. Wharton a similar explanation about the burn the next day at the doctor's office as she later provided to the social worker. She also told Ms. Wharton that Nicholas fell off a slide at the park.

**44**  The explanation about the burn was obviously untrue. All the experts, including Dr. Ferguson, agreed that the burn pattern was inconsistent with a hot liquid spill which would splatter on the skin. The burn pattern is readily observable in the photos. It is a single mark in an irregular rectangular shape. Dr. Ferguson described it as apparently healing from the outside in and about the size of a quarter. This information was known to the police officer who interviewed Ms. Tom on August 3, 2005.

**45**  Only the first part of Ms. Tom's statement was voluntary and admissible. I found the balance involuntary because the police officer made improper inducements. This raised the risk that the ensuing admissions were untrue and inherently unreliable. My analysis at this point is limited to the admissible part of the statement. Mr. Tom was not present at the time of the statement and, to the extent that it refers to his conduct, it is not admissible against him.

**46**  During the course of her statement, Ms. Tom denied physically disciplining any of her children; admitted that she had little bond or attachment to Nicholas; described Nicholas falling while attempting to walk with his father in the park and playing with a soccer ball; denied the suggestions that Nicholas lost weight while in her care; and as to the burn, at first, that Nicholas had spilled tea when she went to do the laundry.

**47**  Ms. Tom went on to state that while she was upstairs, she put a load in the washer, took a load out of the dryer, folded it and started putting things away before she heard Nicholas cry. Throughout this process, the police officer continuously challenged her on differences between her statement and what she had previously said as noted by Ministry representatives.

**48**  Ms. Tom then repeated what she had said previously about finding Nicholas and treating the burn. The statement next digressed into a discussion of the need for a playpen or safety gates, followed by Ms. Tom describing the older two children's habit of throwing toys, particularly that of the two year old. She indicated twice that the two year old hit Nicholas by the bridge of his nose in that way.

**49**  The police officer then asked Ms. Tom if she had been vacuuming that day and specifically, what happened when Nicholas touched the DVDs when she did not want him to do so. She responded that she moved him. The officer then challenged her that, instead, she had thrown a toy at Nicholas and hit him in the nose. Ms. Tom specifically denied the challenge.

**50**  It is apparent that the officer was relying on information received from another source, likely a social worker who had conducted a separate investigation with the older children, but I pause here to observe that there is no direct evidence on this trial that Ms. Tom used a vacuum in any way to make contact with Nicholas or that she threw a toy at him. I further do not accept that the burn pattern, bruises or scrapes are in any way consistent with the markings that may be left if the suction point of a vacuum is pushed into or dragged across skin. I suspect that the officer also discounted that possibility and that is why she so abruptly changed directions in her questioning to focus on whether Ms. Tom had thrown a toy.

**51**  Not long after, the officer returned to the question of the burn mark by stating that it was not due to an accidental spill. I will set out the entirety of the passage to which I now refer ("C" refers to the officer and "T" to Ms. Tom):

|  |  |  |  |
| --- | --- | --- | --- |
|  | C: | ... the burn mark is not due to an accidental spill, |  |
|  | T: | I know it wasn't from the tea. |  |
|  | C: | it wasn't from the tea? |  |
|  | T: | Yeah, I know it wasn't. |  |
|  | C: | No it was not, so tell me what it was from? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | T: |  | I was I told Mary Lou this already I didn't watch like I didn't supervise everything he did and we don't, |  |
|  | C: |  | What was the burn from Ellen, tell me what happened because, |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | T: | I don't know what it was, |  |
|  | C: | But you've been telling me, |  |
|  | T: | ... not watching him the whole time. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | C: |  | you were upstairs he was sleeping on the couch you heard a cry a cry and that it sounded like something was wrong, |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | T: | Yeah. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | C: |  | you came running and he had a red mark and your tea cup was spilled, |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | T: | Yeah. |  |
|  | C: | but now you're telling me, |  |
|  | T: | But I know it wasn't from the tea because its, |  |
|  | C: | What was it from Ellen? |  |
|  | T: | I don't know what it was from I didn't, |  |
|  | C: | Did Leonard (sic) put it there? |  |
|  | T: | Leonard (sic) wasn't home. |  |
|  | C: | Somebody put it there. |  |
|  | T: | I wasn't watching him the whole time, |  |
|  | C: | Ellen, |  |
|  | T: | he was with me. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | C: |  | did you hear another sharp scream or cry when he was in the house other than that time? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | T: | No. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | C: |  | Okay but he would scream when he was burnt is that not right? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | T: | I'm assuming that he would yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | C: |  | Okay but you told Mary-Lou, "that you made a cup of tea left it on the coffee table went upstairs for five or so minutes", that what you first of that's what you told first five then it went to fifteen, |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | T: | I told her when ... ..., |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | C: |  | me, then with me it was half an hour to forty five minutes "you heard Nicholas screaming you went downstairs and found that Nicholas had spilled the tea on himself". Now you're telling me you know that it wasn't from the tea. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | T: | That's what Mary told me that's how I know. |  |

Thereafter, the officer continued to challenge Ms. Tom that she must have intentionally caused the burn but Ms. Tom denied doing anything to Nicholas.

**52**  The reference to "Mary" at the end of the recited passage is likely to Mary Madam, one of the social workers responsible for the Tom family file.

**53**  Mary Madam spoke to Ms. Tom on at least two occasions before Ms. Tom gave her statement to the police. There are issues respecting the reliability of Ms. Madam's recollection of the sequence of events and the actual content of conversations. I found her to be a poor record keeper and a hesitant historian. Her notes were incomplete and, in at least one instance, not reasonably contemporaneous. She was not clear on the dates and sequence of her conversations with Ms. Tom relative to the time of the police interview. I conclude that it is quite possible that she told Ms. Tom that the burn mark was incompatible with a tea spill before the police interview.

**54**  According to Ms. Madam, she told Ms. Tom that the doctors said that the bruises were not consistent with a fall. She also told her that the boys said that Nicholas was hurt by the vacuum to which Ms. Tom responded that she had pushed Nicholas out of the way by placing the vacuum against his leg because she was trying to clean up and Nicholas kept coming close to the vacuum.

**55**  Even if Ms. Madam's evidence is an accurate account of what was said, I do not accept it as an admission of causing the burn. At most, pushing with the end of the vacuum might cause a mark or bruise unless there was no attachment in which case there would likely have been petechiae, or very tiny patterned bruising, that were not present here. The business end of a typical vacuum is not, by nature, hot.

**56**  What is to be made of these statements and, in particular, the untruth and later concession about the burn? In my view, nothing is to be made of the untruth respecting the burn from a medical perspective. Forensic medicine does not extend to rendering a positive diagnosis based on disbelief of an account. I will later address the use that I am permitted to make of evidence of a lie.

**57**  Dr. Ferguson was not prepared to diagnose child abuse as a cause of the burn just because Ms. Tom provided a false explanation. Instead, he considered the possible innocent explanations for the burn pattern. That approach was medically appropriate and helpful.

**58**  From the pictures, Dr. Ferguson described a minor first degree burn which required no actual treatment other than ensuring cleanliness. The only lasting effect would be a faint discolouration. It did not require medical attention, a fact confirmed by Dr. Wilson who examined the burn on July 16 and suggested that the site be kept clean and, at most, polysporin applied.

**59**  Dr. Ferguson agreed that Nicholas' lower thigh must have come in contact with a sufficiently hot object but opined that there is an endless possibility of accidental injuries in a house that may give rise to the type of burn pattern. From a medical perspective, a differential diagnosis requires some provable alternate explanation rather than speculation. Most injuries of this type in his experience are accidentally caused.

**60**  Because everyone involved in the investigation assumed that Ms. Tom caused the burn injury, nobody questioned Mr. Tom about the topic. Instead, the police officer interviewed him about the bruising and the subdural haemorrhage.

**61**  Mr. Tom admitted that Nicholas did not get bruised at the park; that he hit him on top of the head when feeding him; hit him once on the hand on another occasion to discipline him; and finally, hit him again on the head on a further occasion while in the home. He also admitted picking up Nicholas and shaking him when he got frustrated with him.

**62**  The passages in the statement relating to shaking are as follows ("C" refers to the officer but, on this occasion, "T" refers to Mr. Tom):

|  |  |  |  |
| --- | --- | --- | --- |
|  | C: | Tell me about the time that you shook him. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | T: |  | Shook him, ah I just picked him up and I, I don't know it was in the evening anyway before we were going to bed. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | C: | When was this? |  |
|  | T: | ... like Wednesday night. |  |
|  | C: | What happened? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | T: |  | Um I, I'm trying to get into, I'm trying to do everything with my kids and I tend to Dominic, |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | C: | Uh hmm. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | T: |  | like I wake up in the middle of the night and everything like I let Ellen sleep and I've just been tired lately so, just the crying and everything and, |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | C: | What happened? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | T: |  | gets me frustrated so I picked up Nicholas and I shook him a couple of times and that was it. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | C: | When did you, when, what time of night was this? |  |
|  | T: | It was Wednesday night probably around 10:30. |  |
|  | C: | Show me how you shook him. |  |
|  | T: | I picked him up a normal baby just shook him. |  |
|  | C: | Show me how you shook him. |  |
|  | T: | went like that. |  |
|  | C: | How many times did you shake him? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | T: |  | just twice I don't, not hard but I just went like that like quickly. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | C: | Uh hmm. |  |
|  | T: | and that was it. |  |

**63**  I have no reason to disbelieve Mr. Tom's admissions. I doubt that he would have made them if they were untrue. If anything, he gives the impression of minimizing the nature of the hits and the shaking. I find that Mr. Tom caused at least some of the bruising visible on Nicholas' upper facial and temple area by hitting the child.

**64**  The medical evidence respecting the subdural haematoma is complex and again, as to causation, in some conflict. I am satisfied that Nicholas sustained a subdural haematoma on one side of his brain. The dura is the tough membrane inside the skull that surrounds the brain. Tiny connecting veins connect from the brain through the dura. The medical witnesses described the bleeding as a subdural haematoma. The location of the bleeding is below the dura in the space through which the veins connect.

**65**  Fortunately, the bleeding resolved without any long-term effect. Based on the evidence of Dr. Finn, a radiologist, which I accept on this point, the injury could have occurred towards the end of the time frame when Nicholas was with his parents.

**66**  Turning to the question of causation, Dr. Finn left me with the impression that she relied primarily on the scientific literature in expressing her opinion that the finding was more consistent with non-accidental than accidental trauma. Unfortunately, like the other Crown experts, Dr. Finn apparently also relied to some extent on her understanding of the history given by the parents. She did not identify what that information was. In all, I found her evidence on causation of limited assistance.

**67**  In my view, Dr. Zinkiew's views on the causation issue deserve more weight than Dr. Papp's. She has more experience than Dr. Papp and was not as much of an advocate. She opined that significant force is necessary to result in a subdural haematoma. According to the doctor, shaking a baby can cause such an injury without leaving any external signs of trauma.

**68**  Dr. Zinkiew described the shaking as a whip-lashing of the head but typically not in a single plane of movement. With the force required, the movement of different layers of tissue in the brain is sufficiently violent that someone watching would realize that it was unhealthy for the baby. She further opined that a child of similar size would not have the necessary strength. In her view, the bleeding could not have resulted from a fall down a few stairs.

**69**  Dr. Zinkiew agreed in cross-examination that the vast majority of shaken baby cases involve infants under the age of one year as they are more vulnerable to this type of injury due to the relatively large size of the head, weak neck muscles and the nature of the infant brain. As the child ages, each risk decreases. She agreed that the force necessary to cause such an injury to a 19 month old child is considerably more than to a baby. The doctor further agreed that Nicholas did not sustain a retinal haemorrhage as is usually seen in shaken baby cases.

**70**  At one point, Dr. Zinkiew referred to shaken baby syndrome as just a working hypothesis rather than a diagnosis. This was apparently because she could not determine any other cause. She then modified her answer and suggested that there was enough information for a diagnosis.

**71**  One important difference between Dr. Zinkiew's evidence and that of Dr. Ferguson concerns the unilateral or one sided location of the injury. Dr. Zinkiew agreed in cross-examination that the movement of the whole brain when shaken often results in bilateral bleeding, that is on opposing sides of the brain, but maintained that unilateral bleeding can result as well. Another difference relates to the degree and type of force involved in causing the bleeding that was present.

**72**  Dr. Ferguson expressed the view that the amount of trauma involved was minimal and also that shaking a baby usually occurs with a front to back motion resulting, according to the literature, in bilateral subdural haematomas 75 per cent of the time. He considered the injury pattern consistent with blunt force trauma but inconsistent with shaken baby syndrome. He also considered the lack of retinal haemorrhaging significant because it appears in up to 90 per cent of the cases diagnosed. Finally, he pointed out that Nicholas was bigger and older than is usually the case in shaken baby syndrome.

**73**  Dr. Ferguson also opined that it is possible for a child to sustain a unilateral subdural haemorrhage from falling down stairs even absent a skull fracture. I observe that there was evidence of one or two flights of un-gated stairs inside the Tom home at the time.

**74**  Finally, Dr. Ferguson stated that there was no life threatening risk here because there was no injury to the brain itself. Had there been, the risk is that Nicholas' brain would have swollen which would clearly have been life threatening.

**75**  I turn next to the respective submissions and my conclusions.

**76**  Count 1 alleges that both accused committed an aggravated assault of Nicholas Tom, by shaking, contrary to s. 268(2) of the *Criminal Code*. I dismissed the allegation as against Ellen Tom on a no evidence motion at the close of the Crown's case and, as a result, must only consider whether the Crown has proven the allegation against Lenard Tom.

**77**  Again, Count 1 alleges that Mr. Tom:

Between the 10th day of July, 2005 and the 16th day of July, 2005, inclusive, at or near Victoria, in the Province of British Columbia, did commit aggravated assault of Nicholas Tom by shaking Nicholas Tom, contrary to Section 268(2) of the Criminal Code.

Section 268(1) defines an aggravated assault:

Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

At issue here is whether the Crown has proven beyond a reasonable doubt that shaking, as alleged, endangered the life of the complainant. The Crown theory is that Mr. Tom shook Nicholas causing the bleeding in the subdural layer of the brain thus endangering his life.

**78**  The Crown says that, on the two outstanding counts requiring proof of assault, the evidence demonstrates logically that either the two accused, someone else, or some combination of the above, assaulted the child. According to the Crown, if I am satisfied beyond a reasonable doubt that one or both accused were actors, that is principals under s. 21(1)(a) of the Code, guilt necessarily follows.

**79**  On Count 1, Mr. Tom contends that because the injuries were limited to bleeding without any consequent brain swelling, there was no endangerment of life. He says that any assault by shaking was not an aggravated assault. According to him, potentially life threatening injuries are insufficient to bottom a conviction for aggravated assault. He says that the injuries must actually have threatened life.

**80**  Mr. Tom admitted to the police that he shook the child but he contends that the admission is insufficient to prove beyond a reasonable doubt the type of shaking necessary to cause a subdural haemorrhage. Absent Mr. Tom's statement, it is common ground that there is no other admissible evidence that he shook the child.

**81**  Mr. Tom further argues that, as a matter of law, in determining his guilt or innocence, I should consider Ms. Tom's involuntary statement to the police respecting her alleged involvement in actions that may have caused the subdural haematoma. This evidence, according to Mr. Tom, is admissible for that limited purpose and assists in raising a reasonable doubt about his alleged involvement.

**82**  Given my conclusion otherwise as to the insufficiency of the evidence regarding a link between the shaking as admitted and the subdural haemorrhage, it is unnecessary for me to address the last submission. It should have been raised before the defence closed its case so that all counsel could fully address the implications but was not. Instead, counsel for Mr. Tom raised the issue for the first time in final submissions and I am not persuaded that counsel adequately addressed the issue which is a novel one given my finding that the statement was involuntary and unreliable. For example, counsel for Mr. Tom proceeded on the apparent assumption that only the parts of the statement favourable to his client would be introduced if he succeeded but no counsel challenged or addressed the correctness of that assumption.

**83**  Finally, Mr. Tom contends that the Crown failed to prove that the injury pattern is consistent with shaking the child as opposed to some other innocent explanation such as accident. At the very least, according to Mr. Tom, there is a reasonable doubt arising out of all these issues.

**84**  My conclusion on Count 1 follows. If I were deciding this matter on a balance of probabilities, I might well conclude that the injury resulted from shaking but that the injury pattern was atypical because of Nicholas' age and stage of development. It is, of course, not open to me to decide on that basis in a criminal trial. Proof beyond a reasonable doubt of the essential elements of any criminal charge is much closer on a continuum to absolute certainty than a balance of probabilities.

**85**  Given Dr. Ferguson's expertise and experience, along with observing his careful, responsive and fair manner under cross-examination by the Crown, I am left with a reasonable doubt as to the correctness of the Crown theory that shaking caused the subdural haemorrhage. Because the Crown particularized shaking as the means of committing the alleged offence in Count 1, it is not open to me to find the offence made out by some other mechanism of injury such as a blow. As a result, it is unnecessary that I deal with Mr. Tom's other submissions about the nature of the injury.

**86**  Nonetheless, Mr. Tom admitted that he shook Nicholas. His explanation for doing so offers no legal justification whatsoever. Although the evidence does not support a conclusion that there was any injury associated, the shaking constituted an assault. Mr. Tom is guilty of the included offence of assault *simpliciter* under s. 266(a) of the *Criminal Code*.

**87**  I will proceed directly to the other assault charge. Count 4 also alleges an assault by both parents on Nicholas during the same time frame at the same place. It alleges that the parents:

In committing an assault upon the complainant, Nicholas Tom, did cause bodily harm to the complainant, to wit: a burn and bruises, contrary to Section 267(b) of the *Criminal Code*.

It is, accordingly, convenient to next identify the issues arising on that count. The specific allegation is that the assault caused bodily harm to Nicholas. Section 2 of the Code defines bodily harm as meaning:

Any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.

The Crown conceded during final submissions that only the burn was capable of meeting the definition of bodily harm. As a result, there can only be a conviction for assault *simpliciter* if the Crown proves an assault that caused bruises but no burn.

**88**  As to Ms. Tom, the Crown further conceded that the evidence of assault is circumstantial and limited to:

1. pushing Nicholas with a vacuum cleaner;
2. causing the burn.

The Crown says that I should take into account that Ms. Tom admitted being home with Nicholas when he sustained the bruising and also that she admitted lying to the police about how it happened. The Crown also contends that the location of the burn on the inner thigh is in a location inconsistent with most potential accidental causes.

**89**  As to Mr. Tom, the Crown relies on his admission that he struck the child on the head. The Crown says that any such striking of a child the age of Nicholas exceeds any deemed consent to parental correction. Further, the Crown says that Mr. Tom confessed to shaking Nicholas, also an assault, but not one, I observe, on the evidence, that caused the injury patterns particularized in Count 4.

**90**  The additional issues respecting Count 4 are as follows. It is common ground again that there is no direct evidence that either parent assaulted Nicholas. Apart from the expert evidence respecting the constellation and pattern of injuries present, the Crown relies principally on the content of the statement each accused made to the police and, as well, in the case of Ms. Tom, her statements to Ms. Wharton and the social workers, to prove that the accused assaulted Nicholas causing the particular injury.

**91**  As to the burn, Ms. Tom contends that her statement to the police does not include an admission of any act consistent with causing the burn pattern on the child's inner thigh and further, in any event, that the defence expert evidence raises a reasonable doubt whether the burn was caused accidentally rather than deliberately.

**92**  As to the bruises, Ms. Tom contends that her statement contains no admission of assault causing such injuries and maintains that there is a reasonable doubt whether the bruises resulted from accidental rather than intentional causes. Alternatively, she says that, on the evidence, the child's siblings, then aged two and one-half and five years, may have caused some or all of the bruising.

**93**  For his part, Mr. Tom contends that there is no evidence in his statement linking his conduct to any burn. He contends that Ms. Tom, in her admissible statement, told the police that Mr. Tom was not home when Nicholas sustained the burn. He acknowledges that his statement to the police includes admissions of striking the child but says that evidence does not tie in to the bruising.

**94**  Further, Mr. Tom says that the bruises are not bodily harm as envisaged by s. 2 set out above. He raises the same defence to the potential included offence of assault *simpliciter* as does Ms. Tom and also contends that the *de minimus* principle applies having regard to the nature of the admitted striking.

**95**  As to Count 4 against Ms. Tom, the significance of her lie about the burn and, to a lesser extent, her later acknowledgment that she knew it to be untrue, is found solely in the use that I may make of it as circumstantial evidence in deciding whether the Crown has proven beyond a reasonable doubt that Ms. Tom caused the burn.

**96**  In that regard Ms. Tom's statement, or post-offence conduct in telling a lie, is some evidence consistent with guilt but also requires me to consider her potential reasons for lying that may be rationally consistent with innocence. As well, the more important the evidence, the more careful the scrutiny required.

**97**  This limited use is apparent from *R. v. White,* [*[1998] 2 S.C.R. 72*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M403-00000-00&context=). The following is illustrative, at paras. 21 and 22:

21 Evidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence. In some cases it may be highly incriminating, while in others it might play only a minor corroborative role. Like any piece of circumstantial evidence, an act of flight or concealment may be subject to competing interpretations and must be weighed by the jury, in light of all the evidence, to determine whether it is consistent with guilt and inconsistent with any other rational conclusion.

22 It has been recognized, however, that when evidence of post-offence conduct is introduced to support an inference of consciousness of guilt it is highly ambiguous and susceptible to jury error. As this Court observed in *Arcangioli*, [*[1994] 1 S.C.R. 129*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3BW-00000-00&context=), the danger exists that a jury may fail to take account of alternative explanations for the accused's behaviour, and may mistakenly leap from such evidence to a conclusion of guilt. In particular, a jury might impute a guilty conscience to an accused who has fled or lied for an entirely innocent reason, such as panic, embarrassment or fear of false accusation. Alternatively, the jury might determine that the conduct of the accused arose from a feeling of guilt, but might fail to consider whether that guilt relates specifically to the crime at issue, rather than to some other culpable act.

The danger of a mistaken leap to judgment is present here.

**98**  One obvious possible reason for Ms. Tom telling an untruth about the timing and circumstances causing the burn would be to protect Mr. Tom if she knew or believed that he deliberately caused the particular injury. She may have been entirely innocent of any alleged wrongdoing but, in order to preserve as much of the family unit as possible, still insist that she accidentally caused the burn to deflect any attention from Mr. Tom. Given Mr. Tom's history, this is not an implausible explanation. Another possibility is that she may have been reluctant to tell the truth if she accidentally caused the burn pattern directly because she knew that the family was under intense, ongoing Ministry scrutiny.

**99**  Having regard to the whole of the evidence against Ms. Tom, I am not persuaded beyond a reasonable doubt that she assaulted Nicholas. I acquit her on Count 4.

**100**  As to Mr. Tom, he admitted striking Nicholas on the head on three occasions. His admitted conduct is entirely consistent with the presence of some of the head and upper facial bruising. According to Mr. Tom, his conduct was that of a reasonable parent and the assaults were so minor, in effect, as to be unworthy of the attention of the law. Although counsel did not develop the second proposition using any authority, it must be linked to the policy considerations that underlie deemed consent which I set out below. I do not accept that there is some additional application of force that exceeds the boundaries permitted by deemed consent, and where no other defence such as necessity applies, that would attract the application of the *de minimus* principle.

**101**  Any intentional application of force to a person without that person's consent is an assault. The law recognizes that caregivers must necessarily apply some physical force to children in their care. Section 43 of the *Criminal Code* permits, for example, the corrective use of force, provided it does not exceed what is reasonable in the circumstances. Counsel for Mr. Tom did not suggest that s. 43 of the *Criminal Code* applies here. It could not in light of Nicholas' age at the time.

**102**  Independently of the Code, however, the common law recognizes a deemed consent on the part of infants to the application of force for the purpose of caring for them. Such consent is limited, however, to conduct consistent with the underlying policy rationale for the consent, namely the child's inability to care for him or herself. Only force necessary for that care is justifiable. The determination whether the force used was for the purpose of caring for the child is an objective one, namely whether the force used is consistent with what a reasonable parent would do in similar circumstances. See *R. v. Palombi,* [*2007 ONCA 486*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF01-JS0R-2078-00000-00&context=), at paras. 30 and 31.

**103**  The deemed consent may apply to the application of minor corrective force such as hitting Nicholas on the hand. Mr. Tom did not, however, offer any explanation for his conduct in hitting Nicholas on the head in his statement to the police other then by referring to his own anger and frustration. In fairness, he did not suggest in his statement that he was, in some way, disciplining the child. I find it difficult to imagine a reasonable parent ever justifiably striking a developmentally delayed 19 month old in the upper facial area or head.

**104**  If I am wrong and the application of the particular type of force was reasonable, I consider the amount of force applied to have been clearly excessive. It was sufficient to cause bruising. This is a further limit on the deemed consent. See *Palombi* at para. 32. I am satisfied beyond a reasonable doubt that Mr. Tom assaulted Nicholas causing bruising. The Crown conceded, however, that bruising alone is insufficient to support a finding of assault causing bodily harm.

**105**  I also agree with the defence that there is no evidence that Mr. Tom caused the burn which would constitute bodily harm within the meaning of the section. In the result, Mr. Tom is not guilty of the offence charged in Count 4 but is guilty of the included offence of assault *simpliciter*.

**106**  Counts 2 and 3 apply to both accused and again, relate to the same time and place. Both focus on the parents' alleged failure to act in the circumstances.

**107**  Count 2 alleges:

Did by criminal ***negligence*** cause bodily harm to Nicholas Tom by omitting to perform their duty to protect Nicholas Tom from bodily harm, contrary to Section 221 of the Criminal Code.

Bodily harm is, as I have already set out, a defined term and as a result, the bodily harm at issue is the burn and the subdural haemorrhage. There is no question as to the applicable standard.

**108**  Section 219(1) sets the legal standard for criminal ***negligence*** under s. 221. Here, the Crown must prove that the accused omitted to do something that it was in their duty to do, showing wanton or reckless disregard for Nicholas' safety.

**109**  The duty must be one imposed by law. See s. 219(2). The common law imposes a duty on a parent to protect his or her child from danger or unlawful violence that the parent foresees or ought to foresee. See *R. v. Popen* [*(1981), 60 C.C.C. (2d) 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCH1-F57G-S44N-00000-00&context=); [*[1981] O.J. No. 921*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCH1-F57G-S44N-00000-00&context=) (C.A.).

**110**  Ms. Tom contends that the evidence does not establish beyond a reasonable doubt that she knew Nicholas was being harmed or about to be harmed and, with that knowledge, failed to protect him. In response, the Crown contends that she failed to meet the standard because Nicholas was alone in the house with her and his siblings at the time he suffered the burn. As to Count 2, Mr. Tom makes a similar argument that there is insufficient evidence to demonstrate that he knew Nicholas would be at risk if left home with his mother while Mr. Tom went to work.

**111**  I am assisted in applying the principles respecting criminal ***negligence*** to alleged cases of physical abuse, whether due to a failure to protect against the other parent causing harm or against other foreseeable dangers, by the analysis of the Saskatchewan Court of Appeal in *R. v. Schoenthal*, [*2007 SKCA 80*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-F1P7-B3V4-00000-00&context=).

**112**  As I have pointed out earlier, I am not able to determine how Nicholas sustained either the burn or the subdural haematoma. The only known circumstance is that he sustained both while under the care of his parents in the time frame alleged in the indictment.

**113**  I am not persuaded that the Crown proved that either parent failed in their duty in a manner that showed wanton or reckless disregard for Nicholas' safety. I acquit both accused on Count 2.

**114**  Count 3 alleges:

Did fail to perform their legal duty to provide necessaries of life to Nicholas Tom, a child under the age of sixteen years, by failing to protect him from physical harm, failing to provide him proper sustenance, and failing to seek medical attention for a burn to his leg, contrary to Section 215(2)(a) of the Criminal Code.

Count 3 applies only, as a matter of law, to persons under a legal duty as defined in s. 215(1)(a). There is no question that the two accused, as parents, owed Nicholas a legal duty at the material time to provide necessaries of life under that subsection. Section 215(2)(a)(ii) creates an offence when a person owing a duty under the subsection fails without lawful excuse to perform the duty if such failure:

endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently.

In final submissions, the Crown conceded that there is insufficient evidence, given the nature of the burn, that the parents failed to meet the applicable standard in failing to seek medical attention for the burn but says that, on the evidence, the physical harm associated with the bruising, the subdural bleeding and the under-nourishment were likely to cause permanent injury to health. According to the Crown, the applicable standard is that of a reasonable parent in the circumstances.

**115**  On Count 3, both accused repeated the submissions made respecting Count 2 and also challenged the sufficiency of the Crown evidence of malnourishment. Taking into account the defence expert evidence that Nicholas did not appear malnourished or to have suffered permanent injury, both further contended that the Crown failed to prove any permanent endangerment of health.

**116**  There is, in my view, merit to the defence submission. The Crown has not persuaded me beyond a reasonable doubt that either accused deprived Nicholas of food or drink so as to actually endanger his life or likely cause permanent endangerment to his health. As to the physical harm, I am unable, on the limited evidence, to identify any breach of parental duty connected to either the burn or the subdural haemorrhage. While the bruising, or some of it, may be so connected, it did not cause or risk any likely permanent endangerment to Nicholas' health. I acquit both accused on Count 3.

**117**  By way of summary, my findings are:

**Count 1:**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Ms. Tom: | not guilty; |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Mr. Tom: |  | not guilty of aggravated assault but guilty of assault *simpliciter;* |  |

**Count 2:**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Ms. Tom: | not guilty; |  |
|  | Mr. Tom: | not guilty; |  |

**Count 3:**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Ms. Tom: | not guilty; |  |
|  | Mr. Tom: | not guilty; |  |

**Count 4:**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Ms. Tom: | not guilty; |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Mr. Tom: |  | not guilty of assault causing bodily harm but guilty of assault *simpliciter.* |  |

MACAULAY J.

**End of Document**

[***Saborio v. Guitard, [2016] B.C.J. No. 450***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J9K-5FJ1-F2MB-S21C-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

T.C. Armstrong J.

Heard: April 13-17, 20-24, August 14, 2015.

Judgment: March 4, 2016.

Docket: M128140

Registry: New Westminster

**[2016] B.C.J. No. 450** | 2016 BCSC 385

Between Nelson Saborio and Carmen Lacayo, Plaintiffs, and Gerald A. Guitard and Marie C. Guitard, Defendants

(335 paras.)

**Case Summary**

**Damages — Types of damages — For personal injuries — Considerations — Pre-existing medical conditions — Cost of future care — Loss of housekeeping ability — Special damages — Medical — Therapy or rehabilitation — Non-pecuniary loss — Pain and suffering — Prospective pecuniary loss — Action for personal injuries suffered in 2008 motor vehicle accident allowed in part — Plaintiff, 51, had a history of hand injury, cancer, shoulder and back complaints and headaches, ongoing depression and poor psychiatric health — Plaintiff awarded non-pecuniary damages of $70,000, cost of future care of $50,000,impairment to housekeeping capacity of $8,000 and special damages of $3,932 — Claims for future income and for in trust awards on behalf of her husband and daughter dismissed — Plaintiff suffered soft tissue injury that, combined with her psychological problems, developed into significant pain disorder.**

|  |
| --- |
| Action for personal injuries suffered in a 2008 motor vehicle accident. The plaintiff, 51, had suffered a work injury to her hand in 1992 which became disabling by 1994. She was diagnosed with a tumour in her arm in 1995. After treatment, she was diagnosed with a permanent disability and unable to work. Despite her declaration of ongoing disability, she returned to work in mid-1997. The plaintiff did not report any income from employment or other sources notwithstanding her claim that she worked throughout this time. The plaintiff had a long history of fraudulent schemes to obtain money from public bodies based on representations that she was totally disabled from working commencing in 1994. As a result of the accident, the plaintiff alleged she suffered from headaches, pain in her jaw, neck, back, arms and leg. The plaintiff also claimed that she had suffered serious psychological and emotional consequences as a result of the accident.  HELD: Action allowed in part.  Much of the plaintiff's evidence was not credible. Her characterization of the effects of this accident was exaggerated and her pre-accident health problems understated. Her evidence of her pre-accident working history was confusing, inconsistent, unreliable and untrustworthy. The court accepted that the plaintiff suffered a soft tissue injury in the accident that, combined with her psychological problems, developed into a significant pain disorder. The plaintiff was motivated by the prospects of significant secondary gain that was causing a continuation of her subjective pain complaints. Her prognosis was poor but there were treatment options that would optimize her chances of recovering to a better level of function. Even though she had psychological injuries caused by the accident, the continuation of the symptoms, in part, was driven by her desire for secondary gain and thus was not compensable. The plaintiff suffered an exacerbation of depressive and anxiety symptoms post-accident, but did not suffer from post-traumatic stress disorder. She had a moderately severe pain disorder and experienced pain-related symptoms aggravated and perpetuated by emotional factors. She would likely have had ongoing depression and anxiety issues. Non-pecuniary damages were assessed at $70,000. There was a paucity of reliable and credible evidence to persuade the Court that the plaintiff had suffered any economic loss. Her claim for future income loss was dismissed. She was awarded $50,000 for future care costs. An in trust award for the plaintiff's husband and daughter had not been made out. The plaintiff was awarded $8,000 for loss of housekeeping ability and $3,932 for special damages. |

**Counsel**

Counsel for the Plaintiffs: O. Hui.

Counsel for the Defendants: R. Moen and J.J. Johal.

**Reasons for Judgment**

T.C. ARMSTRONG J.:

**Introduction**

**1**  This case concerns the plaintiff Carmen Lacayo's claim that she suffered debilitating injuries in a 2008 car accident, to which liability is admitted. She seeks non-pecuniary damages of $200,000, an in trust claim for her husband of $30,000, an in trust claim for her daughter of $1,000, $80,000 compensation for her loss of housekeeping capacity, $200,000 to pay for the costs her future care, and $20,000 for damage to her income earning capacity.

**2**  The overarching issue in this case is the claimant's credibility and whether she has proven on the balance of probabilities that the accident caused injuries to the extent described by her and her physicians. The impact of the injuries caused in the accident on her ability to function to the level she asserts is central to her claim.

**Background**

**3**  The plaintiff is a 51 year old native of Nicaragua who immigrated to Canada in 1986. She is married and is the mother of five children, ages 27, 24, 16, 15 and 11. She was educated in Nicaragua and completed secondary school followed by three years of university.

**4**  Before immigrating to Canada in 1986 the plaintiff worked in animal food cultivation, as a part-time executive secretary and as a kindergarten teacher. She learned no English while living in her home country and currently speaks little English; she said she is able to read but cannot write in English.

**5**  She married Nelson Saborio in 1982 and preceded him to Canada; he arrived in 1987. Initially, the Lacayo family settled in Vernon, BC, where they lived for approximately eight years before moving to Surrey, BC. Currently she lives with Mr. Saborio in their two bedroom townhouse in Surrey. At the time of the accident, they had owned their home for about eight years. Three of the plaintiff's children aged 16, 15 and 11 continue to live with her; her eldest daughter resides in Pennsylvania and her eldest son is in the Armed Services.

**The Accident**

**6**  The plaintiff testified that she and her daughter were returning from Chilliwack, travelling west on Highway 1 and apparently exiting onto 200th Street. She was in the front passenger seat of her husband's 2004 sedan. She could not recall what happened or the name of the street they were on at the time of the collision. She said it was raining heavily and their car had stopped at an intersection waiting for the lights to change. She said: "I only saw a black thing coming towards us" and heard a "boom". Later in her testimony she said she had not seen the car.

**7**  Curiously, she told her family doctor, Dr. Benitez the impact was a T-bone collision. This report is against all of the evidence about the impact.

**8**  The defendant said he was travelling southbound on 200th Street intending to enter Highway 1 eastbound. He was travelling between 50 and 60 km/hr and attempting to change into a lane of traffic to his left. Notwithstanding that he made a shoulder check, he did not see the plaintiff's motor vehicle. He realized the presence of their vehicle when he heard a slight scraping noise. He said the force of impact was minor. There was relatively little damage to his motor vehicle.

**9**  The plaintiff had no cuts or bruises as a result of the impact, stating only that her forehead was red. She said she remembers nothing after the impact; she maintained at trial that she lost consciousness in the accident and her next memory was being at the hospital, where she recalls being hot and shaking. At her examination for discovery on October 2, 2012 (the "discovery") she gave an alternative narrative: she said she woke up in the ambulance before reaching the hospital; at trial she disavowed this version and testified she made a mistake at the discovery.

**10**  Regardless, her testimony regarding having lost consciousness is against the evidence of her daughter, the ambulance attendants and the hospital records recording her responses to their questions, all of whom reported her as being conscious. When confronted with the hospital records in particular, which included answers that she was unemployed and had not lost consciousness. She testified she could not recall being asked those questions and that it was impossible she gave those answers. On those records her last name was recorded as "Betanco".

**11**  With regard to this issue, I do not believe the plaintiff's evidence that she was rendered unconscious or that she informed staff that she had lost consciousness at the time of the accident.

**12**  In chief, the plaintiff testified that she had remained in hospital overnight and was released the next day. She said she was released the next morning because they were doing x-rays and she was crying and her back hurt. On cross-examination she could not explain hospital records indicating that she was admitted at 12:20 p.m. and discharged at 2:55 p.m. She also testified that when she left the hospital it was dark; either the night or the late afternoon. This of course contradicts her earlier evidence that she left the hospital the following morning.

**13**  I am satisfied that the plaintiff is incorrect in her assertion that she remained in hospital until the day after the accident.

**Pre-Motor Vehicle Accident Work History and Health Status**

**14**  The plaintiff testified that before the accident she was healthy and well except for adult onset diabetes which was discovered when she was pregnant. Otherwise, she testified, she had "no other health problems".

**15**  A review of her pre-accident health and work history suggests otherwise.

**16**  The plaintiff's first job in Canada, when she lived in Vernon, was culling apples and cherries. Soon after she got a job plucking chickens for a commercial poultry business. While performing her duties in June of 1992, she suffered a work injury to her right hand. By 1994 this injury became disabling.

**17**  She was diagnosed with a tumour in her arm in March of 1995. This condition was treated with chemotherapy, and while currently asymptomatic, she is concerned "it is still there". After this treatment she was diagnosed with a permanent disability and unable to work.

**18**  The plaintiff was off work for two years due to her tumour. Shortly after she began receiving homemaker assistance and disability payments from the Government of British Columbia ("BC"). Later, she applied for and began receiving Canada Pension Plan ("CPP") disability pension benefits. She remains on that disability pension to the present; she receives $1,195 per month, including $700 which she said is attributable to her children's entitlement.

**19**  Despite her declaration of ongoing disability, she returned to work in mid-1997. Her work history is reviewed below.

**20**  In 1998 she was denied continuing social assistance benefits by the Province. She appealed the termination of those benefits, and in October 2002, BC re-confirmed her entitlement to disability benefits including homemaking and financial assistance. This reinstatement was done without the knowledge that she had returned to the workforce, where she now claims she continued earning income until the date of the accident. However, the benefits paid by BC were stopped in 2004 after a 2003 investigation in which BC discovered she had fraudulently failed to declare support payments from her husband.

**21**  I infer from those facts that the plaintiff was separated from her husband sometime in 2003 or 2004.

**22**  In April 2001, the plaintiff was awarded Workers' Compensation Board ("WCB") benefits based on 2% of a total disability due to her work injury in the chicken plant.

**23**  The plaintiff testified about her work history prior to the accident. This evidence was imprecise and confusing. In describing the work she did before she was injured, the plaintiff testified she was employed at the Royal Columbian Hospital in a casual/part time position assisting in cleaning and meal preparation; it is not clear when she began or ended her employment at that hospital. Afterwards she worked cleaning offices, commercial buildings and residences in association with several cleaning businesses. She said she was doing this work at the time of the accident.

**24**  In addition, she explained she operated her own housekeeping/cleaning business. She said her duties involved cleaning four houses, spending three hours cleaning each house and doing so three times per month. She was paid $18 per hour, resulting in a monthly income of $648. She did not provide many details about her cleaning business. She had no records and declined to identify her clients although in re-examination identified the surname of one person.

**25**  The plaintiff also worked for the New Westminster Pentecostal Church preparing meals. She would produce approximately 200 dishes four times per month, which she sold to the church for $4 each. If this pattern of work persisted throughout the year, she would have earned $3,200 per month, but she provided neither confirmation of the amount she earned nor the duration of that work.

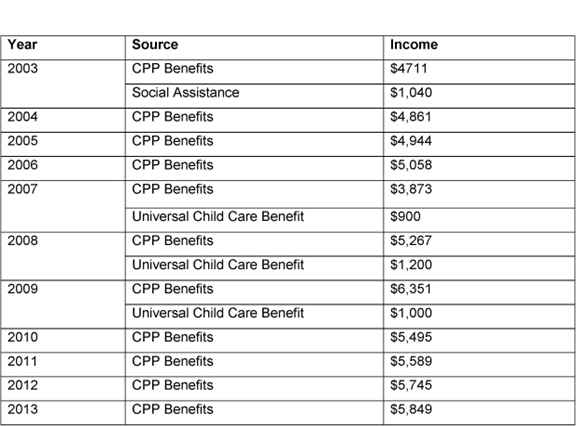
**26**  She also prepared wedding cakes and other celebratory cakes. She testified she would prepare approximately five or six orders per month for between $55 and $120 each. This effort would have yielded between $275 per month and $720 per month.

**27**  The plaintiff also worked as a painting decorator on a casual basis, usually paid $475 per project. She did not describe the frequency of this work.

**28**  Finally, the plaintiff was involved in a vacuum cleaner sales business. She was employed for approximately four to five years by "Lou's Company" and was paid $500 per unit. She typically sold two vacuums per month.

**29**  Although her evidence about her work history was not clear or complete, it appeared to me that she may have earned, by her testimony, as much as $5,000 or $6,000 dollars per month before the accident.

**30**  The plaintiff's reported income for 2003 to 2013 are as follows:



**31**  During these years the plaintiff did not report to the Canada Revenue Agency ("CRA") any income from employment or other sources notwithstanding her claim that she worked throughout this time.

**32**  Away from work, the plaintiff's leisure activities included volunteering at her child's school day trips. She would exercise at the Newton gym, bicycle and run. She did not drive. At home, she was able to clean her house including vacuuming and all other necessary chores, though she had some help with the laundry.

**33**  Despite at least one separation, the plaintiff testified that her relationship with her husband before the accident was sweet and normal.

**34**  She denied having many of the chronic physical pain or disabilities she now complains of, with the exception of her hand (which she says is now worse). She likewise denied having any problems sleeping before the accident and said she did not take any sleep medications - her medications were limited to those used to treat her diabetes.

**35**  She said that prior to the motor vehicle accident she had no psychological or emotional problems and had seen a physiatrist once post-partum, because her diabetes did not go away after the pregnancy. She said that in the year before the accident she did not feel depressed or sad.

**36**  She likewise denied she was "a worrier" or an "anxious" person before the accident, as her daughter reported to the ambulance attendants.

**37**  For reasons referred to later, I do not accept the plaintiff's evidence.

**Post-Accident Life**

**Injuries**

**38**  Since the accident, the plaintiff reports a wide range of serious injuries. These injuries include:

1. Continuous headaches that have not lessened since the accident;
2. Pain in her jaw extending from her ear to her chin. She said she first noticed this jaw pain one month after the collision, and that since then it has been constant, though it wavers in severity;
3. Neck pain that has been "there all the time" since the accident, without change. She described the pain as starting from her neck and shooting down her spine to her lower back and right leg. She also described "noises" her neck has made since the accident. Her symptoms worsen with activity or if she straightens her trunk in bed. She has received injections which seem to have lessened the pain a bit, but overall there is no improvement;
4. She said there is pain over her head which has not improved or changed since the accident;
5. Problems with pain in her shoulders;
6. Pain in her arms, but not in her elbows or hands;
7. A feeling of "pressure" in her upper back all the time and without change since the accident;
8. "Horrible" pain in her lower back that has seen no improvement and is only slightly lessened with medications. This pain worsens if she tries to walk, to such an extent that if she walks a distance more than the width of a room, she is "done". She had surgery to her lower back in 2012 to address these issues, but she says things have worsened since this surgery; her intake of medicines and pain reducing measures has only increased. She has also complained of bladder control issues since the surgery;
9. Pain in her right leg. She claimed this pain started about three months after the accident, when the leg became "really swollen". Presently, she reports her right leg as constantly numb, that numbness extending to her right foot. She also feels a tingling in her knee. She also reported her legs and hips hurting if she opens them.

**39**  The plaintiff also claims that she has suffered serious psychological and emotional consequences as a result of the accident.

**40**  She said she has flashbacks to the accident and lives in terrible fear of riding in cars. These fears started immediately after the accident. She described having panic attacks if driving in a car with her husband or children. She also has difficulty watching television depicting accidents. She travels less now and to accommodate her fears she rides in taxis rather than personal cars.

**41**  She also described recurring hallucinations which started three months after the accident. In these hallucinations she hears voices and sees cars coming in the direction of her house.

**42**  Since the accident, she feels depressed and has a poor appetite. She has had suicidal thoughts and made a plan to end her life. She also reported that her temper has been worse since the accident.

**43**  The plaintiff said the effects of her accident have caused problems in her marriage. Since the accident, she and her husband have had no intimate relations and have started sleeping in separate beds. She has kicked him out four times, at which times he has stayed away two to three days before returning.

**44**  Since the accident the relationship with her children has varied. As described below, she maintains the children help out with chores in ways they did not before the accident. She is short tempered with the children and on one occasion they called the police because she kept yelling at them.

**45**  Regarding sleep, the plaintiff reported that she has had problems falling asleep since the accident. She has taken medication to help her sleep. She cannot sleep through the night, and on waking requires additional pills to help her fall back to sleep. These issues have become worse since her 2012 surgery, which she maintains necessitated her buying a new bed. She does not have a regular sleep schedule and finds herself fatigued during the day.

**Daily Routine and Activities**

**46**  The plaintiff claims her daily routine has been restricted since the accident as a result of her injuries.

**47**  Her typical day begins with her husband helping her down the stairs to the main floor of their house. She is able to walk up and down the 12 stairs connecting each level of her residence. From there, she often sits in and moves with the assistance of an electric wheelchair she acquired eight months after the accident. She said she can only stand five to ten minutes a day, and that her spine hurts if she uses any other chair. Her need for this chair has restricted her mobility - she can only travel with her children because they are capable of loading her wheelchair into a car.

**48**  To deal with her pain, she uses a back brace and applies ice packs. Otherwise, she is on a number of medications. Some of these medications cause her to shake and she has allergic reactions to Lyrica, an anticonvulsant. Other medications have made her unable to see, and all upset her stomach.

**49**  Her leisure activities have all been affected by her symptoms. Her children have to brush her hair and help her dress; as a result she has cut her hair short and no longer wears skirts or high-heeled shoes. Her husband must also assist her with travel and in other personal care. She has stopped going to parties and to church and avoids children's activities. She has done some travelling, taking a four day trip to attend her son's promotion from the military Academy in Montréal and a one-month vacation to Pennsylvania where her daughter, Claudia, currently lives. She testified that she took her wheelchair on each of these trips.

**50**  Her physical activities are restricted. She has difficulty reaching over her head and when stretching feels a pinching in her neck. Crouching hurts and squatting is difficult but she is able to hold that position. She has difficulty when kneeling and requires assistance to stand up. She said climbing up and down stairs is awful; ascending the stairs is more difficult than descending.

**51**  She is unable to exercise due to her pain, but has lost weight, going from 200 lbs at the time of the accident to 167 lbs at the time of trial.

**52**  She described difficulties she encounters when driving. When her husband is driving she said "I throw myself at him and tell him to stop". She does not like watching television because there are too many accidents.

**53**  Her children give her pleasure but she struggles with a bad temper and is often unfair to them.

**54**  Respecting house work, the plaintiff reported that she has difficulties contributing. She reports being able to do her own laundry, wash dishes, and can do some sweeping. She is able to cook when she takes morphine. Otherwise the children and her husband do the vacuuming, most of the cooking, clean the washrooms and are responsible for their own laundry.

**55**  The family was previously assisted by a woman, Conchita, who lived in the home before the accident. She moved out before the accident.

**56**  For approximately one year after the accident the plaintiff employed a woman who came four hours per day to look after her children and otherwise assist in the home. She paid $425 per month for this assistance.

**57**  Except for a brief time immediately after the accident, the plaintiff has not worked since 2008.

**58**  The defendant vigorously challenges the plaintiff's claims concerning her pain and incapacity. The issue of her current capacity to perform work or domestic tasks was addressed, in part, through the introduction of surveillance footage and social media postings.

**59**  Ms. Lacayo admitted she is the person shown in the surveillance footage taken in February, March and April of 2015. She is shown walking independently in a mall parking lot and in front of a residential complex. She is also seen carrying bags in her right hand and sweeping her front porch for two to three minutes. These videos show her able to move her arm freely and to walk and bend fluidly. In general, the observations of the plaintiff on the videos are inconsistent with her evidence, appearance and demeanour at trial.

**60**  The defendant also referred the plaintiff to several Facebook postings which appear to show the plaintiff in somewhat happy and relaxed circumstances after the accident. She testified that some of these images were pre-accident images but several of the pictures appear to be post-accident. Nonetheless, such "snapshots" should be addressed carefully and should not be overly relied on in determining a party's credibility or state of mind: see *J.D. v. Chandra*, [*2014 BCSC 466*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61V4-00000-00&context=) at para. 108.

**Analysis**

**Credibility**

**61**  The plaintiff's problems in this case mirror those described by Finch J. (as he then was) in *Gagnier v. Canadian Forest Products Ltd,* [*1991 CanLII 143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X2XM-00000-00&context=) (B.C.S.C). In that case the Court said:

As counsel for the defence so bluntly, but so accurately put the matter, Mr. Gagnier has demonstrated that he will lie when it is to his economic advantage to do so. He has done so in many ways, to many people, for a long time. He has lied to his accountants, to Revenue Canada, to the Unemployment Insurance Commission, and to his trustee in bankruptcy. I have no confidence that anything he told me was reliable or true. I feel bound to disregard Mr. Gagnier's evidence altogether insofar as it touches on his claim for damages.

**62**  Much of the plaintiff's evidence simply lacked credibility and reliability and cast a shadow over all of her evidence. Her history of defrauding BC, CPP and the CRA seriously undermined her evidence.

**63**  Credibility issues in her evidence also affected the assessment of the opinions given by many medical experts whose opinions tried to explain the plaintiff's current presentation in connection to the motor vehicle accident. These issues are developed below.

**64**  The plaintiff's credibility and reliability issues include the following:

1. The plaintiff exaggerated and overstated aspects of her evidence. Her characterization of the effects of this accident were exaggerated and her pre-accident health problems understated. As an example, she said that she saw a black object coming towards her and after the collision thought she was dead. She also told her family doctor, Dr. Benitez, the impact was a T-bone collision. In fact, this accident was a mild to moderate impact collision involving two cars coming together side by side while travelling in the same direction. Nothing in the circumstances could reasonably have led the plaintiff to think that she was in mortal danger. Contrasting her initial testimony, later in her evidence, she acknowledged that she had not seen the defendant's vehicle before impact.
2. The plaintiff has a long history of fraudulent schemes to obtain money from public bodies based on representations that she was totally disabled from working commencing in 1994. In October 2005 she was convicted of defrauding BC of $115,277 over a ten-year period relating to a disability pension she received when she was able to work and working. She was given an 18-month conditional sentence and ordered to pay restitution of $65,000 by June 25, 2006.

On March 17, 2007, BC obtained a default judgment against the plaintiff for $120,948 in respect of benefits she had unlawfully received from them. On April 12, 2007, the plaintiff made an assignment into bankruptcy and was discharged on March 11, 2009. The plaintiff also attempted a fraudulent transfer of her interest in her family home in a scheme which saw the family purchase a new house and put the majority interest in the names of her daughter and husband, providing her a 2% ownership interest; this transfer was subsequently reversed.

1. The plaintiff applied for CPP disability benefits in July 1995, stating that she had been unable to work since November 1994 due to a right-hand injury caused while working in a poultry plant and the subsequent detection of a tumour in her arm. In making the application, the plaintiff agreed to notify CPP of any change that might affect her eligibility for benefits including an improvement in her medical condition and a return to full-time or part-time work; she was entitled to keep a threshold level of income with the reporting of those earnings to CPP In mid-1997, the plaintiff returned to work. In 1998, she obtained further CPP pension benefits for her child Carmen.

In April 2001, the plaintiff was given a partial disability award from WCB based on 2% of total disability relating to an injury to her right hand.

In 2004, CPP had informed the plaintiff that she no longer qualified for a disability pension. They suggested that she was capable of some form of light work. In September of that year, the plaintiff wrote to CPP advising that her medical condition had not changed and she could not return to work. Her letter stated as follows:

I am writing to you because I do not like the decision that is being made. My medical situation has not changed for the better. I have to intake many pills:

Tylenol #3 every four hours

Celebrex 200 MG every four hours

Naproxen 375 MG twice daily

Cyclobenzaprine 10 mg one tablet at bedtime

not only that but I am also diabetic(Type #2) and my blood pressure drops suddenly if I don't have enough rest and take care of myself. This being the case I cannot work especially with my haemangioma in my right wrist and am limited in my capabilities. I cannot go back to work, and I need my pension to survive, for myself and my children. Please don't take this away from me.

Dr. Benitez and Dr. Tesler-Mabe provided opinions that she was unable to work due to her major depression with psychotic features and chronic pain from her right wrist. She wrote this statement and elicited these diagnoses notwithstanding the fact that she had at that time been working for seven years.

In receiving CPP benefits, the plaintiff was also required to report to CPP any income above a threshold amount in a calendar year. The threshold for reporting income has increased over the years, but was $7,200 in 2014. She was aware of these requirements, stating at trial "they [CPP] let you earn a little bit". The plaintiff's testimony placed her earnings well above these reporting thresholds. In defending her non-reporting the plaintiff said that all of the income she was earning before the accident was paid to her in cash without deductions for tax, employment insurance and CPP contributions. She challenged the need to declare this income, rhetorically asking "how can I declare income when there are no deductions made?" She would not directly answer the question when it was put to her that she failed to report her earned income to avoid losing her CPP disability payments.

Moreover, the plaintiff neither reported her income to the CRA from 1994-2014 nor informed CPP or BC of her health improvements or return to work, or the income she earned from it. In fact, it is apparent from the records that she informed BC that she had not been working before her statement in 2004.

1. The plaintiff was interviewed by Home Health Rehabilitation, a community therapist company, to provide recommendations for the plaintiff's rehabilitation plan. Notwithstanding the recommendation of physiotherapy intervention, the plaintiff lied to the physiotherapist, Ms. Rodriguez, telling her she was going to be away on holidays for three months to explain why she would not to be able to take the recommended treatment.
2. If I could accept the plaintiff's evidence concerning her multiple income sources in the years prior to the accident, she would have earned significant income in those years. However, she failed to report any income, other than her government-funded benefits, from 2003- 2008. Thus, the plaintiff avoided her reporting obligations and likely failed to pay some income tax, employment insurance obligations and Canada pension remittances.

**65**  When cross-examined on these points, she repeatedly deflected the questions with related but unresponsive answers. On the issue around her fraudulent conduct with CPP I found the plaintiff evasive and untruthful. In my view, the plaintiff clearly was aware of her obligation to report changes in her employment status, health and income. She continued fraudulently receiving disability benefits even after her criminal conviction. In spite of the fact that she has advanced claims in this case for future income loss she continued to take these benefits before and after the date of the accident.

**66**  Moreover, her description to the court of her pre-accident working history was confusing, inconsistent, unreliable and untrustworthy. In addition to the lack of income tax reporting, the plaintiff did not produce any records at trial concerning her work, income or expenses. At one point, the plaintiff was asked to identify some of her house cleaning clients. She refused to identify these people before and during the trial with the exception of offering the surnames of three women who employed her. I conclude that the plaintiff was well aware that waiting to identify these people so late in the process meant her evidence could not be tested or investigated.

**67**  As she was cross examined her attitude was somewhat defiant and indignant; she accused counsel of "harassing her about the past". She said she was "here for my children" and, concerning her fraud conviction, insisted "I paid the government back".

**68**  Despite these shortcomings in her testimony, she declared she was entitled to the full of the amount claimed in this action. When specifically asked if she felt entitled to both a wage loss claim against the defendant and the CPP disability benefits she had received since 1995 she said "I don't know how to answer that question". When challenged further on her failure to declare her ability to return to work and report her income, the plaintiff responded "I am not a thief; I pay my taxes as any human being". When challenged on the truth of that statement she replied, speaking in English, "I need to respect myself as a human being". She appeared to feel justified in her position because, as she stated, "[m]y pain is my pain. Someone has to pay for my back". The impression I received throughout her testimony and demeanor is that the plaintiff has no grasp of the truth and she is prepared to do or say what is required to obtain compensation.

**69**  The plaintiff argued that although the court can consider her criminal conviction for welfare fraud, the fact that she provided restitution is a factor to be considered. She recognizes that her failure to declare her work income or changes in health to CPP are problematic. Evidence of remorse or insight may limit the prejudicial effect of prior convictions: *Fast Trac Bobcat & Excavating Service v. Riverfront Corporate Centre Ltd.,* [*2009 BCSC 268*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3RY-00000-00&context=). In this case, the Court said:

[23] In some cases, a conviction that is 20 years old should be given limited weight. This may be the case if the person, by his or her conduct in the years following the conviction, has demonstrated good, honest behaviour and shown remorse and insight into the harm caused by the conduct in issue.

**70**  This argument may have currency in a case with different facts. In this case, the plaintiff's conviction for fraud and repayment of those monies under compulsion happened only two to three years before the accident. More importantly, the plaintiff continued to defraud CPP notwithstanding her recent conviction for defrauding BC. Rather than showing remorse or insight, the plaintiff revealed an ongoing appetite to obtain whatever benefit was offered in spite of the fact she said her health improved and she was earning significant income.

**Pre-Accident Condition**

**71**  Under cross-examination the plaintiff said:

1. She had no sleep problems before the accident;
2. Before the accident she took no medications for sleep problems;
3. Before the accident she was healthy except for her diabetes.

**72**  Counsel referred the plaintiff to her PharmaCare records that record medications purchased by her before the accident. These records confirm that on November 24, 2008, she received prescriptions of Metformin (diabetes), Bisoprolol (high blood pressure), Diovan (high blood pressure), and Lipitor (cholesterol), among other drugs. She received a similar list of prescription medications three times in November 2008.

**73**  She acknowledged receiving additional prescription medications including:

1. Restoril, insomnia medication, prescribed on September 29, 2008, and again on November 24, 2008;
2. Zytran Excel, insomnia medication, prescribed on October 28, 2008;
3. Ratio-Emetic, which was prescribed on September 30, 2008. She did not know what this medication was but was reminded by counsel that the medication is more commonly known as Tylenol 3 with Codeine. She received a prescription of 100 pills two months before the accident. She said she told her doctor that her tumour hurt a lot and he prescribed Tylenol 3.

**74**  This medical evidence is in stark contrast to the plaintiff's testimony that except for her diabetes she was healthy, had no sleep problems and had no pain in her arm. When asked why she had said earlier she was only taking medications for diabetes, she replied "one can't remember everything".

**75**  Counsel asked why the plaintiff had denied taking sleep medications before the accident. She answered "yes, but not like now". She responded at other times, in dismissing the line of inquiry, that she could not remember what caused her issues or, more generally, that "one cannot remember everything, these documents refresh my memory". These answers were not entirely responsive to the questions, but clearly indicated that she was untruthful in her earlier testimony that she had no sleep problems before the accident.

**76**  Regarding her pre-accident physiological problems or depression issues, the plaintiff was prescribed:

1. Effexor, an anti-depressant, prescribed in May of 2004;
2. Celexa and Remeron, both anti-depressants, prescribed on October 6, 2008;
3. Temazepam, Mirtazapine, Citalopram, and Risperidone, all anti-depressants prescribed on November 2008.
4. Trazodone, an anti-depressant which she said aided her in falling asleep and which was prescribed in October, November and December. Trazodone was prescribed four days before the accident;

**77**  The plaintiff confirmed that before the accident she had taken the advice of a psychiatrist for depression. She explained she was sad because her eldest daughter had moved away from her home (though this is inconsistent with her and her daughter's evidence that her daughter moved after the accident) and she was concerned about the scholastic performance of three of her children continuing to live with her - apparently she was worried the children were not performing well at school. She otherwise sought to explain away her earlier testimony that she was not depressed or being treated for depression in a similar manner to that relating to her sleep issues.

**78**  The plaintiff also admitted that she experienced headaches before the accidents, but similarly argued that those headaches were not the same as the ones she has now. She was likewise impeached on her statement that her previous headaches were not limited to when she had a cold; when her attention was brought to the transcript of such testimony at her discovery, she denied she had made the statement.

**79**  To explain this contradiction, the plaintiff said that she could not recall the answer she had given at the discovery and that there are many things she does not remember. She eventually agreed that she did have headaches in the month before the accident, but they were small, acute pain headaches. She was asked about the frequency of those headaches and declined to answer fully; she said they would go away and come back.

**80**  She confirmed that there was an occasion in early November 2008, when she had such severe headaches that she went to St. Paul's Hospital for a CT scan. She could not remember when this visit was, but the clinical records indicated it was 27 days before the accident. The records described her symptoms as unrelenting headaches lasting three weeks.

**81**  In reviewing the plaintiff's more distant physical history, she was asked about comments in Dr. Benitez's clinical records:

1. 2003: In 2003 there was a September entry that the plaintiff had slipped and injured her back. At this appointment described suffering crying spells, difficulties sleeping, and a reduced memory and inability to concentrate;
2. 2004: In 2004 there were eight entries referencing stress and depression. At an appointment on March 29 she described experiencing visual and auditory hallucinations and was suffering from stress and a depressed mood. She also described, in June, the revelation of her welfare fraud and complained it was causing her considerable stress and anxiety, reporting that she was experiencing a loss of sleep, crying spells and depression. There were six entries concerning pain in her right wrist, describing it variously as painful, swollen, numb, and tingling. She complained of having a sore neck on a number of occasions, once going to a chiropractor. She also complained of a pain in her low back between August and November;
3. 2005: In March of 2005 there is an indication that the plaintiff was in an accident and dragged by a taxi. She apparently landed on her shoulder/hip and legs. At trial, she denied this event happened or that she reported it happening to Dr. Benitez. Also in March, she complained of suffering stress, headaches and fatigue and was contemplating surgery be performed in April by "Dr. Dole". She could not recall Dr. Dole. In July, the plaintiff reported she began experiencing groin pain. The doctor recorded right hip pain. She said she had a "ball" in her left hip. She said it was not her hip but her neck that was a concern. This groin pain was recorded again in November, where she again reported feeling stressed and anxious;
4. 2006: In January of 2006 she described her family situation as serious and said a divorce was imminent. She reported feeling depressed and strained. In April her legal difficulties over the welfare fraud began. She was facing the payment of $65,000 due to the fraud. She was under stress and was seen by a court-appointed psychologist. Reports of stress related to the court process and her cancer were recorded again in May, August, and December, at the last of which she again reported difficulties sleeping and crying spells. In May, she also complained of a back pain she had been suffering under for at least two weeks;
5. 2007: In January she received an injection for her right shoulder. She relates this injection to the pain and discomfort related to her cancer. She said that she received one or two shoulder injections, and that one of these was just before the accident. Complaints of her shoulder re-occurred in February, April, May, and June. Through this time she also complained of pain in her right hand, rotator cuff, in her temporomandibular joint (which she believed was just "ear pain"), and rotator cuff tendinitis. In February she had fallen and reported injuring her lower back. She described falling again in December of 2007, where she reported suffering lower back pain in the lumbosacral region. Finally, through the year there were also two entries regarding jaw pain, two entries regarding frequent headaches, and two entries related to stress and depression;
6. 2008: In February reports of pain in her right shoulder and arm continued. Arm complaints were repeated in February and May. She received injections for these issues in August but complaints continued in September and October, at which time she requested analgesics. She complained of right groin pain in August and September and was prescribed x-rays. Finally, she also complained of stress, reduced energy and concentration, attention and memory in July, and reiterated these complaints in September, at which time she was prescribed the medications reviewed above.

**82**  Throughout cross-examination, the defendant pointed to the many inconsistencies in the plaintiff's evidence and in the information she communicated to the experts concerning her pre-accident condition. Suffice it to say, it is difficult to reconcile the disparity between the plaintiff's report of her pre- and post-accident condition. The effect of these discrepancies on the proof of her damages is addressed below.

**Lay Witnesses**

**83**  The plaintiff's husband Nelson Saborio testified. He was a passenger in the car at the time of the accident and because of receiving some ophthalmological drops his eyes were closed. He felt the impact of the collision but did not see the other car. He said his wife screamed and cried but he heard nothing else.

**84**  He said he was not aware she received social assistance benefits from 1994 to 2004 although they were living in the same house at the time. He did not know about her WCB pension or her receipt of CPP benefits.

**85**  He did not know about the plaintiff's use of antidepressant medications, sleep problems and other physical ailments extent at the time of the accident.

**86**  Mr. Saborio generally confirmed some aspects of the testimony of the plaintiff. In particular, he said after the accident she was limited in her activities (discussing the new difficulties she had with cooking and walking) and that she seemed to be in additional pain. He said that the changes in her activity seem to be accompanied by increased expressions of pain.

**87**  He does not see any significant changes in her mental functioning.

**88**  He confirmed that before the accident their relationship was happy, though not always harmonious (admitting he knew she discussed divorcing him), but since the accident they have argued strongly. He does not enjoy the time he spends with the plaintiff. He echoed of the plaintiff's comment that their intimate life has ended.

**89**  The plaintiff does not have a driver's license. For a few months after the accident Mr. Saborio was unemployed and was able to drive her to appointments. After he obtained his new job, he said he has taken time off of work to drive the plaintiff to medical appointments. He has not kept an accurate record of the time off but was able to make up time missed. He finds her difficult to drive with because she often screams at him.

**90**  He added that since the accident he believes the plaintiff is more aggressive and argumentative and her behaviour towards the children has changed. She often becomes angry with them.

**91**  However, Mr. Saborio's testimony diverged from the plaintiff's in some respects. He agreed that the plaintiff's right hand and wrist caused her difficulties, but said she had difficulties cooking, cleaning the house and combing her hair before the accident. He said the plaintiff could cook but not every day. The balance of the cooking and the cleaning was done mostly by the children and himself.

**92**  He did not know that the plaintiff was working as a house cleaner at the time of the accident nor what income she might have received. He was aware that the plaintiff had sold some vacuum cleaners.

**93**  He denied that there was a woman named Conchita living in their basement at the time of the accident. He said the plaintiff told him Conchita helped with the housework and cooking and with the children sometime before the accident.

**94**  Further, he denied the plaintiff had any paid help after the accident.

**95**  The plaintiff's daughter Claudia Gumina testified. Ms. Gumina was driving the car in which the plaintiff was a passenger at the time of impact. She made some observations of her mother complaining of pain after the accident.

**96**  She said that before the accident everyone around the house did chores but the plaintiff did the majority of housework including cooking, laundry and mopping floors. She said her father did the yard work.

**97**  Regarding her mother's post-accident condition, she said that her mother cannot move the same way she did before the accident. She moves slowly and is unable to reach things and bend down. Her observations have been limited, however, as a few months following the collision Ms. Gumina moved to Thunder Bay and has returned only for short visits since.

**98**  After her mother's surgery Ms. Gumina visited her and stayed for approximately two weeks. She helped her with bathing, haircare and cooking. She worked approximately three hours per day. The plaintiff also visited Ms. Gumina in the United States in August 2013, reporting she came with her wheelchair.

**99**  She described her mother as becoming a little sad when she moved to the state of Pennsylvania in 2011. She was not familiar with the plaintiff's psychiatric treatments, though she observed that the plaintiff was distressed when diagnosed with diabetes and observed her as being sad and depressed and seeming to take more medications after the accident.

**100**  She keeps in touch with the plaintiff via Facebook and identified a number of photographs recorded since the accident. These photos were of little assistance but did reflect the plaintiff in happier circumstances than she appeared at the trial.

**101**  The plaintiff's son Jeremiah testified. He described his mother's activity in the home before the accident and changes he has observed since the accident. He said he did not know that the plaintiff had any health problems prior to the accident. He confirmed that she is now mentally and physically limited and seems to have a shorter walking stamina. He also finds his mother is more paranoid when driving with him in a car.

**102**  Garth Geddes, who ran a family business selling vacuum cleaners, also testified. The plaintiff worked for him in this business for about one year around 2005. He said that she sold approximately six vacuums and earned around $2,500. She also attended company sales meetings. Before the accident he felt she seemed lively and appeared to have good energy and did not remember her exhibiting any physical disabilities.

**Medical Opinions**

**Physical Evidence**

***Dr. Borhorquez***

**103**  Dr. Borhorquez is a physiatrist who was retained to provide an independent medical opinion concerning the plaintiff's health. He met with her and performed assessments on August 18, 2011, January 23, 2014, and March 13, 2014.

**104**  In his first report, dated January 4, 2012, Dr. Borhorquez gave opinions about the diagnosis of the plaintiff's injuries, causation of those injuries and her residual disability and limitations. He observed that the plaintiff demonstrated excessive pain behaviours during his examination.

**105**  He reviewed the plaintiff's background health circumstances with her; she reported having Type 2 diabetes and hypertension and denied any previous neck or low back pain. He was not informed of her long-running complaints regarding several areas or that she received recent left shoulder injections. He did not know that she had received a WCB pension, social assistance from BC, or a CPP disability pension for an ongoing disability associated with her right hand and arm and mental health problems.

**106**  He said that it was difficult to assess how much of the plaintiff's pain was due to her degenerative changes and how much was due to muscle pain. His assessment was that her excessive pain behaviours were interfering with her recovery. He found she had poor psychological coping mechanisms and was suffering from chronic pain. This pain was contributed to by her lack of physical activity, which has resulted in her becoming deconditioned.

**107**  He did not find any evidence of an S1 nerve root injury, weakness in her ankles, or sensory loss in her S1 dermatome.

**108**  Regarding her psychiatric conditions, Dr. Borhorquez believed she had developed a major depressive disorder since the accident because of her poor ability to cope with symptoms.

**109**  Dr. Borhorquez believed that her symptoms are related to the motor vehicle accident. He came to this conclusion recognizing she had episodes of back pain that were self-limiting before the accident.

**110**  Regarding the treatment of her physical injuries, he noted that trigger point therapy had been successful, albeit to improve her function rather than eliminate her pain. Those injections can be performed every two to three months and recommended they be done for symptom relief. He also believed that a stretching and strengthening program could help her resolve her muscle pain. Core strengthening would help her mechanical neck and back pain and in the result he recommends she attend a gym and the assistance of a kinesiologist for five sessions.

**111**  He referred the plaintiff to a pain clinic at the Jim Pattison Outpatient Care Centre in Surrey. This multidisciplinary program would likely have focused on therapies to improve her function. He further recommended a tapering off of the opioid medications she was receiving. No information from the outpatient clinic was put into evidence.

**112**  He believes she has become deconditioned because of a lack of physical activity that relates to her neck, low back and lower extremity pain. He concluded that she would not be able to return to work as a housekeeper or in positions demanding use of her neck, low back and right leg, and her employment options are thus limited. He infers that her best chance of returning to the workforce is retraining in a less physically demanding occupation but expects she will need flexibility in the workplace.

**113**  To address both her psychiatric and pain issues, he recommended continuing psychiatric help and cognitive behavioural therapy, suggesting five of such sessions would be reasonable.

***Dr. Benitez***

**114**  Dr. Benitez prepared two medical reports tendered by the plaintiff at trial. His first report is dated February 12, 2011, and the second January 9, 2015. A third report prepared by the doctor was introduced during cross-examination.

**115**  In his 2011 report, Dr. Benitez diagnosed the plaintiff with whiplash, thoracic and lumbar strain, post-traumatic stress disorder, and a right arm/forearm contusion.

**116**  He was concerned about the unusual exacerbation and peak of symptoms and muscle spasticity affecting her neck muscles and trapezius muscles. She also had an exacerbation of her right shoulder and right hand pain and was also complaining of excruciating (10 out of 10) right-sided low back pain.

**117**  She had two physiotherapy treatments. He insisted that she do strengthening exercises, stretch and apply heat to treat symptoms and encouraged her to lose weight. He recommended non-impact exercises such as bicycling and swimming. She did not follow that advice.

**118**  Nevertheless, by January 2011 her cervical spine was between 60 and 70% improved, although she complained of ongoing severe neck and upper back pain

**119**  Ongoing bilateral back pain became the most significant symptom aggravating her pain to an intensity level of 10 out of 10. She received spinal injections to the right lumbosacral region but the resulting improvement was brief. She had also been prescribed Tramadol or Acetram for flare-ups of her right arm, right shoulder and right elbow pain. She also had a vascular malformation of the right arm which required medications.

**120**  He recorded that she had flashbacks relating to her accident and some auditory hallucinations.

**121**  He suggested she use a power wheelchair for occasional use only when severe pain interfered with her mobility. He also had recommended she obtain an orthopedic bed to assist in restorative sleep.

**122**  Beyond these treatments and recommendations, he referred the plaintiff to Dr. W. Gittens, a neurosurgeon to address her low back complaints. Dr. Benitez followed the plaintiff's progress post-surgery with Dr. Gittens. He also monitored of the plaintiff's progress with Dr. Mallavarapu.

**123**  In forming his diagnoses and reviewing these treatments, Dr. Benitez's only mention of the plaintiff's medical history was "of hypertension and diabetes mellitus type II"; there was a note relating to her medical history of depression, beside which he opined she "was at the moment of the MVA frail and a much higher risk to develop posttraumatic stress disorder and depression than the average population".

**124**  His report did not review the details of her medical history concerning depression, shoulder pain, arm pain, back pain or headaches. As addressed in his cross-examination and reviewed above, his pre-accident notes were replete with references to these observations.

**125**  The plaintiff also relied on Dr. Benitez's January 9, 2015 report. However, the defendant argues that this report should not be accorded any weight because Dr. Benitez violated his duty not to be an advocate for the plaintiff. The defendant contends that Dr. Benitez failed to disclose the medications the plaintiff was taking at the time of the accident and the multiple injections into her right shoulder and elbow that had been delivered in the two years before the accident. He made no comment on whether her ongoing pain control regimen was altered by the accident.

**126**  The defendant also points to a report Dr. Benitez prepared dated December 21, 2014, an early draft of his January 9, 2015 report which was not served, as a demonstration of this bias. Dr. Benitez was cross examined on his draft report and a number of inappropriate comments were identified.

**127**  First, in the December report, Dr. Benitez states:

Patient feeling very frustrated as ICBC would recommend one in a half [*sic*] hour per week of assistance which to me is ridiculous

He formed this view erroneously; the recommendation to ICBC was that the plaintiff receives four to five hours of homemaking per week.

**128**  He also recorded in his report:

The patient" was devastated to learn that Dr. Gittens has written a very controversy [*sic*] a letter indicating that her herniated disc was somewhat coincidental and not related to her previous MVA. I commented on September 25, 2012, that I strongly disagree"

**129**  The defendant argued that there was nothing controversial in Dr. Gittens' opinion to the plaintiff's lawyer.

**130**  Also, in his report he said that the three neurosurgeons and one orthopedic surgeon based opinions on "inaccurate, false and incorrect information", stating:

I am convinced that the opinion of these three physicians is inadmissible and lacking of [*sic*] professional credibility.

**131**  Dr. Benitez commented on Dr. Paquette's report:

In my opinion, there is a clear attempt to overstretch information, undermine symptoms and to confuse facts by specialists paid by ICBC

**132**  Dr. Benitez also attacked Dr. Semrau by alleging he was biased towards ICBC for financial reasons and said he did not believe Dr. Semrau's opinion was objective, credible, impartial or admissible in court. He described Dr. Semrau as "irrational, insensitive and preposterous". He asserted Dr. Semrau's opinions were "absurd and nonsense".

**133**  The defendant urged that Dr. Benitez' reports should be given limited or no weight because he performed his duty more in the manner of an advocate than a person assisting the court. As a result, the defendant invited the Court to deny the plaintiff's costs in relation to preparation of his opinion and testimony at trial as a rebuke of his failure to abide by his duties to be objective and not act as an advocate for either party.

***Dr. Mallavarapu***

**134**  Dr. Mallavarapu began treating the plaintiff in May 2011 at the request of her family doctor for depression, pain, anxiety and insomnia which "got worse following a motor vehicle collision on November 28, 2008."

**135**  He continued to treat her on an ongoing basis and authored reports dated December 19, 2011; March 13, 2012; March 22, 2012; and February 13, 2014.

**136**  In preparing his initial opinion, he relied on the plaintiff's subjective reporting of symptoms. She did not provide him with and he did not mention her pre-existing symptoms of depression extent for two years before the accident.

**137**  as such, in his December 19, 2011 report he incompletely described the plaintiff's pre-accident medical history. He said in 2004 she was treated for depression, anxiety, poor sleep and crying. He then jumped to 2011 to deal with her post-accident history. In terms of past medical history he said she suffered from Type 2 diabetes.

**138**  He then concluded the accident was responsible for her most significant physical symptoms including headaches, neck, upper and lower back pain as well as pain radiating into her right leg. He said she developed chronic pain disorder due to psychological factors including anxiety and depression.

**139**  Dr. Mallavarapu further determined the plaintiff was emotionally traumatized in the collision, causing her to develop post-traumatic stress disorder and that she continues to experience the symptoms of that condition. He said the essential feature of this disorder is that the focus of her clinical presentation was pain that caused distress or impairment in social, occupational or other important functioning. In this way, the pain is not intentionally produced or feigned.

**140**  Further symptoms attributed to the accident include fear of getting into another accident, anxiety and fear of travelling, avoiding travel, experiencing visual and auditory flashbacks of the accident and sleep disturbance associated with nightmares. He said that the plaintiff had depression before the accident which was exacerbated by the collision. She experiences sad mood, increased emotional liability, severe anxiety, poor concentration, decreased energy and motivation, reduced ability to experience joy in life, decreased libido, persistent sleep problems and irritability.

**141**  He said that most of her ongoing sleep problems are related to pain but acknowledged that he had not analyzed the plaintiff's pre-accident sleep issues before preparing his report.

**142**  He noted that even though the plaintiff suffered from depression before the motor vehicle accident on November 28, 2008, she continued to work. Earlier in his report he said that she reported working as a housekeeper at Royal Columbian Hospital after coming to Canada but that following the collision she could not go back to that work due to her ongoing symptoms.

**143**  He confirmed that the claimant had informed him that she had lost consciousness at the time of the accident but that her report was inconsistent with the hospital records and ambulance crew report.

**144**  The matter of the plaintiff's self-reporting symptoms is addressed above. Further, before writing his opinion, Dr. Mallavarapu had not reviewed the pre-accident PharmaCare records or Dr. Tesler-Mabe's 2004 report to CPP indicating the plaintiff had a significant level of disability. He only noted that Dr. Tesler-Mabe had seen the plaintiff in 1991 and she suffered from post-partum depression in 2005. He did not have the hospital records from 2006 relating to her previous suicidal ideation and, although he was aware of her previous neck and back pain, did not mention them in this report as it was his impression these had not become acute until after the accident.

**145**  Although Dr. Mallavarapu was in possession of Dr. Benitez's clinical records from 2004 to 2008, he said he skipped a review of those records in preparing his report and reviewed only the notes from December 30, 2008, to November 5, 2011. He was thus not apprised of the details concerning the plaintiff's medical and psychiatric condition during the four years immediately prior to the accident.

**146**  Mr. Mallavarapu characterized the plaintiff's psychological condition as depression with psychotic symptoms. In doing so, the plaintiff did not inform Dr. Mallavarapu regarding the antidepressants she was taking before the car accident or of Dr. Tesler-Mabe's diagnosis of schizoaffective disorder. He was likewise not aware she continued to claim CPP disability benefits during the previous ten years in part on the basis of a continuing psychological disorder or of her conviction for defrauding BC.

**147**  Dr. Mallavarapu nevertheless rejected the possibility that the plaintiff had a continuation of her pre-existing major depressive disorder.

**148**  It was apparent from the evidence that the plaintiff's fraud conviction and subsequent claims for reimbursement of $65,000 were emotionally stressful times for the plaintiff. In addition, given the fact she continued to receive benefits from CPP and reported no earned income to the CRA, she would likely have been stressed at the prospect of further criminal or administrative charges and penalties. Dr. Mallavarapu was not aware of those details until he reviewed Dr. Semrau's report and commented in his February 13, 2014 report.

**149**  Dr. Mallavarapu concluded that the plaintiff would need to continue medications until March 2014, and in the absence of full remission and functional recovery he considered her condition to be at a plateau. He opined she will likely continue to need medications for the management of her depression and chronic pain disorder.

**150**  The defendant contends that the plaintiff's failure to accurately inform Dr. Mallavarapu concerning her pre-accident psychiatric history and employment, the absence of Dr. Tesler-Mabe's records, and his lack of awareness about her suicidal ideation severely undermined his report.

***Dr. Semrau***

**151**  Dr. Stanley Semrau assessed the plaintiff on behalf of the defendant. He conducted a psychiatric interview punctuated by significant concerns regarding the objectivity and reliability of the information he received from the plaintiff. He had limited confidence in the opinion contained in his report because of difficulties in the information he obtained (or was denied) at the time.

**152**  He said that it is important to be able to rely on the information communicated from patients. He takes information from patients and reviews it in contrast with documents and independent records that may be produced in order to obtain confidence in the credibility of the patients reporting.

**153**  His opinion was divided into her pre-accident history, accident related events, post-accident history, post-accident treatment and prognosis.

**154**  Dr. Semrau's conclusions and reservations concerning the plaintiff's diagnosis include the following:

1. Her pre-accident history included many difficulties including forced immigration, chronic marital problems, serious stresses with her children, poor English language skills, limited employment skills and history, lengthy employment disability, multiple serious physical health problems, multiple chronic and serious mental health problems, criminal behaviour and related financial stresses;
2. The accident may have caused travel anxiety and avoidance symptoms and some partial post-traumatic stress symptoms;
3. The plaintiff's pre-accident depression and anxiety may have worsened after the accident due to the results of the accident and many other factors;
4. Psychological factors including a pronounced disabled/helpless sick role tendencies and secondary gain mechanisms have likely been aggravating her physical symptoms and functional complaints. There may be some intentional malingering of symptoms;
5. The plaintiff's mental health treatment has been somewhat appropriate but without significant resulting gains;
6. The plaintiff's future mental health treatment requires radical changes. The *status quo* needs to be challenged with expectations of better functional capacity;
7. The plaintiff's mental health prognosis is guarded but there is a decent prospect of improvement with changes to treatment; if that is not successful further improvement is unlikely;
8. The plaintiff's mental health symptoms arising from the accident are not likely to interfere with her future work or educational capacities.

***Pre-Accident History***

**155**  Dr. Semrau reviewed a lengthy list of events in the plaintiff's life which illustrate a long and troubled personal history.

**156**  She denied she had ever experienced any health-related employment disability. In spite of the fact that she was convicted of fraud concerning disability benefits she received from the Province she maintained, in Dr. Semrau's words, "she could not recall having experienced any such problems, so no further detail could be obtained on this aspect of her history during the interview".

**157**  She told Dr. Semrau that her only pre-accident difficulty had been diabetes and she was sure that she had never experienced any other significant physical health problems before the accident. This evidence was repeated in her trial testimony in chief. When the contrary records were brought to her attention by Dr. Semrau she retorted he "should just look at the records then". The records disclose a plethora of significant health challenges experienced by the plaintiff until shortly before the accident.

**158**  Regarding her mental health, the plaintiff told Dr. Semrau that she had been happy all the time and had never experienced any sort of mental health symptoms, assessment or treatment. When questioned on this point she said "maybe I saw somebody a few times -- not sure -- can't recall anything more". Dr. Semrau observed that she had been diagnosed with a relatively severe form of depression in 2004, experienced psychotic symptoms, and was at one point diagnosed with schizoaffective disorder. She was prescribed some eight medications to address her psychiatric condition and Dr. Semrau's assessment was that her mental health problems were relatively severe and quite chronic before the accident.

**159**  She denied any pre-accident marital difficulties until confronted with the contrary records. She then admitted to marital difficulties and other difficulties regarding her children's educational problems. She had felt her husband was not properly carrying out his duties as a husband and father and said she stayed with him before the accident because she felt sorry for him.

**160**  She told him her pre-accident employment had always gone well. When confronted with her health-related disabilities, she could not recall the difficulties reflected in those documents. She said she had always been financially comfortable, had no problems with debt, and denied any pre-accident legal difficulties. Dr. Semrau noted that this is inconsistent with the records he had received.

**161**  Based on the review of her pre-accident medical records, he said she may well have suffered from some form of somatoform disorder such as somatic nation disorder or pain disorder before the accident.

**162**  After reflecting on this evidence, the inconsistencies in her presentation, and her responses, Dr. Semrau said "it is likely that Ms. Lacayo would have continued with a similar pattern of chronic intermittent multiple physical and mental health problems". He said ongoing depression and anxiety would likely have continued absent the accident.

***Accident Related Events***

**163**  Dr. Semrau noted that the plaintiff's subjective report of a fear she might die at the moment of impact likely created some increased risk for the development of vehicle travel anxiety and/or post-traumatic stress symptoms.

**164**  He reviewed all of the details concerning a possible head injury and concluded that it was unlikely she had suffered a significant head injury in the accident.

***Post-Accident History***

**165**  Dr. Semrau began this part of his opinion with a diagnosis of a vehicle travel anxiety/avoidance condition. Although the plaintiff claimed her symptoms were worsening over time, Dr. Semrau said that was unlikely based on the information available. He said a diagnosis of post-traumatic stress disorder was not justified but it was possible "some" post-traumatic stress symptoms might have occurred. Her travel anxiety and the post-traumatic stress-like symptoms were caused by the accident.

**166**  He concluded that the plaintiff's depressive and anxiety symptoms were not likely caused by the accident. He noted the records did not document depressive/anxiety symptoms until one year after the accident. He questioned whether those symptoms were related to the accident because depressive symptoms usually begin within a few months of the event. He suggested the post-accident emotional symptoms were largely a continuation of her pre-accident chronic depressive and anxiety disorders and the operation of other physical symptoms and circumstantial stress factors post-accident, the latter of which he opined played a major causative role.

**167**  He said that it is possible that there has been some aggravation of her pre-accident emotional symptoms due to the direct and indirect effects of the accident.

**168**  Dr. Semrau observed that the plaintiff had severe financial problems after the accident including the repossession of her house. He was unable to ascertain if this was connected to the fraud judgment against her.

**169**  He learned from the plaintiff that her marriage is now better than before the accident. Her family has been helpful to her in her post-accident circumstances. Her husband and children take care of all of the cooking and kitchen duties, housekeeping and laundry. She believed they are doing everything because she is unable to perform any of the chores. He learned from her that her children's pre-accident learning difficulties have continued after the accident.

**170**  At one point he observed that the plaintiff's report of high pain levels was inconsistent with the level of physical discomfort he observed during his examination. She used very strong language such as" I have pain everywhere -- it's killing me".

**171**  Dr. Semrau described how, in his opinion, the plaintiff's symptoms and functional impairments are evidence of a "secondary gain" effort that reinforces the perpetuating effect of her current symptoms. He believes she has taken on a fairly extreme disabled/helpless sick role within her family far beyond what could be reasonably explained on the basis of objective medical symptoms. He could not be certain if the plaintiff's behaviour was consciously focused on secondary gain; her descriptions exceeded anything he had seen before and this factor suggests there is a conscious desire for secondary gain. He described her condition as being addicted to secondary gain from her family and healthcare providers. He said that the plaintiff's pain disorder means the plaintiff genuinely experiences and expresses pain and other related symptoms, but emotional factors have an important role in aggravating and perpetuating the perception and experience of pain symptoms. Regarding causation, the pain disorder is due to the combination and interaction of the plaintiff's physical injuries and the other for psychological problems experienced by her.

***Post-Accident Treatment***

**172**  Her mental health treatment has been, in Dr. Semrau's opinion, "somewhat appropriate", but it has not resulted in significant improvement.

**173**  He proposes a radically different treatment approach. He opined she needs therapy that emphasizes a practical rehabilitation component in which she is challenged to increase her physical activity and which will reward actual performance and stop her from paying attention to her symptoms.

**174**  He believes that the plaintiff needs vigorous therapy that includes separating the plaintiff from her family to interrupt the secondary gain features of her condition. He said she needs to go "cold turkey" for at least one month to curtail the continuation of the symptoms of this role. It will be an uphill battle and she is not likely to willingly participate. Dr. Semrau mentioned a clinic in Alberta that treats disorders similar to the plaintiff's condition at between $500 per day and $1000 per day.

***Prognosis***

**175**  Dr. Semrau believes that there is a possibility of some improvement in her condition but his mental health prognosis is guarded. In his opinion, there is a "decent prospect of improvement if major changes are made to the treatment approach".

**176**  Further, he said, regarding the plaintiff's work and educational capacities, "any mental health symptoms arising from this accident have not been significantly limiting in the past and are unlikely to interfere in future either".

***Dr. Sahjpaul***

**177**  The plaintiff was assessed by Dr. Sahjpaul at the request of her solicitor on July 5, 2013. He provided a report the same day concluding the following:

1. The neck pain and cervicogenic headache were the result of a soft tissue/myofascial injury caused by the accident;
2. The thoracic and low back pain were myofascial and caused by the accident;
3. The right arm symptoms were pre-existing but previously intermittent and infrequent; they were significantly aggravated by motor vehicle accident in question. The MRI cervical spine demonstrates C 6-5 foraminal stenosis. More likely than not, this stenosis is pre-existing, but probably rendered symptomatic by the motor vehicle accident accounting for some of her right arm symptoms. But for the motor vehicle accident, she probably would not have her right arm symptoms to the extent that she does now;
4. The right leg symptoms are due to motor vehicle accident. After the accident she had disc pathology at the L4-5 and L5-6 disc levels. There is evidence of a right L4-5 stenosis and a right L5-S1 disc herniation. These were related to her S1 and possibly L5 nerve root compression from the disc pathology noted;
5. The disc herniation was pre-existing and rendered symptomatic by the motor vehicle accident;
6. Although there is a delay in documentation of the right leg symptoms (which reflects nerve root compression) there was a definite recording of right leg symptoms in a December 17, 2008, entry by the RehabMax Physiotherapy & Sports Injury Clinic. The plaintiff's lumbar spine pain it is predominately myofascial and the disc herniation has not contributed to her low back pain;
7. Her depression and anxiety were caused by motor vehicle accident, but are best left to more qualified practitioners. Depression and chronic pain psychiatric diagnosis can negatively modify physical pain appreciation;
8. The plaintiff will not likely be able to return to her pre-motor vehicle accident work;
9. The plaintiff will not likely have meaningful improvement in her pain presentation because she is overweight and deconditioned.

**178**  Under cross-examination Dr. Sahjpaul discussed the information he received from the plaintiff when he assessed her. This cross-examination reviewed the following:

1. She told him that she had no issues with her spine before the accident;
2. She denied experiencing any headaches before the accident;
3. She did not advise the doctor that at the time of the accident she was claiming and in receipt of CPP disability pension for 13 years;
4. She did not advise that she had been in receipt of social services benefits from 1994 to 2004 based on a false claim of disability;
5. The plaintiff did not inform the doctor of the medications she was taking at the time of the accident;
6. The plaintiff did not recall and did not report to him the mechanism of the accident;
7. She reported to Dr. Sahjpaul that the sensation in her right leg developed later on but he was unclear about the timing of that symptom;
8. He was aware the plaintiff had chronic shoulder pain for more than six months before the accident and that may have impacted her overall chronic pain;
9. He was aware she had pre-accident shoulder complaints but was not aware she had received injections into her acromioclavicular joint in August 2008;
10. She did not inform the doctor that she had restrictions in her ability to cook and clean before the accident;
11. The plaintiff did not inform the doctor that she had diabetic neuropathy before the accident;
12. The disc herniation suffered by the plaintiff was not a contributing cause to her pain or at least not a significant cause;
13. The plaintiff was deconditioned and he recommended she exercise and wean herself off reliance on her scooter;
14. The plaintiff told Dr. Sahjpaul that before the accident she was working as a "housecleaner and working in decoration, full time";
15. She reported a history of diabetes but no other serious medical issues and no ongoing issues with her spine.

***Dr. Paquette***

**179**  Dr. Scott Paquette is a neurosurgeon and examined the plaintiff on February 8, 2013. She was accompanied by a professional Spanish interpreter. At that interview, she could not recall the events of the motor vehicle accident but informed him she had been advised by her lawyer on how to respond to his questions. The plaintiff declined to give a medical history when questioned by Dr. Paquette. She told him she had not been in any previous accidents nor had she had prior surgeries. She would not answer his question about whether she had pre-existing or coexisting medical problems. The only information she gave him was that she did not have back pain or leg pain before the accident. She told him that her symptoms, including her back pain and right leg pain, "began approximately six months after the motor vehicle accident". Dr. Paquette's inability to obtain a history with regards to the events of the motor vehicle accident or her pre-accident medical history is consistent with her presentation with other doctors.

**180**  After their interview, Dr. Paquette obtained information concerning the plaintiff's medical history from records provided to him by counsel. The records describe a person with very frequent contact with the medical system before the accident. Her "six-month" statement, however, correlates to the information he found in her family doctors records where the pain is noted for the first time in March 2009.

**181**  The plaintiff would not allow Dr. Paquette a full physical examination. She refused to allow him to examine any part of her body other than her lower extremities.

**182**  He said that the plaintiff's disc herniation surgery was done to address the symptoms of her nerve root compression. The surgery recommendation was based on a combination of subjective symptoms and physical findings which correlate to neurologic evidence of a compressed spine.

**183**  Dr. Paquette stated disc herniations are symptomatic on or around the time of the trauma. Minor damage to discs leading to later disc herniations are quite rare and isolated events, and the delay in the onset of her symptoms suggested against the injury being caused by the accident. Further, the early examinations of the plaintiff with specialists familiar with spinal anatomy did not find sufficient evidence of a lumbar radiculopathy or nerve root entrapment by a disc in the back. The operative findings were not in keeping with the radiology findings; the disc herniation was much smaller than expected. Finally, the plaintiff's symptoms were made worse by the decompression of the nerve root and that is against the proposed association between the accident. the disc herniation and the need for surgery.

**184**  He could not say whether the disc herniation was created or caused by the subject motor vehicle accident.

***Dr. Gittens***

**185**  Dr. Winston Gittens, a neurosurgeon, performed a discectomy on the plaintiff's right L5-S1 disc. He reviewed the history of her treatment from the date of the accident until his meeting with her on January 19, 2011. He noted that she walked with a cane, was tender in the lower back and para-lumbar and sacroiliac areas and was tender over the right greater trochanter. She had restricted leg raising on the right side it due to back pain. She also demonstrated decreased effort on motor testing.

**186**  When he saw her, he was unable to explain her symptoms in the L5-S1 region because they were not typical of an injury in that area. He believed her pain was myofascial in origin.

**187**  He reviewed a CT scan demonstrating a disc herniation at L5-S1 and bulging discs at L3-4 and L4-5. A later MRI scan confirmed the disc herniation on the right side and he performed the surgery.

**188**  In his follow-up with the plaintiff she came to his office in a motorized wheelchair complaining of pain in the incision but no pain into the lower extremity.

**189**  He said that the plaintiff's responses at this post-surgical examination were excessive. He said normally you can touch an area but found her response to touching well beyond the expected.

**190**  He saw her again on June 29, 2012, when she again attended in her scooter. She reported a deep, near-daily pain across her back. At that stage he believed she had musculoskeletal pain and needed a consultation with a physiatrist.

**191**  He considered the records of Dr. Benitez and concluded that she suffered a soft tissue injury to the neck and lower back and to the shoulder without any neurological injury. He commented that the plaintiff complained of right lower extremity pain in March 2009. Based on Dr. Benitez's records he concluded that the disc herniation was probably unrelated to the car accident and more likely due to degenerative changes in her lower spine. The car accident instead caused soft tissue related injuries.

**192**  He did not believe her ongoing pain or disability was related to the disc pathology. He said lower back pain is not consistent with nerve root entrapment caused by the degenerated disc. He was cross-examined on his opinion regarding the connection between the accident and the nerve entrapment in her L5-S1 disc and confirmed that degenerative discs can exist without causing symptoms. He added that tingling in the right leg is not a common sign of entrapment and can sometimes be caused by diabetes.

**193**  He said that a heavy right leg is not indicative of nerve root compression. It was not until Dr. Benitez's comments in March 2009 that there was evidence of a nerve root entrapment.

**194**  He acknowledged that straight leg raising test is not an infallible test for nerve root entrapment. Rather, it is necessary to identify pain radiating into the leg in order to support a diagnosis of entrapment. He was provided the records of Dr. Kousai who had seen the plaintiff previously; she had a normal neurological examination with him and at that time there was no sign of nerve root irritation with 90[degrees] leg raising.

**195**  In Dr. Gittens' opinion, her prognosis is guarded in part due to her pre-accident history of back problems, including her low back pain in the right sacroiliac region reported in December 2007 and her psychological problems. He said the fact she has been deconditioned related to reduced activity and musculoskeletal pain.

**196**  Regarding treatment, he said that her current symptoms are most likely musculoskeletal and a pain management program would be helpful.

**Differences and Conclusions**

**197**  Any fair and accurate analysis of the medical evidence is severely compromised by the plaintiff's lack of credibility and reliability in her trial testimony and the quality of information provided to the assessing physicians.

**198**  There are further difficulties because some of the doctors who testified at this trial considered opinions given by other doctors who did not testify and whose reports were not included in any of the evidence. As an example, Dr. Tesler-Mabe had previously treated the plaintiff for her mental health issues and provided reports supporting her claim for a disability pension in 2004. Dr. Kousai, a neurologist, also assessed the plaintiff after the accident and produced consultation reports. Both were in turn relied on by some of the medical witnesses at trial without reference to those opinions.

**199**  The plaintiff contends that suffers from post-traumatic stress disorder and constant pain in her low back. She claims to suffer thoracic and lumbar strain with a possible L5-S1 radiculopathy and chronic neck pain with radiation to the arm in association with occipital and cervicogenic headaches, myofascial pain in her right shoulder, mid and upper back pain, and lumbar pain radiating into her right leg. Her right arm symptoms were significantly aggravated by the accident. Her sleep is disturbed.

**200**  She contends that her prognosis is poor or guarded and her psychological symptoms have plateaued. She accepts there is a possibility of improvement but argues that the affliction of six years works against any improvement.

**201**  She contends that these symptoms were caused by the accident.

**202**  In argument the plaintiff said the clinical records appear to record only occasional complaints of episodic neck and low back pain before the accident, but there is a lack of information to indicate that these problems were prolonged and ongoing. There was ongoing right AC joint and right arm pain up to the time of the accident or recently before. Dr. Benitez's evidence was that the pre-accident right shoulder complaints were localized to the acromioclavicular joint. Her post-accident complaints stems from the neck and over a wider area.

**203**  She claims that she suffered a lumbar disc herniation as a result of the accident. She acknowledges that testing done in December 2008 and in 2010 did not support a conclusion of nerve root compression; she argues this test was not conclusive and later imaging confirmed this diagnosis.

**204**  She also contends that Dr. Benitez's findings of spasms over a long period after the accident demonstrate that she has myofascial pain in the low back.

**205**  The defendant contends that the evidence does not support a conclusion that the plaintiff's nerve root compression problem was, more likely than not, caused by the accident. In any event, the plaintiff's low back complaints are largely soft tissue in origin or related to her mental health difficulties. He contends that the plaintiff has not proven the allegation of post-traumatic stress disorder.

**206**  He contends that Dr. Benitez' opinion is of little value to the court and should not be relied upon.

**207**  I accept that Dr. Benitez was shown to demonstrate an underlying bias to support the plaintiff's claims. Although not fully articulated in his January 2015 report, his views contained in the December 2014 report reveal he adopted an advocacy role in forming his opinions and communicating them in his reports. In his February 2011 report Dr. Benitez made almost no reference to the plaintiff's medical and psychiatric health immediately before the accident. It is hard to imagine how a physician could form an opinion regarding causation of a patient's symptoms that were, at least in part, ongoing immediately before the accident. He did not address those issues until his second report, January 9, 2015, which he described as intending to provide an update of the plaintiff's symptoms, and to provide a chronological description of events, procedures, investigations, comments about the medical opinions made by other consultants, as well as a final diagnosis.

**208**  I accord Dr. Benitez's opinions very little weight where they conflict with those of Drs. Paquette, Gittens and Semrau.

**209**  Similarly, the defendant contends that Dr. Borhorquez's opinion is of little value because the doctor was not given an accurate or complete history of the plaintiff's pre-accident physical and mental health condition. In particular, he was not aware of the plaintiff's fraud and subsequent legal proceedings concerning her social services disability benefits or her ongoing receipt of CPP disability payments.

**210**  Nonetheless, the defendant says that Dr. Borhoquez found it difficult to determine how much of her pain was due to degenerative changes and how much due to muscle pain. He considered the low back pain multifactorial and was concerned that the plaintiff's excessive pain behaviours interfered with his assessment. He could not find any clinical evidence of radiculopathy and considered her chronic pain syndrome exacerbated by a poor psychological coping mechanism. He recommended the plaintiff should focus on improving her function despite pain.

***Psychiatric Conclusions***

**211**  The defendant's attack on Dr. Mallavarapu's report is based on his acknowledgement that he did not have a substantial amount of pre-accident information about the plaintiff that related to her physical and psychiatric circumstances. In particular, in his initial report he ignored Dr. Benitez's records for 2004-2008. He contends that the significant shortcomings noted above diminish the significance and weight. I should accord his opinions concerning the plaintiff's psychiatric condition.

**212**  Dr. Mallavarapu did not or could not confront the plaintiff with many of the inconsistencies observed in her evidence nor the gaps of important information that did not come to his attention until much later.

**213**  Among the many discrepancies in the plaintiff's evidence, she appears to have told Dr. Mallavarapu that she had been working as a Royal Columbian Hospital cleaner before the accident; he was not sure if she was maintaining full-time or part-time employment. She appears to have told Dr. Semrau that she worked 35 hours per week cleaning houses before the accident.

**214**  In contrast, Dr. Semrau had the ability to question the plaintiff about inconsistencies in her evidence and was able to draw conclusions based on the shortcomings in the pre-accident information available to both himself and Dr. Mallavarapu.

**215**  Dr. Mallavarapu had opined that the plaintiff suffered major depression as a result of the accident. Dr. Semrau said that he believed she had suffered a less serious diagnosis of adjustment disorder with depressed and anxious mood.

**216**  I have considered the opinions of each psychiatrist and their cross-examinations. Contrasting the two opinions, I am persuaded that Dr. Semrau had a better informed and more objective perspective on the plaintiff's overall pre-accident and post-accident physical and mental health circumstances. I am satisfied he more skillfully investigated the evidence and that his conclusion regarding the plaintiff's condition on the balance of probabilities more accurately sets out the state of her past and present mental health and the causes of her ongoing complaints.

***Orthopedic Conclusions***

**217**  An accurate finding regarding the plaintiff's physical injuries is likewise hampered by the shortcomings in her evidence, including her lack of credibility and reliability. The fact that she was untruthful or unreliable in describing her medical history to her doctors adversely affects the conclusions reached by them. She allowed Dr. Paquette to perform a very limited physical examination and misstated her pre-accident health to Dr. Semrau. These anomalies in her behaviour appear to be deliberate measures taken to avoid the risk they would give opinions adverse to her claim.

**218**  Drs. Sahjpaul and Gittens each agree that the plaintiff's ongoing symptoms are most likely soft tissue in origin. Dr. Paquette believes that there is a psychiatric diagnosis to explain her ongoing symptoms. Dr. Borhorquez did not find that she had a lumbar radiculopathy but said she was experiencing multifactorial pain and chronic pain syndrome. Dr. Semrau concluded she was suffering depression and anxiety symptoms, together with an adjustment disorder with depressed and anxious mood symptoms. He believed that her physical symptoms may aggravate her psychological symptoms. Her pain disorder is due to a combination of the interaction of the injuries and or psychological problems. He believed that secondary gain had a substantial conscious reinforcing and perpetuating effect on the plaintiff's statements regarding her symptoms and functional impairment. Dr. Gittens concluded causation was limited to soft tissue-related injuries.

**219**  Dr. Sahjpaul opined that the plaintiff's right-L4-5 pathology was extant before the accident but rendered symptomatic by the accident. He said that although Dr. Benitez's records reflected normal right leg symptoms until March 2009, there was a recording of a right leg symptom on December 17, 2008, indicating that the plaintiff was complaining of right leg symptoms within three weeks of the accident. He said this was an indication that she was experiencing a nerve root entrapment shortly after the accident. Thus, he concluded the accident was the cause of that condition.

**220**  The only record reflecting any concern by the plaintiff connected to her back or leg was contained in a record from the RehabMax clinic dated December 18, 2008. Those records noted, with respect to the plaintiff's condition, "leg feels heavy". In the diagram attached to that note, the only indications of injury were in the plaintiff's neck back/shoulder area and mid to lower back. There is no indication of pain or discomfort or numbness in the right leg. There is no mention in any of the doctor's records in the three weeks before this visit that the plaintiff had any leg related symptoms.

**221**  The evidence also indicates that the forces of the collision were not as described by the plaintiff to some of the doctors, i.e. a "T-bone collision". The impact in this accident was modest with the forces coming from two vehicles colliding side by side.

**222**  Dr. Sahjpaul disagreed with Dr. Paquette's opinion that the lack of postsurgical improvement was indicative of an absence of symptomatic nerve root pathology because there can be multiple reasons for deterioration in symptoms including nerve root attraction. Nonetheless, his opinion is that the plaintiff's predominant symptoms are soft tissue injury and not connected to the disc herniation.

**223**  I accept the opinions of Drs. Paquette and Gittens in preference to that of Dr. Sajhpaul and conclude that the evidence does not support the plaintiff's contention that this accident caused a disc herniation and the right leg symptoms precipitating the symptoms stemming from her pre-existing right L4-5 pathology. It follows that I do not accept that the surgery performed by Dr. Gittens was as a consequence of the accident or the injuries suffered by the plaintiff at that time.

**224**  Dr. Sahjpaul testified that at least 90% of the plaintiff's pain emanates from the soft tissue injury and not from the disc. He is supported in that view by Dr. Gittens.

**225**  I have concluded that the plaintiff suffered a level of soft tissue injury in the accident that combined with her psychological problems, developed into a significant pain disorder. I accept she genuinely experiences and expresses pain and other related symptoms but emotional factors have a role in aggravating and perpetuating her perception of those symptoms.

**226**  I am further satisfied that the plaintiff is motivated by the prospects of significant secondary gain that is causing a continuation of her subjective pain complaints. Her statement during the trial that "somebody has to pay" for her back pain, coupled with her history of abusing the disability resources made available by BC and Canada and her refusal to follow the recommended treatment regimens are compelling indicators that she seeks financial and social gains including the comfort she derives from the care and attention of her family.

**227**  Her prognosis is poor but there are treatment options that will optimize her chances of recovering to a better level of function. It is a challenge to determine which ongoing symptoms are caused or contributed to by the collision and which symptoms are perpetuated by her pursuit of secondary gain or which symptoms would have occurred in any event absent the accident. This is because the plaintiff's claim is complicated by the shortcomings in her evidence. As the court stated in *Minhas v. Sartor*, [*2014 BCCA 455*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-FK0M-S4TX-00000-00&context=), referrring to *Le v. Milburn*, [*[1987] B.C.J. No. 2690*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JNY7-X296-00000-00&context=) (C.A.):

When a litigant practice is to deceive, whether by deliberate falsehood or gross exaggeration, the court has much difficulty in disentangling the truth web of deceit and exaggeration. If, in the course of the disentangling of the web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame. In this case there has been some deliberate falsehood and some exaggeration.

**Causation**

**228**  To succeed in her claim Ms. Lacayo must establish on a balance of probabilities that the defendants' ***negligence*** caused her injuries. 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, the Court described the test the plaintiff proved a causal connection between the defendant's ***negligence*** and the injury sustained. The plaintiff must meet the "but for" test, which inquires "but for" the defendant's ***negligence***, would the plaintiff's injuries have occurred?

**229**  In *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=), the court framed the question this way:

[11] Thus, in applying the "but for" test, the trial judge was required to consider not just whether the defendant's conduct was the sole cause of the plaintiff's disabling pain, but also whether the plaintiff had established a substantial connection between the accident and that pain, beyond the *de minimus* level.

**230**  Thus, if the plaintiff can prove a substantial connection between the injury and the defendants' conduct, beyond the *de minimus* range, she can succeed.

**231**  Where there are potentially multiple causes of a plaintiff's injuries, it is further necessary to determine whether the injuries are divisible or indivisible in order to ensure that the defendants are not held liable for injuries not caused by their ***negligence***: *Athey* at paras. 24-25. 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, leave to appeal ref'd [*[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=). Whether damage is divisible or indivisible is a question of fact: *B.P.B. v. M.M.B.*, [*2009 BCCA 365*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-625F-00000-00&context=) at para. 74, leave to appeal ref'd [*[2010] S.C.C.A. No. 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-JWXF-21HW-00000-00&context=).

**232**  If an injury is indivisible, subject to contributory ***negligence***, the defendants are liable for all damages attributable to that injury regardless of the contribution of other causes: *Athey* at paras. 17-20, 25.

**233**  A further relevant consideration is the pre-existence, inevitability or predisposition to suffer psychological injury in circumstances such as those brought about in a particular case.

**234**  In *Athey*, the Court addressed issues of pre-existing and inevitable injury in explaining the "crumbling skull" rule:

35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), atpp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence***, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, [*[1990] O.J. No. 2314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCK1-JCJ5-22YM-00000-00&context=), *supra*; *Malec v. J.C. Hutton Proprietary Ltd.*, *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.

**235**  Where there is a predisposition to suffer injury, the defendant is not relieved of liability for the injuries represented by the injuries caused by their wrongful act. Such relief could only occur if the injuries or symptoms would have occurred in any event.

**236**  With respect to psychological injuries, the principles described in *Maslen v. Rubenstein,* [*[1994] 1 W.W.R. 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B0MF-00000-00&context=), [*33 B.C.A.C. 182*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B0MF-00000-00&context=), are apposite this analysis:

[8] To meet the onuss which lies on a plaintiff in a case of this sort. . . 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".

[9] If psychological problems exist, or continue, because the plaintiff for some reason wishes to have them, or does not wish them to end, their existence or continuation must, in my view, be said to have a subjective, or internal, cause. To show that the cause lies in an unlawful act of the defendant, rather than the plaintiff's own choice, the plaintiff must negative that alternative. The resolution of this issue will not involve considerations of mitigation, or lack of mitigation. . . If a court could not say whether the plaintiff really desired to be free of the psychological problem, the plaintiff would not, in my view, have established his or her case on the critical issue of causation.

[10] Any question of mitigation, or failure to mitigate, arises only after causation has thus been established.

**237**  These principles were restated in *Yoshikawa v. Yu,* [*[1996] 8 W.W.R. 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2J5-00000-00&context=), [*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=), as follows:

[14] . . . First, it must be shown that the defendant's unlawful act was a "cause-in-fact" of the plaintiff's psychological symptoms. That means that the plaintiff must establish that "but for" the defendant's unlawful act the plaintiff's psychological symptoms would not have occurred or would not have occurred in the way they did. That is a factual question. Second, it must be shown that the defendant's unlawful act was a "proximate cause" that is, a legally relevant cause-in-fact, as a matter of law, of the plaintiff's psychological symptoms. That is a legal question. . .

[15] So if the psychological symptoms from which the plaintiff is suffering after the accident are symptoms from which the plaintiff would have been suffering in any event, even if the defendant's wrongful act had not occurred, then the plaintiff cannot meet the cause-in-fact test and the defendant is not liable for the loss represented by those symptoms.

[16] But if the psychological symptoms from which the plaintiff is suffering after the accident would not have occurred if the defendant's wrongful act had not occurred, then the cause-in-fact test is met and consideration must be given to the question of "proximate cause" in law.

**238**  It is then for the plaintiff to provide evidence of a "convincing" nature to overcome the improbability that her pain, depression, and anxiety will continue, in the absence of objective causes, well beyond the normal recovery period. Such a claim will be carefully scrutinized: *Yoshikawa.* The test for accepting or rejecting this evidence is one of reasonableness: *Janiak v. Ippolito* [*(1985), 16 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=) at 11.

**239**  The other element that has to be considered in determining whether the objective test of reasonableness applies to decisions made by the alleged thin-skulled plaintiffs is the nature of the pre-existing psychological infirmity. It is evident not every pre-existing state can be said to amount to a psychological thin skull. It seems to me the line must be drawn between those plaintiffs who are capable of making a rational decision regarding their own care and those who, due to some pre-existing psychological condition, are not capable of making such a decision. Accordingly, non-pathological but distinctive subjective attributes of the plaintiff's personality and mental composition are ignored in favour of an objective assessment of the reasonableness of her choice. So long as she is capable of choice the assumption of tort damages theory must be that she herself assumes the cost of any unreasonable decision. On the other hand, if due to some pre-existing psychological condition she is incapable of making a choice at all, then she should be treated as falling within the thin skull category once it is established that she has been wrongfully injured should not be made to bear the loss.

**240**  If, as described in *Maslen* and *Yoshikawa*, the psychological symptoms which the plaintiff suffers would have occurred if the accident had not happened, then she is entitled to compensation for those features of her injuries that would not have happened but for the accident. In this case, I have concluded that a portion of the plaintiff's psychological injuries would have occurred absent the accident and her damages will be reduced accordingly.

**241**  The difficulty in this case is that I have found the plaintiff to be consciously motivated by a desire for secondary gain. Thus, even though she has psychological injuries caused by the accident, the continuation of the symptoms, in part, is driven by her desire for secondary gain and thus is not compensable.

**242**  The determination of damages resulting from a defendant's ***negligence*** is an assessment and not a calculation informed by any mathematical formula. I have taken into account the principles articulated in *Athey, Meslin*, and *Yoshikawa* in my analysis of the plaintiff's claims.

**Non-Pecuniary Damages**

**243**  I conclude that before the December 2008 accident, the plaintiff was a victim of intermittent ongoing depression and poor psychiatric health. She had a history of hand injury, cancer, shoulder and back complaints and headaches. It appears that her relationship with her husband was unsatisfactory before the accident and somewhat better after the accident although there were continuing issues between them. Before the accident she was unable to do many of the domestic chores including cleaning, some laundry and some cooking. She claimed to be disabled from working.

**244**  I accept the conclusion of Dr. Semrau that the plaintiff suffered an exacerbation of depressive and anxiety symptoms post-accident, but does not suffer from post-traumatic stress disorder. I accept Dr. Semrau's opinion that she has a moderately severe pain disorder and experiences pain-related symptoms aggravated and perpetuated by emotional factors.

**245**  I am also satisfied that a dramatic program emphasizing "a practical rehabilitation component" in which she is encouraged to increase physical activity will likely provide her some significant benefits. This program was described in Dr. Semrau's opinion and appears to set an optimum strategy toward her recovery. Otherwise, her mental health prognosis is guarded.

**246**  I accept Dr. Semrau's opinion that if the November 2008 accident had not occurred, it is likely the plaintiff would have continued with a similar pattern of multiple chronic physical and mental health problems including depression and anxiety. It is established that the plaintiff's difficulties with concentration and memory are likely related to pain, emotional causes and her medication's side-effects.

**247**  Dr. Semrau was unable to conclude that the plaintiff was consciously malingering; however, having heard all of the evidence with particular emphasis on the plaintiff's incredible and unreliable testimony, I am satisfied that it is more likely than not that she is consciously seeking a secondary gain.

**248**  This conclusion is supported by the established challenges to her credibility and reliability. She has long demonstrated a willingness to lie for financial gain. She stated at trial her view that "somebody has to pay for my back". She did so in the context of being challenged on her right to claim under certain heads of damage. My impression is that her positions at trial are no different than her long history of relying on disability benefit support from both levels of government that she was not entitled to receive and her failures to report any earned income to the CRA (while insisting in court that she pays her taxes).

**249**  I find that the plaintiff's failure to engage in rehabilitative measures recommended by her physicians and treatment providers, although falling short of a failure to mitigate as described below, is some evidence that the plaintiff is not as physically impacted by the injuries claimed. Features of her complaints are exaggerated and where she has failed to accept medical advice, she demonstrates her desire to avoid improvement thus increasing the secondary gain she obtains from her current presentation.

**250**  I accept the evidence of Drs. Gittens and Paquette that the plaintiff's disc herniation was probably unrelated to the motor vehicle accident. Put another way, I am not satisfied on the balance of probabilities that the accident caused her disc herniation. I also accept their conclusions that the accident caused soft tissue related injuries.

**251**  In reconciling the opinions of Dr. Semrau and Dr. Paquette, I find that the plaintiff would have continued with a similar pattern of chronic intermittent physical and mental health problems if the accident had not occurred. In particular, she would likely have had ongoing depression and anxiety issues.

**252**  The defendant relied on the following cases in support of his submission that non pecuniary damages, assessed at $30,000-$40,000. These cases include:

1. *Schofield v. Jentsch*, [*2012 BCSC 1130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S252-00000-00&context=), awarding $30,000 for non-pecuniary damages. The plaintiff was rear-ended at a stoplight and sustained some soft tissue injury to her neck and upper back. She was unable to work for approximately four months and could not resume full-time work for an additional two months. Approximately a year after the accident, the plaintiff was able to return to all her previous work and recreational activities.
2. *Brown v. Raffan*, [*2013 BCSC 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M361-00000-00&context=), where non-pecuniary damages were assessed at $35,000. The plaintiff was 44 years old and worked a variety of low-labour service jobs before being involved in a violent motor vehicle accident causing significant cuts, soft tissue injuries, and which broke her dental plate. The injuries interfered with her ability to carry out normal domestic activities, but had largely resolved within two years. Otherwise, she was left with some scarring, continued to have some headaches and knee pain, and suffered from anxiety associated with driving.
3. *Tibeault v*. *MacGregor*, [*2013 BCSC 808*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20FV-00000-00&context=), assessing non-pecuniary damages at $35,000. The plaintiff was a disabled 48 year old mother of four who was injured as a result of a low-velocity impact collision. Despite the negligible impact and the trial judge's finding she exaggerated her condition, the accident did exacerbate her poor physical condition, causing difficulty sleeping, headaches, neck, shoulder and back pain and further difficulties in participating in domestic work.
4. *Sharifi v. Chaklader*, [*2012 BCSC 685*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3NM-00000-00&context=), assessing non-pecuniary damages at $50,000. The plaintiff worked fulltime for the Ministry of Social Development, four nights a week at an assisted living facility, and occasionally at home as an esthetician. She was involved in a forceful collision while the passenger of a van and suffered soft tissue injuries to her upper back, neck, and upper shoulders, which in turn caused occasional migraine type headaches, stress, anxiety, fatigue and depression-like symptoms. These injuries have diminished her capacity to enjoy life and work, but did not interfere with most activities of daily living. There was also some hope of a recovery or reduction in pain with appropriate treatment.
5. *Minhas v. Sartor*, [*2012 BCSC 779*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3X5-00000-00&context=), where non-pecuniary damages of $70,000 assessed before being reduced for contributory ***negligence***. The plaintiff was employed in a variety of warehouse jobs before being injured in a motor vehicle accident. At trial, the court reviewed the plaintiff's serious credibility concerns, including his applying for and accepting social assistance, employment insurance, and WCB benefits to which he was not entitled, a history of faking workplace injuries to obtain leave and benefit, and filing false tax returns. To the extent his evidence could be relied on, the court found the plaintiff suffered soft tissue injuries to his neck and back that caused discomfort and reduced mobility or range of motion in his neck and back. He also had jaw problems for which he sought surgery, and which resulted in a respiratory infection. His issues had limited interference with his hobbies and, with the exception of some ongoing jaw pain, largely were resolved within one year.

**253**  In support of the plaintiff's submissions that non-pecuniary damages be assessed at $200,000, she relies on:

1. *Al-Hendawi v. Sidhu*, [*2006 BCSC 522*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1NS-00000-00&context=), awarding non-pecuniary damages of $150,000. The plaintiff was an active 43 year old doctor who suffered a disc herniation. This injury caused pain and disability, and paralyzed his left foot such that he required surgery, which in turn caused such pain that he was immobilized for two months; in this time he depended on his wife and brother to assist him in going to the bathroom, washing, or eating, which caused him extreme embarrassment. The injuries also interfered with his enjoyment of intimacy and disrupted his and his wife's plans to have more children. The undisputed prognosis was that he would experience chronic back pain in the future.
2. *Cumpf v. Barbuta*, [*2014 BCSC 1898*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M49R-00000-00&context=), awarding $150,000 in non-pecuniary damages. The plaintiff was a 44 year old housekeeper and property manager. After her accident, the combined effects of residual physical injuries (headaches, neck and back pain, loss of function in her wrist, shoulder and ankle), along with the pervasive emotional disorder resulting from them and the trauma of the collision, devastated Ms. Felix's personal and vocational life. She lost much of her ability to be self-reliant and to participate in many of the activities that had been the foundation of her social life and she was unlikely to improve without significant further treatment.
3. *Chowdry 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=), awarding $200,000 in non-pecuniary damages. The plaintiff, a 64 year old lease manager for a car dealership, was seriously injured when a transport trailer crushed the driver's side of his car. He was rendered catatonic for six months. His physical symptoms (headaches and back, neck and shoulder pain) resolved before trial, but he continued suffering symptoms of a mild traumatic brain injury, PTSD and a major depressive disorder which caused him to lose his job and strained his self-identity and relationship with his family. There was hope for improvement, but little doubt issues would continue for the rest of his life.
4. *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=), where non-pecuniary damages were set at $200,000. The plaintiff was a 43 year old business woman involved in a three-vehicle collision. Her injuries include a soft tissue sprain and secondary fibromyalgia which worsened over time and had crippling effects on her demeanor and ability to contribute to her relationships and business ventures. The medical evidence suggested she would continue to deteriorate and her prognosis was very guarded. However, the Court of Appeal noted this award was at the high end of the appropriate (reducing it from a jury's suggestion of $950,000).
5. *Felix v. Heame*, [*2011 BCSC 1236*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-625V-00000-00&context=), where non-pecuniary damages were set at $200,000. The plaintiff was a 44 year old court reporter who suffered recurrent headaches, tinnitus, vertigo, neck, back, shoulder and ankle pains and concussion symptoms. Shortly after the accident she developed post-traumatic stress disorder and related panic attacks. She was in constant pain and her psychological issues affected her work, family life and social activities. By the time of trial there was only a modest hope for further improvement.
6. *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=), awarding non-pecuniary damages of $225,000. The plaintiff was a 32 year-old labourer. The injury required emergency surgery, and after the accident the plaintiff developed a serious conversion disorder. He withdrew socially and gave up hopes of becoming a father. He experienced constant pain, was disabled from competitive employment, and could not engage in any physical activity without assistance and discomfort. At the time of trial, no expert predicted anything approaching a full recovery.

**254**  There is a formidable challenge to assessing the plaintiff's non-pecuniary damages in light of the findings made above. It is the plaintiff's burden to prove on the balance of probabilities that the accident has caused the symptoms that form the basis of her claim. I was not referred to any authorities that reflect my findings of the compensable part of the plaintiff's claim. Considering the principles 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 authorities cited by the parties, I am satisfied that the plaintiff's non-pecuniary damages for those injuries that were caused by the defendant's ***negligence*** after considering the plaintiff's desire for secondary gain and those symptoms that would have existed absent the accident are $70,000.

**Future Income Loss**

**255**  There is a paucity of reliable and credible evidence to persuade the Court that the plaintiff has suffered any economic loss. In the past, she has demonstrated a propensity to be untruthful to improve her economic circumstances when convenient. She has persisted in these habits for many years and continues notwithstanding a recent conviction for fraud. She has lied to the CRA, to CPP, to her doctors and to the Court. I have no confidence that most of what she has said were reliable or true. I am compelled to disregard any of her evidence concerning her income loss claim.

**256**  Her counsel conceded the issues in her credibility, and brought the Court's attention to *Wepruk v. McGarva and Butt,* [*2006 BCCA 107*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23T0-00000-00&context=), which states a plaintiff has a high burden in proving loss of income-earning capacity where there is no corroborating evidence.

**257**  Nonetheless, the plaintiff made much of the fact that recipients of CPP disability benefits can pursue "small scale" income-earning ventures. She contends despite the lack of documentation, it was likely that she was involved in some income earning activity before the accident and suggests these ventures would have continued for some time (perhaps ten years) beyond the date of trial. Estimating her potential earnings at $1,000 to $2,000 per year; she submits she deserves "nominal" damages of $10,000 to $20,000 to compensate for this loss.

**258**  Through trial, the plaintiff suggested she was working either part-time or full-time before the accident; her reports to some doctors indicate she was working full-time, her reports to others part time. Her testimony on the types of work she did and the related earnings suggested she made anywhere from $12,000 to $60,000 per year, but this testimony was often contradictory and confusing and she resiled from much of it in her submissions.

**259**  Otherwise, there was an almost complete absence of credible or reliable evidence concerning her pre-accident employment. In particular, there were no tax records, and no report to CPP that she was able to work or of the amounts made, all because the plaintiff intended to continue defrauding the federal government of both income tax and her disability pension. The plaintiff even refused to disclose to the Court or to the defendant the identity of clients she performed housecleaning without any convincing reason to support her defiant position.

**260**  She does not make a claim for past income loss; presumably she recognizes that the evidence does not support that claim. Equally, the evidence does not meet the test described 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=), that she must prove a substantial likelihood of income loss in the future.

**261**  In the result, I award no compensation for future income loss.

**Cost of Future Care**

**262**  Paul Pakulak is an occupational therapist retained to assess the plaintiff on April 29, 2014. His role was to test the plaintiff's physical abilities to complete the functional activities and this included assessment of her mobility strength, dexterity, performance of work activities will among other goals.

**263**  His report contained the following:

During the musculoskeletal assessment results indicated the presence of significant non-organic pain behaviours and variable levels of physical effort in the testing. Based on the testing results, it is not possible at this time to provide an opinion regarding Ms. Lacayo's maximum physical capacity. Given the variable levels of physical effort provided during the testing, the results of testing cannot be relied upon to generate such an opinion. Further, given the positive non-organic signs and presence of inappropriate illness behaviour the degree to which one can rely on the reported symptoms is also drawn into question.

**264**  He noted that this conclusion did not imply that the plaintiff was intentionally attempting to exaggerate her symptoms or level of physical capacity. This type of presentation is not uncommon in individuals with significant emotional and psychological difficulties. However, he said the plaintiff tested positive for "simulated weakness" in her legs and he conceded that her non-organic signs raised the possibility of malingering.

**265**  He interviewed the plaintiff and obtained some information from her concerning the accident and her current circumstances. He did not obtain her pre-accident medical history or PharmaCare history. He did not know that prior to the accident she was receiving a CPP disability pension; he indicated that information might have been important in his assessment of her current physical capacity. He did not know she was taking antidepressant medications before the accident. The only information he received was that she had suffered a wrist fracture in the past, was diabetic and had some depressed mood before the accident which became worse after the accident.

**266**  Ms. Lacayo told Mr. Pakulak that she had a clear recollection of the accident mechanism and recalled sitting in the car in pain after the impact. She said she was transported to the hospital by ambulance. She also told him that after the accident, she returned to work for two full weeks but quit because of worsening symptoms.

**267**  Mr. Pakulak's report beyond these notes is based largely on comments made by the treating physicians concerning their views on her condition and needs.

**268**  Deborah Edwards was the client services manager at We Care Services. She provided a letter that records her recollections and recommendations concerning the plaintiff. These were typical recommendations with a computer generated care plan for the plaintiff. It is a standard plan prepared by another coordinator.

**269**  In April 2012, We Care charged $25.50 (now $26.50) plus GST for home making services and $26.50 (now $28.) for personal care.

**270**  These services that would have been available to the plaintiff in 2011.

**271**  Her letter says the plaintiff became angry when reviewing her suggestions and rejected her and those services.

**272**  At a trial, the plaintiff described Ms. Edwards as a "nice lady". However, in her discovery evidence, the plaintiff said that Ms. Edwards was a "bad" person and was asked to leave her house. At trial, the plaintiff denied asking Ms. Edwards to leave her house but confronted with her October 2, 2012, discovery evidence, acknowledged that she probably asked Ms. Edwards to leave.

**273**  Dr. Benitez recorded that Ms. Edwards' recommendation of two hours per day personal help for the plaintiff was not nearly enough.

**274**  The claimant contends there is medical justification for future care cost claims advanced in the trial. *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=); [*30 A.C.W.S. (2d) 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21HK-00000-00&context=).

**275**  She submits that it is not necessary to adduce opinion evidence concerning each item claimed; the whole of the evidence is sufficient to support an award for specific items: *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=); *Aberdenn v. Zanatta*, [*2008 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RY-00000-00&context=); *McCarthy v. Davies,* [*2014 BCSC 1498*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R02-7JM1-F7G6-64V6-00000-00&context=).

**276**  The plaintiff seeks $13,500-$14,000 to fund a single attendance at a multidisciplinary pain program as recommended by Dr. Benitez, Dr. Borhorquez and Dr. Semrau. Dr. Semrau's description of an appropriate residential program requires separating the plaintiff from her current surroundings. This approach will allow her to begin a treatment program without the limitations of her current circumstances that may block meaningful change. In my view, this is a compelling recommendation best suited the plaintiff's optimum recovery. Mr. Pakulak approves of this program.

**277**  I accept that there is a connection between the plaintiff's chronic back pain and her depressive symptoms. I am satisfied that the injury suffered in the car accident has exacerbated her pre-accident condition to such an extent that this program is warranted based on the opinions of three doctors.

**278**  The plaintiff also claims for psychological counselling at a cost of $3,500-$5,250 (subject to a net present value reduction). Mr. Pakulak recommends psychological counselling as a transitional program from the multidisciplinary pain management program. He based his estimate on Dr. Mallavarapu's recommendation. Dr. Mallavarapu's recommendation did not take into account that the plaintiff might be referred to a pain management program. I accept that some treatments might assist the plaintiff in transitioning away from the multidisciplinary effort, but not to the extent recommended. I am not satisfied that this program superimposed on, or in addition to, the multidisciplinary pain program is medically warranted in its entirety.

**279**  In my view, $2,500 should be sufficient to assist in her transition from the multidisciplinary program.

**280**  The plaintiff argues that Dr. Borhorquez recommended sessions with the psychologist. That recommendation was premised on the recommendation that she required cognitive behavioural therapy to deal with pain and improve her activity. It seems to me those concerns will be addressed if the plaintiff pursues the month-long multidisciplinary plan, and as such further recovery for these sessions is not allowed.

**281**  The plaintiff seeks kinesiology sessions at a cost of $1,795 for one year based on Dr. Mallavarapu's and Dr. Borhorquez's recommendations. The need for a kinesiologist is based on the plaintiff's fear of making her symptoms worse if she becomes active. Bearing in mind all of the evidence and the difficulties with the plaintiff's reliability and credibility, I am not satisfied that this would be a medically necessary or reasonable expense.

**282**  The plaintiff also claims between $3,567 and $5,296 for a gym/pool pass, the amount representing the cost of an annual pass over 25 years. This claim is based on the recommendation of Dr. Benitez, who recommended a pool exercise program as medically necessary if she had difficulties with other exercises.

**283**  She said she tried swimming once in 2013 but is not interested in going to a pool because she is afraid of something untoward happening. She acknowledges that Dr. Benitez told her to walk, climb stairs and try swimming; she admits she has not pursued that advice.

**284**  Mr. Pakulak said that a gym pass might facilitate her involvement in a self-directed exercise program as she works through the plans he laid out. However, she has declined to take up swimming in the past and I am not satisfied that the plaintiff will use a pool/gym pass if awarded sufficient money to engage in that process. No amount is awarded for this expense.

**285**  The plaintiff claims a lump sum award of approximately $200,000 for the costs of medications. In considering what portion of her medication costs is awardable in this action, it is significant that the plaintiff was receiving between 36 and 55 prescriptions every month from September 2008 to November 2008. Many of these were prescribed to address her inability to sleep, right arm pain, fatigue and tiredness, unrelenting headaches, and depression - issues she continues to struggle with and take medication for today. Mr. Pakulak's medication summary recommendation reflects estimates for her current reported medication intake from the date of trial into the future and is based on the net present value calculations performed by Turnbull and Company.

**286**  The plaintiff contends that the records reflect higher painkilling medication consumption in 2014 than she used before the accident. She asks the Court to infer that the increased medication consumption was made necessary by her injuries because no other potential causes were identified. She also argues that the medications she currently consumes are substantially different from those taken before the accident.

**287**  She also contends that the award for future care cost should not be based on the amount of the claim for special damages.

**288**  The defendant argues that the plaintiff's post-accident prescription medications have been, when considering actual cost to the plaintiff, less than $100 per year. The actual expense for her prescription medications since November 28, 2008, is paid by PharmaCare. He contends that Mr. Pakulak did not undertake an analysis to determine whether her post-accident medication needs have changed or whether the need for those medications is causally connected to the accident. He submits the plaintiff has not met the burden of proving she will incur future expenses as claimed due to the consequences of the accident.

**289**  Although I recognize the plaintiff will likely continue taking medications, the evidence does not assist in informing the Court on what level of medications would not have been necessary but for the accident. Indeed, for the year 2008 prior to the accident the plaintiff received 624 prescriptions for medicines recorded in her PharmaCare print-out. Many of these are to address her sleep issues, pain complaints, and headaches. Further, there is no persuasive evidence to assist the Court in measuring how long the plaintiff might require these medications and what, if any, improvement might eliminate the necessity of medications in the future.

**290**  Given the state of the evidence, the possibility she may need medications for the balance of her life, and bearing in mind that the plaintiff will likely benefit from PharmaCare support, the determination of the compensation for future medications, is difficult.

**291**  The plaintiff reports medication expenses in 2014 of $10,018.47. She sets out future annual medication costs in the order of $10,861 per year calculated in the Pakulak report. Applying a net present value multiplier of 23.889, she estimates $259,459 to be the cost of her required medications for the balance of her life. She accepts that there should be a deduction for contingencies set at a 20%, thus producing a total future care cost for medications of $200,000.

**292**  Alternatively, the plaintiff suggested that her pre-accident medications for 2008 cost approximately $5,000 per year. Thus, the difference between the pre-accident and post-accident medication levels would be $5,000 per year, justifying an award of $119,445.

**293**  This latter suggestion does not take into account my findings concerning the plaintiff's secondary gain motivation or the prospect that she would have continued to have intermittent mental health and physical health issues regardless of the accident. Nonetheless, I must deal with this part of the claim by estimating the amount of the plaintiff's pre-accident medication needs and the post-accident medication requirements that would not have been necessary if the accident had not happened.

**294**  Assessing the plaintiff's future medication needs that would not have been required but for the accident is complicated by the lack of credibility and reliability in the plaintiff's overall evidence. The recommendations for these medications derive from the opinions of several doctors whose evidence has been given less weight because of the failure to do a careful comparison between her pre-accident condition and long term prognosis (failures in no small part owing to the plaintiff lying about this condition or otherwise her failure to provide this that information). Further, there is no indication about the level of medication she might require if she meets with some success in the multidisciplinary assessment planned.

**295**  The plaintiff has a doubtful prognosis for recovery. She may be permanently afflicted with symptoms following the accident. However, I am unable to do a mathematical calculation under this head of damages. As in all cases, the compensation for this head of damage is an assessment and not a calculation. In the final analysis, and taking into account her presentation of ongoing annual prescription expenses of $10,861 set out in the schedule attached to the written argument, the plaintiff will recover $50,000.

**Mitigation**

**296**  The applicable test to be applied to a defence of failure to mitigate was set out 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=):

[78] In *Chiu* (which remains the guiding authority on this question), Low J.A. said 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. These principles are found in *Janiak v. Ippolito*,, [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=).

**297**  The defendant argues that the plaintiff had refused to follow treatment advice to exercise and engage in a pool program and had been untruthful with the therapist. He contends she did not undertake the steps to improve her condition nor had she reduced her reliance on the motorized wheelchair notwithstanding the wisdom to do so. He said none of the medical experts support her continued use of the wheelchair and noted that Dr. Sahjpaul said she needed to walk more to increase her muscle strength, which he opined would lead to a reduction of pain intensity.

**298**  The plaintiff was cross-examined regarding the use of the wheelchair/scooter. At trial she denied the scooter was used because of back pain. She said it hurts when she walks longer distances and she has pain when she sits in ordinary chairs. In the wheelchair she said she felt relaxed. She was then confronted with her evidence at her examination for discovery where she said she uses the wheel chair because of back pain and not because of difficulties with her right leg.

**299**  When asked if Dr. Benitez told her to stop using the scooter, she said she could not remember; later, she admitted that Dr. Benitez told her to buy a back brace and stop using the scooter. When asked again if Dr. Benitez recommended she reduce her use of the chair she said "I'm sorry things are not stored in my head". It was in turn revealed that she was the one who suggested to Dr. Benitez that she wanted a scooter. None of her doctors have recommended that she get or continue to use it.

**300**  Otherwise, the plaintiff submits that there was no evidence that she consciously took on a sick role. She argues that she has been compliant with her family doctor's advice and her decision to decline an exercise program was reasonable because there were only limited prospects that program might succeed. She also argues that Dr. Sahjpaul's opinion concerning the results of her efforts to improve is not established. The evidence does not point to the likelihood of a successful outcome; the effects of exercise will be directed to better pain management, not the elimination of pain.

**301**  She acknowledged making a misleading statement to Ms. Rodriguez, the ICBC appointed physiotherapist, when she said she would be away for three months and could not take the treatments recommended; she admitted she was absent for only one month and explained she simply did not want to see anyone else at the time. Although there is no opinion regarding the impact on her recovery that might have followed these treatments, it is troubling that the plaintiff arbitrarily and without a sound reason deflected the opportunity to obtain physiotherapy assistance.

**302**  At her discovery, the plaintiff was questioned about Ms. Deborah Edwards from We Care, who came to assess her needs at her house. The plaintiff acknowledged asking for four hours for personal care and meal preparation and when Ms. Edwards suggested she would only need two hours, the plaintiff asked Ms. Edwards to leave her house, asserting at discovery she was a "bad" person.

**303**  I accept the submissions that the plaintiff has failed to pursue the recommendations concerning exercise and reducing her reliance on the motor scooter. There are measures recommended by the physicians she could take to ameliorate some of the pain symptoms and I accept that if the plaintiff embraced this medical advice she could reasonably expect to reduce the level of pain she experiences. It is likely that the serious mental health issues that overshadow her self-perception of pain and injury have impeded her ability to make rational choices in response to the doctor's recommendations. Nonetheless, I am inclined to the view that the plaintiff's decisions to eschew medical advice to exercise and reduce her reliance on her scooter were conscious and deliberate.

**304**  However, there is no evidence to inform the Court of the extent of any anticipated pain reduction or improvement in function that might have resulted from the plaintiff pursuing these recommendations. Additionally, there is no evidence to clarify the duration of any expected pain reduction. I accept that common sense could lead to a conclusion that the plaintiff's rejection of her doctor's recommendations might have ameliorated her ongoing symptoms. Nevertheless, in the circumstances of this case and considering the complexities of her physical symptoms and psychiatric difficulties, including the plaintiff's mental health shortcomings, contributed to in part by the accident, and the dearth of evidence concerning the anticipated impact of her involvement in either an exercise program, the reduction in the use of her scooter or other recommended treatment, I am not satisfied the defendant has proven a failure to mitigate on the balance of probabilities.

**In Trust Awards**

**305**  The plaintiff seeks an in trust award for her husband, Nelson Saborio, based on the evidence that he drove her to many appointments (at least 10 per year at two hours each), took time off work, and did cooking, cleaning and laundry that she maintains she was unable to do. She argues that his efforts were beyond the call of duty and, although he has not kept a record of his time, he should be awarded compensation based on 100 hours per year of assistance at $25 per hour. This rate would compensate him at $18,000 for the six years he has performed these tasks. Because her condition is unlikely to improve, she contends I should add a "future component" for a total claim of $25,000-$30,000.

**306**  The defendant argues that Mr. Saborio's services were no more than what might reasonably be expected in a family situation where there is" give-and-take": see *Dykeman v. Porohowski*, [*2010 BCCA 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DXWW-2018-00000-00&context=).

**307**  Mr. Saborio did not provide any documentary evidence proving a financial loss for caring for his wife; instead, his employer confirmed that there was no loss of income because he was able to make up time as required. He also testified he was not working at the time of the accident but for some time after the accident, Mr. Saborio was not working and would not have incurred any financial loss in driving the plaintiff to employ appointments or otherwise performing domestic chores.

**308**  Nevertheless, it is not necessary to establish that Mr. Saborio lost any income while providing services to the plaintiff in order to recover an in trust award.

**309**  The defendant also points out that the plaintiff did not have a driver's license and was, before the accident, regularly attending her physician's office. There is no basis to conclude that this pattern changed as a result of the accident. Finally, the defendant points out that the plaintiff was disabled from house work due to her pre-existing condition and had assistance with it before the accident. Indeed, Mr. Saborio said prior to the accident the plaintiff could not exert strength in that hand. As a result, she did not clean the house or comb her hair; it was he and the children who were doing the cleaning. The plaintiff did some cooking, but not every day. Her hand limited her otherwise.

**310**  Mr. Saborio's evidence underscores the consequences of the plaintiff's unreliable and unbelievable evidence. It is clear that the plaintiff was not performing the household duties and services alleged in her evidence or submissions. I accept the husband's evidence that he was already doing many of the domestic chores in the family home prior to the accident because the plaintiff's arm was too painful for her to perform those duties. She continued complaining about her hand after the accident, but downplayed at trial the impact it had on the things she was doing.

**311**  I am not satisfied that the plaintiff has established on the balance of probabilities that an in trust award for Mr. Saborio has been made out. On his evidence alone, it does not appear that she was performing the duties in the home before the accident, or that since the accident he has taken up any extra cooking or any other household duties he was not performing at the time of the accident.

**312**  I accept that he may have driven his wife to some appointments and he may have done some cooking that the plaintiff could not do after the accident, but I am not able to accept that the very minor increase in duties he undertook rise to the level that would support an in trust award for him. The purpose of an in trust award is to compensate the plaintiff for the reduction in her the ability to carry out household tasks performed by a family member. The foundation for such an award must be established in the evidence: see *Kroeker v. Jansen* [*(1995), 123 D.L.R. (4th) 652*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X11W-00000-00&context=), [*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.). In this case, the plaintiff has not proved that her post accident ability to perform those tasks has been reduced because of the injuries. Her disability was extent at the time of the accident.

**313**  The plaintiff also claims an in trust award for her daughter, Claudia Gumina, for personal care she required during the post-surgical convalescence. The plaintiff argues that the services provided by Claudia were done three hours per day for two weeks following the surgery. She seeks an award of $1,000 as reasonable compensation for that help.

**314**  I have determined that the plaintiff's radiculopathy was not caused by the accident and the resulting surgery was not caused in the collision. Thus, the plaintiff has not proven that there should be an in trust award for Claudia for her post-surgical services to her mother made necessary because of the plaintiff's reduced capacity resulting from the injuries caused by the defendant's ***negligence***.

**Loss of Housekeeping Capacity**

**315**  The plaintiff seeks $80,000 as compensation for the loss of her capacity to perform household tasks that were part of her role at the time of the accident. She acknowledges that at the time of the accident she had some restrictions on her ability to perform these duties including a reduced ability to cook.

**316**  The plaintiff refers to *Deo v. Deo -and- Deo v. Fourchalk*, [*2005 BCSC 1788*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S2Y2-00000-00&context=), and *Kroeker*, and argues the court could estimate the number of hours of work performed by others without charge and calculate the value of the services based on a minimum wage payment for the number of hours required. She contends the We Care estimate of $26.50 per hour for between six and seven hours per week for housekeeping and personal care should be awarded for at least four to six weeks. She also argues that her overall diminution in housekeeping capacity is $6,250 per year (calculated at five hours per week and $25 per hour). The sum of these amounts is $80,000. She accepts that this amount can be reduced due to limitations in her pre-accident housekeeping capacity.

**317**  She relies on *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=), where the plaintiff claimed for a loss of capacity, distinct from a future care claim, which was intended to reflect the value of work that would have been done by the plaintiff but which she is incapable of performing due to the injuries caused by the accident. There, the plaintiff claimed that before the accident she performed all the cooking and housekeeping as well as laundry and grocery shopping. The plaintiff contended that she was able to perform many of those duties but they were now more time-consuming. The Court, without calculations, provided a rough estimate of replacement services. The plaintiff contends that Dr. Gittens, Dr. Borhorquez and Dr. Benitez commented on the plaintiff's inability to return to work. It is curious that these physicians spoke about the plaintiff's physical inability to work without regard to her pre-accident inability to perform domestic chores because of her hand problems.

**318**  Again, the tension arising from the unreliability in the plaintiff's evidence hampers the Court's assessment of what, if any, interference in the plaintiff's homemaking ability arises from the accident related injuries.

**319**  Based on my findings concerning the diagnosis and prognosis of the plaintiff's physical and mental health, I accept that the accident may have interfered in her ability to perform some chores in or about the family home. However, I am not satisfied on the evidence that the plaintiff performed any significant measure of housekeeping chores prior to the accident. It is accepted that she did some cooking and her ability to continue working in the kitchen and/or helping out in any modest way with household chores is uncertain. Nonetheless, I am prepared to make a modest allowance for the impairment in her home making capacity that was likely caused by the injury sustained in the accident and award the plaintiff $8,000 under this head of damage.

**Special Damages**

**320**  The plaintiff has presented a list of special damages totaling $17,603.72.

**321**  The first item is a charge of $585 from the RehabMax clinic for user fees charged between December 18, 2008, and June 27, 2009. I am satisfied that the user fees incurred in the immediate aftermath of the plaintiff's accident were appropriate and she will have judgment for that sum.

**322**  The plaintiff claims for prescription medications totaling $631.50. The defendant does not take issue with this claim.

**323**  The plaintiff claims $6,555 for child care/home support. The person who provided these services was not called and the plaintiff's husband testified that she did not have any paid help after the accident. Finally, there is no medical evidence to support such a claim.

**324**  I am not satisfied on the balance of probabilities that the evidence warrants an award for this amount of money as an item of special damages. Though the plaintiff produced some receipts curiously reflecting the same $795 each month from April 2009 to November 2009 and $195 in March 2010, the contradictions between her evidence and that of her husband cannot be reconciled. Based on my overall view of the plaintiff's evidence noted above, I am not satisfied that these damages have been proven.

**325**  The plaintiff claimed $78.15 for a back support belt and knee brace. The evidence did not relate that expense to an injury sustained in the accident. It will not be allowed as a special damage claim.

**326**  The plaintiff claimed $2,486 for a bed that she contends was purchased to facilitate her post-surgical recovery. The bed was not purchased on the recommendation of her surgeon, Dr. Gittens. Dr. Benitez had written a note supporting its purchase and testified that it would assist in improving her restorative sleep. Still, it is clear she was having sleep difficulties before the accident. In view of my findings concerning the surgery and in the absence of a recommendation from Dr. Gittens, the plaintiff has not proven on the balance of probabilities that the acquisition of this bed was medically necessary because of the plaintiff's motor vehicle accident related injuries.

**327**  The plaintiff claims $3,285 for MRI scans performed at the recommendation of her treating physician. The defence says it should not be responsible for those costs concerning a disc herniation because that injury was not related to the accident. In my view, it cannot be said that the decision to have the MRI scans performed should not be paid because the ultimate diagnosis of disc herniation was not related to the accident. The plaintiff was complaining of back pain at the time and her doctor formed the opinion that this investigatory procedure was necessary in the circumstances. If she had not been involved in the accident, she would not likely have experienced low back pain at the levels described after the accident. Thus, in my view the MRIs were investigatory procedures that were undertaken because she had been in the accident, notwithstanding that the findings showed a condition unrelated to the accident. I am prepared to allow $3,285 as a reasonable special damage claim.

**328**  The plaintiff obtained medications from Nicaragua valued at $62.04. The defendant contends this expense was unrelated to the motor vehicle accident; however the medication was used by the plaintiff's treating physician to address accident concerns and in my view would not have done so if he were of the opinion that the medications were not medically necessary. As such, this expense is allowed.

**329**  Finally, the plaintiff claims $3,850.63 for taxi fares and mileage between 2008 and February 3, 2015. The examination of the taxi receipts contained in the plaintiff's evidence indicates that the plaintiff travelled to and from various medical offices, hospitals, therapy clinics and other consultants. I accept that the plaintiff should recover those costs associated with obtaining treatment; some of the charges relate to the plaintiff's attendance with independent medical examiners retained by the defendant.

**330**  In my view, those attendances for IME's are not proper special damage claims; they are more properly claims in the litigation or should have been paid as a condition of the plaintiff's attendance. They should be dealt with in conjunction with the assessment of costs.

**331**  A determination of the appropriate mileage is further troubled by the fact that the plaintiff was seeking an in trust award for her husband who purportedly drove her to and from many appointments.

**332**  The plaintiff may be entitled to a significant award for these transportation costs; however, I am unable to provide any accurate assessment of the amount she should be allowed as special damages based on the evidence before me. If the parties are not able to resolve the question of the latest transportation costs based on the reasons herein, the parties will have liberty to set this matter down for further argument on the question of the amount that should be allowed to the plaintiff.

**Summary**

**333**  The plaintiff will have judgment as follows:

1. non-pecuniary damages: $70,000;
2. cost of future care: $50,000;
3. impairment to housekeeping capacity: $8,000;
4. special damages: $3,932.04.

**334**  The plaintiff's claim for future income loss/impaired earning capacity is dismissed, as are her claims for in trust awards on behalf of her husband and daughter.

**335**  If the parties are unable to agree on a disposition concerning costs of this proceeding, then they are at liberty to make further submissions on costs. In my view, the disposition of the defendant's argument concerning. Dr. Benitez's report should be dealt with later. If no submissions are made by either party by March 15, 2016, the plaintiff will have her costs at Scale B.

T.C. ARMSTRONG J.

**End of Document**

[***Salaam v. Abramovic, [2009] B.C.J. No. 165***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B146-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.M. Gropper J.

Heard: November 10, 2008.

Judgment: February 4, 2009.

Docket: M062858

Registry: Vancouver

**[2009] B.C.J. No. 165** | [*2009 BCSC 111*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2PV-00000-00&context=)

Between Razia Shanaz Salaam also known as Rose Salaam, Plaintiff, and Toni Abramovic, Defendant

(51 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty and standard of care — Duty of care — Causation — Foreseeability and remoteness — Action by plaintiff for damages sustained in motor vehicle accident dismissed — Plaintiff had been at road controlled by stop sign, waiting to make left turn onto road defendant was travelling down — Defendant was in left lane and observed plaintiff blocking right lane while waiting to turn left — Plaintiff suddenly jolted into defendant's lane and defendant honked and braked but skidded on wet pavement and hit plaintiff — Plaintiff had been turning left so it was her obligation to yield and watch for hazards — Plaintiff's presence in defendant's lane caused accident and she was 100 per cent liable.**

**Transportation law — Rules of the road — Careless driving — Turns — Left at intersection — Action by plaintiff for damages sustained in motor vehicle accident dismissed — Plaintiff had been at road controlled by stop sign, waiting to make left turn onto road defendant was travelling down — Defendant was in left lane and observed plaintiff blocking right lane while waiting to turn left — Plaintiff suddenly jolted into defendant's lane and defendant honked and braked but skidded on wet pavement and hit plaintiff — Plaintiff had been turning left so it was her obligation to yield and watch for hazards — Plaintiff's presence in defendant's lane caused accident and she was 100 per cent liable.**

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| Action by the plaintiff for damages sustained in a motor vehicle accident. The plaintiff had no memory of the accident; the defendant was examined for discovery. The defendant had been driving down a steep hill on a dark, slippery road. The road he was on was not controlled by a stop sign. The plaintiff was waiting to turn left from the road controlled by a stop sign at the intersection of the roads. The defendant had been travelling in the left hand northbound lane and saw the plaintiff at the intersection, creeping forward to turn. The plaintiff did not stop at the stop sign and was partially blocking the right hand northbound lane. The defendant continued forward when the plaintiff suddenly jolted forward into his lane. The defendant applied the horn and the brakes and the plaintiff swerved back, but the defendant skidded on the wet pavement and hit the plaintiff. Both parties obtained accident reconstruction experts who supported their positions and accused each other of not taking the road conditions and design into account. The defendant argued that his vehicle was a hazard that the plaintiff was obligated to watch for while turning left. The plaintiff argued that the defendant saw she was turning and her attention was on the southbound lanes so his should not have continued forward at the same speed.  HELD: The action was dismissed as the plaintiff was 100 per cent liable for the accident.  The plaintiff had been turning left so it was her obligation to yield and turn to observe whether traffic had been approaching. The plaintiff had failed to stop before entering the intersection so she had not proceeded with caution, despite her slow speed. The defendant was there to be seen and was entitled to assume the plaintiff would observe the rules of the road and look his way before turning. The plaintiff's presence in the defendant's lane caused the accident. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Accident, [*RSBC 1996, CHAPTER 318, s. 144*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0FY-00000-00&context=), s. 174, s. 175

***Negligence*** Act, RSBC 1996, CHAPTER B33, s. 1

Rules of Court, Rule 18A

**Counsel**

Counsel for Plaintiff: E.A. Thomas.

Counsel for Defendant: B. Devlin.

**Reasons for Judgment**

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| **J.M. GROPPER J.** |

**1**   Ms. Salaam claims damages for injuries she sustained in a motor vehicle accident which occurred at or near the intersection of Scott Road and 120th Street in Surrey on December 10, 2005 at approximately 6:50 p.m.

**ISSUE**

**2**  The only issue before me in this Rule 18A application is liability for the accident.

**FACTS**

**3**  The intersection of 120th St. and Scott Road (the "intersection") is controlled by a stop sign, which requires the vehicles on 120th St. to stop and yield to vehicles travelling on Scott Rd. Scott Rd. is a four lane through-divided road. There are two lanes northbound and two lanes southbound. The accident occurred in the left northbound land of Scott Rd.

**4**  The plaintiff has no memory of the accident. The defendant was examined for discovery. All of the statements attributed to him were made in that discovery, except where noted.

**5**  The defendant was driving his 1989 Nissan Pathfinder north on Scott Rd. toward the intersection of 120th St. The road travels down a steep hill at approximately a 9% grade. At the time of the accident, it was dark and the roads were wet, cold and slippery. When he was approximately 450 feet from the intersection, the defendant saw the plaintiff's vehicle, a 1987 Toyota Tercel, approximately 20 feet behind the stop line on 120th St. He saw that it was signalling to make a left turn. There were no obstructions impeding the defendant's view of the plaintiff.

**6**  In the discovery, the defendant said that as he proceeded toward the intersection he was travelling in the left lane and did not change lanes. In a further affidavit, the defendant said he may have changed from the right to the left lane about 100 feet before the intersection.

**7**  The plaintiff's Toyota did not make a complete stop at the stop sign, which is 26 feet before the intersection. When the defendant was about 350 feet from the intersection, he observed the Toyota creeping its way, with hesitations, into the right hand northbound lane of Scott Road, where it paused again. The defendant could see the plaintiff facing to the right, looking at southbound traffic. She did not look to her left to check the northbound oncoming traffic. The defendant was aware that the plaintiff was blocking a portion of the right northbound lane and was moving slowly forward. He was in the left lane or moved into the left lane, and felt that he was safe in continuing because the plaintiff's vehicle was in the right lane.

**8**  The plaintiff continued to look in the direction of the southbound traffic when the defendant saw her vehicle jolt forward into the left northbound lane. The defendant says that he "laid on the horn." The plaintiff stopped in the left lane almost immediately because she was going very slowly. The defendant had already applied his brakes on and tried to gear down from third to second gear. The defendant said that he applied the brakes more, but his vehicle started sliding because it was wet. The defendant estimates that his vehicle slid approximately 20 feet. The defendant estimates that the plaintiff's vehicle was in the left northbound lane for at most five seconds before the impact. The front of the defendant's vehicle collided with the driver's door of the plaintiff's vehicle.

**EXPERT REPORTS**

**9**  Both parties retained experts in accident reconstruction.

**10**  The defendant's report was prepared on August 20, 2008 by M.E.A. Forensic Engineers and Scientists Ltd. The principal author was Jonathan M. Lawrence, P. Eng.

**11**  Mr. Lawrence made certain assumptions for the purposes of his report, including the date and time of the accident, the positions of the plaintiff's and defendant's vehicles before the collision occurred, damage to the plaintiff's Toyota and the defendant's Nissan, as well as the weights of each vehicle. Mr. Lawrence analysed the collision engagement, and calculated the impact speed based on a crash test comparison and a crash energy analysis. He concluded that at time of impact, the defendant's vehicle was probably travelling between 45 and 55 km/h.

**12**  In a further report dated October 17, 2008, Mr. Lawrence was asked to investigate the opportunities for both the plaintiff and the defendant to avoid the collision. Mr. Lawrence relied on the defendant's description of the accident in his examination for discovery in making certain assumptions about the collision.

**13**  Those assumptions included: that the defendant skidded for about 20 feet before the crash; that the road was wet and slippery; that the plaintiff's Toyota entered the intersection when the defendant was 350 feet from the intersection; that the defendant did not react when he first saw the plaintiff's Toyota, because it was behind the stop sign and he only considered it to be a hazard when it entered the left lane; and that the defendant described the plaintiff's Toyota moving slowly across the right lane for northbound traffic, which Mr. Lawrence interpreted as meaning

that the plaintiff's vehicle was moving at a speed of less than five km/h.

**14**  Mr. Lawrence considered the avoidance opportunities available to the defendant. He considered that the defendant's vehicle was travelling between 52 and 61 km/h at the start of the skid, if it skidded for 20 feet before the crash. He considered that the plaintiff's Toyota was travelling at 5 km/h and that it would take it 2.9 seconds to travel from the edge of the intersection to the left lane for northbound traffic. If the defendant approached the intersection at the speed of 60 km/h, he would have covered a distance of 159 feet in that 2.9 seconds and would have been 191 feet away at the instant the plaintiff's Toyota entered the left lane. Mr. Lawrence concluded:

This is not enough distance for a typical driver to stop short of the intersection (on a slippery wet road a typical driver would cover a distance of at least 102 feet between detecting a hazard and coming to a stop with a perception reaction time of 1.5 seconds, a short break lag of 0.2 seconds and a breaking distance of about 100 feet).

**15**  Mr. Lawrence states that the plaintiff's Toyota, at its speed of 2.5 km/h would have 5.8 seconds to move from the edge of the intersection to the left lane for the northbound traffic. The defendant would have been 35 feet away when the plaintiff's Toyota entered the left lane and, in Mr. Lawrence's opinion "too close to brake to stop before the crash".

**16**  He continues:

A car travelling at a typical rate from the edge of the intersection would take 3.9 seconds to completely clear both northbound lanes. An approaching vehicle travelling at 60 km/h would cover 213 feet in 3.9 seconds. Therefore [the plaintiff's] sightline distance of 450 feet was sufficient for her to see traffic approaching at 60 km/h before it was too close for her to clear its path.

**17**  The plaintiff filed the expert report of Robin B. Brown, P. Eng., who also considered whether it was possible for the defendant to have avoided the collision. His report is dated November 6, 2008. He reviewed the report of Mr. Lawrence, including the assumptions made by Mr. Lawrence, his description of the scene, and his analysis of the vehicle damage, collision engagement and impact speed.

**18**  Mr. Brown considered that Mr. Lawrence did not identify the friction coefficient which he used in his calculations of the defendant's vehicle at the time of impact, or at the onset of the skid. Mr. Brown calculated the friction coefficient provided in "tire friction during locked wheel braking" and concluded that the defendant's vehicle was travelling at a speed of between 58 and 63 km/h for a wet road condition and 62 to 66 km/h for a dry road condition, as a pre-braking speed range. From that, Mr. Brown concluded that the defendant's vehicle was likely travelling at a speed of 50 to 55 km/h at impact. Mr. Brown considered that if the defendant's vehicle was braking prior to impact, its speed would have been higher than the impact speed which he described in his discovery. Mr. Brown suggests it could be higher by approximately 10 to 20 km/h.

**19**  Mr. Brown concludes that the defendant's vehicle could have been brought to a stop at distance of just less than 50 metres if the defendant was surprised by the hazard. However, Mr. Brown considers that the defendant observed the Toyota before it entered the northbound lanes and saw it cross the right northbound lane for a period of more than six and one-half seconds. The defendant was able to honk and brake prior to skidding which would indicate that he was not surprised by the Toyota. If the defendant was alerted to the hazard, Mr. Brown suggests the distance to stop the defendant's vehicle would be reduced to 38 metres before the impact.

**20**  Mr. Brown also states that if the defendant observed the plaintiff's Toyota crossed the right northbound lane and enter the left northbound lane, he could have stopped his vehicle about 20 metres south of the collision area. Mr. Brown opines that if the plaintiff's vehicle came to a stop at the impact area this would increase the time that the plaintiff's vehicle was travelling across the northbound left lane to the impact area. Mr. Brown considers that this additional time would provide the defendant with additional time and distance to execute an avoidance manoeuvre and avoid the collision.

**21**  Mr. Lawrence provided a response to Mr. Brown's opinion on November 7, 2008. He considers that Mr. Brown, in applying the coefficient of friction which Mr. Lawrence also assumed, ignored the effect of the steep downgrade. He is also critical of Mr. Brown using a perception-response time typical of clear central hazard. Mr. Lawrence points out that discrepancy between his report and that of Mr. Brown is Mr. Brown's assumption that the plaintiff's vehicle is a clear hazard just as it enters the intersection, whereas Mr. Lawrence considers that the recognition of the vehicle as a hazard is delayed until it enters the left lane of the northbound traffic.

**MOTOR VEHICLE ACT PROVISIONS**

**22**  The parties rely on the following provisions of the ***Motor Vehicle Act***, *R.S.B.C. 1996, c. 318* (the "***Act***"):

Careless driving prohibited

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

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

...

**Yielding right of way on left turn**

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

**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.

**SUBMISSIONS**

**The Defendant**

**23**  The defendant submits that the facts support that his vehicle was an immediate hazard to the plaintiff as she approached the intersection. His vehicle was there to be seen from the crest of the hill 450 feet away. He argues that if the plaintiff would have turned her head to the left, and checked the northbound traffic on Scott Rd., as she crept into the right northbound lane, she would have stopped and avoided the collision. She was able to stop immediately when the defendant honked his horn, however, by that time she had moved into the left hand lane and the defendant, despite his actions, could not avoid the collision. The plaintiff had a duty to yield the right of way to the defendant in accordance with s. 175 of the ***Act***.

**24**  The defendant relies on ***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.) at para. 49:

While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was [the cause].

**25**  The defendant argues that the plaintiff bears the burden of proof to demonstrate that the defendant was contributorily negligent. The defendant submits that the facts show that as a result of the plaintiff's actions, he did not have a sufficient opportunity to avoid the collision.

**26**  Like all motorists, the defendant argues that he is entitled to assume that other drivers will follow the rules of the road. He does not have an extra duty of care placed upon him due to the presence of the plaintiff turning left. In that regard, the defendant relies on ***Pacheco (Guardian ad litem of) v. Robinson*** [*[1993] B.C.J. No. 154*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=) (27 January, 1993), Vancouver CA015159 (B.C.C.A.) at para. 15, where Legg J.A. states:

... a driver who wishes to make a left hand turn at an intersection has an obligation not to proceed until it can be done safely ... The existence of a left turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care. [Where the left turning driver] has totally failed to determine whether a turn can be made safely, [that driver] should be held on 100 percent at fault for a collision which occurs.

**27**  The defendant argues that the plaintiff had ample opportunity to see the defendant. The defendant's vehicle was there to be seen, if the plaintiff had looked in the direction of the traffic coming towards her. The plaintiff was travelling at such a slow speed, she was able to stop almost instantaneously, and if she had done so before entering the left lane of traffic, the accident could have been avoided.

**The Plaintiff**

**28**  The plaintiff argues that the defendant first saw the plaintiff's vehicle when it was 20 feet behind the stop line on 120th St. The defendant knew that the plaintiff was intending to make a left turn because he could see that her left turn signal was activated. He would have known that the plaintiff, in order to make a left turn, would have to cross over the two northbound lanes and then turn left into the southbound lane. He also knew that there were vehicles in the southbound lanes approaching the intersection. The plaintiff argues that the defendant must have known that it would have been dangerous for the plaintiff to enter the southbound lanes in view of the approaching southbound traffic. The defendant also must have known that the plaintiff was slowly proceeding across the northbound lanes, and that her attention was directed to her right for approaching southbound traffic. The defendant observed the plaintiff's vehicle enter the right northbound lane from approximately 350 feet away and he observed it continuing to move forward slowly.

**29**  The plaintiff argues that from the moment she entered the intersection, the defendant, travelling at 60 km/h, would have 6.5 seconds to arrive at the collision area. Therefore, when the plaintiff first entered the intersection, the defendant was not an immediate hazard and, in accordance with the provisions of s. 174 of the ***Act***, the defendant had a duty to yield a right of way to the plaintiff's vehicle.

**30**  The plaintiff suggests that the defendant's "biggest error in judgment" is that he continued to travel toward the intersection at the same speed, that is, 60 km/h, believing it was safe because he was in the left lane and the plaintiff was slowly crossing the right lane and moving forward toward the left lane. The defendant felt it was safe, despite the road being wet, slippery and having a downhill grade. The plaintiff's vehicle was an immediate hazard to the defendant at that point, when she was blocking the right lane and moving forward. That is when the defendant had a duty to yield to the plaintiff's vehicle.

**31**  The plaintiff states that she was "obviously looking for a break in the southbound traffic to complete her turn." She asserts that the defendant had "absolutely no reason to assume that the plaintiff was aware of the defendant's approach."

**32**  The plaintiff argues that the defendant was "quite some distance away from the plaintiff's vehicle when she entered the left northbound lane." He honked his horn. The plaintiff stopped in the left northbound lane. The defendant geared down and applied his brakes. He then fully applied his brakes and estimated that he skidded 20 feet before he collided with the plaintiff's vehicle. The plaintiff's vehicle was completely stopped in the left lane, for some period of time before the collision occurred. The plaintiff asserts that the "defendant had to be ... quite some distance from the intersection when the plaintiff entered the left northbound lane."

**33**  The plaintiff argues that the plaintiff's vehicle was an immediate hazard as soon as she entered the intersection. The defendant, and Mr. Lawrence, the defendant's expert, consider that the plaintiff was only an immediate hazard when she entered the left northbound lane. The plaintiff argues that the defendant observed the plaintiff enter the intersection from a distance of 350 feet and had a continuous unobstructed view of her vehicle as it proceeded across the right northbound lane. The defendant did not observe the plaintiff stop or otherwise indicate that she going to give way to the defendant travelling in the left lane. The defendant had 350 feet in which to perceive of and react to the plaintiff, who was in the northbound traffic lanes.

**34**  The plaintiff relies on ***Raie v. Thorpe***, [*[1963] B.C.J. No. 14*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JF75-M28S-00000-00&context=) to support her position that the defendant was not an immediate hazard when the plaintiff entered the intersection to execute her left turn. At para.18 Tysoe J.A. for the majority states:

[I]f 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" ...

Tysoe J.A. goes on to state at para. 25 that:

... the punctum temporis at which the question of immediate hazard and right of way arises is the moment before the driver who proposes to make a left turn actually commences to make it and not some earlier time.

**35**  On that basis, the plaintiff contends that when she entered the intersection, it was safe to do so in accordance with s. 175(1) of the ***Act***.

**36**  The plaintiff further relies on ***Carich v. Cook*** [*(1992), 90 D.L.R. (4th) 322*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61WK-00000-00&context=), [*9 B.C.A.C. 112*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61WK-00000-00&context=) for the principle stated at p. 4:

... Once the turn is commenced both of the drivers in that situation, the one who is doing a left turn and the ones that are approaching straight ahead in a situation where a vehicle could turn in front of them, all must keep a proper lookout.

**37**  The plaintiff also relies on ***Amador v. Hans***, [*2004 BCSC 348*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B22M-00000-00&context=) at para. 20, where the court found that the left-turning driver had a statutory duty to proceed with caution, however, once the left-turning driver was in the intersection, that driver could expect that oncoming cars would respect the priority of this position. Once the left turning driver had substantially entered the intersection, the court concluded, he became the dominant car to which the other car should have yielded (referring to s. 175(2) of the ***Motor Vehicle Act***).

**38**  The plaintiff urges that the defendant was not an immediate hazard to her when her vehicle entered the intersection. Having entered the intersection when it was safe to do so, the defendant then had a corresponding duty to yield the right of way to the plaintiff's vehicle as it proceeded into or across the highway. The plaintiff urges that the decisions of the courts have held that drivers on a through highway, having failed to yield a right of way to a motorist crossing the highway, bears the majority of liability.

**39**  Alternatively, the plaintiff argues that if the court concludes that both parties are negligent but is unable to apportion liability, then it should be apportioned 50/50 in accordance with the ***Negligence Act***, R.S.B.C. 1966, c. 333, s. 1.

**DECISION**

**40**  The essence of the plaintiff's position is that the defendant should have foreseen what the plaintiff would do: he knew that the plaintiff intended to make a left hand turn, crossing the northbound traffic and entering the southbound lane to Scott Rd.; he knew that her attention was to her right for approaching southbound traffic. He should have known that the plaintiff was moving slowly across the northbound lanes and would continue to do so despite the presence of the defendant's vehicle. She argues that the defendant had no reason to assume that she was aware of the defendant's approach.

**41**  The plaintiff relies on the provisions of s. 175(1) of the ***Act***. She says that once she entered the intersection, the defendant's vehicle had not nor was it approaching so closely that it constituted an immediate hazard. Essentially, when she entered the intersection it was safe to do so and the defendant ought to have yielded the right of way to her.

**42**  The plaintiff was the left turning vehicle. It was her obligation, in accordance with s. 174 of the ***Act***, to yield the right of way to the traffic approaching from the opposite direction. The plaintiff did not turn her head to observe whether traffic was approaching. Nor did the plaintiff comply with the provisions of s. 175 of the ***Act***. She did not stop before entering the intersection. The plaintiff did not do anything to ascertain whether there was traffic on the through highway, or whether it was close. She did not proceed with caution, despite driving slowly.

**43**  The unassailable fact is that the defendant was there to be seen from 450 feet away from the plaintiff before she entered the intersection.

**44**  The plaintiff argues that the defendant had no reason to assume that she was aware of his approach. Putting aside for the moment that was her duty to determine whether there was traffic approaching on the through highway, he was entitled to assume that she did know he was approaching, by hearing him, or to expect that she would actually turn her head to observe approaching traffic.

**45**  I agree with the analysis in ***Pacheco*** that it was the plaintiff's obligation, as she wished to make a left turn at the intersection, not to proceed until she could do so safely. The plaintiff did not determine whether her turn could be done safely.

**46**  The authorities upon which the plaintiff relies, as well as the provisions of the ***Act***, require, at the very least that all drivers keep a proper lookout.

**47**  The dispute between the experts devolves to when the defendant's approach constituted an immediate hazard to the plaintiff. The defendant's expert, Mr. Lawrence, describes the defendant becoming an immediate hazard to the plaintiff when she enters the left lane of the northbound traffic. The plaintiff's expert, Mr. Brown, considers that the plaintiff's vehicle was an immediate hazard to the defendant when she entered the intersection.

**48**  Mr. Brown's analysis ignores the provisions of ss. 174 and 175 of the ***Act***, which require the left turning vehicle to first stop, and then yield the right of way to traffic approaching so closely that it constitutes an immediate hazard, and then proceed with caution. The plaintiff did none of those things, she did not stop at the stop sign, she did not ascertain whether there was any through traffic, whether such traffic constituted an immediate hazard or not, nor did she proceed with caution. Mr. Brown's analysis requires the defendant to anticipate that the plaintiff was not following the rules of the road.

**49**  Mr. Lawrence considers that the immediate hazard arose when the plaintiff entered the left lane of the northbound traffic. I agree. The plaintiff was driving very slowly and could stop almost immediately. It was reasonable for the defendant to assume that she was aware of his presence and that she would not move into his path. She did. When the defendant honked, the plaintiff stopped. It was the plaintiff's presence in the defendant's lane of travel which caused the accident.

**50**  The plaintiff did not ascertain whether the defendant was an immediate hazard when she entered the intersection. In all the circumstances, I find that the plaintiff is 100% liable for the collision which occurred.

**51**  Therefore, the plaintiff's claim is dismissed. The defendant shall have his costs.

J.M. GROPPER J.

**End of Document**

[***Swiss Reinsurance Co. v. Camarin Ltd., [2017] B.C.J. No. 1782***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PG6-3J91-DXPM-S4PH-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N.P. Kent J.

Heard: August 24, 2017.

Judgment: September 7, 2017.

Docket: S023476

Registry: Vancouver

**[2017] B.C.J. No. 1782** | 2017 BCSC 1586 | 2017 CarswellBC 2452 | 282 A.C.W.S. (3d) 733 | 71 C.C.L.I. (5th) 194

Between Swiss Reinsurance Company, Plaintiff, and Camarin Limited, Defendant, and AON Reed Stenhouse Inc., AON Limited, AON Global Risk Consultants Limited and Alexander Howden Limited, Third Parties

(55 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Third party procedure — Pleadings — Amendment of — Statement of defence — Adding cross-claim or counterclaim — Leave to amend — After expiry of limitation period — Application by defendant to further amend counterclaim and third party claim allowed — Defendant provided reinsurance to main insurer, plaintiff provided layer of reinsurance to defendant, and third party was broker — Plaintiff commenced rescission action following product liability claim — Plaintiff did not object to proposed amendments to counterclaim — Crux of defendant's third party claim was well known, and proposed amendments added nothing new, and merely provided greater detail and particulars — Confusing aspect of claim could be cured in amendment process, and third party could raise contributory fault and res judicata in its defence.**

**Insurance — Reinsurance — Authority to reinsure — Requirements — Application by defendant to further amend counterclaim and third party claim allowed — Defendant provided reinsurance to main insurer, plaintiff provided layer of reinsurance to defendant, and third party was broker — Plaintiff commenced rescission action following product liability claim — Plaintiff did not object to proposed amendments to counterclaim — Crux of defendant's third party claim was well known, and proposed amendments added nothing new, and merely provided greater detail and particulars — Confusing aspect of claim could be cured in amendment process, and third party could raise contributory fault and res judicata in its defence.**

**Insurance — Liability insurance — Business and commercial insurance — Product liability insurance — Application by defendant to further amend counterclaim and third party claim allowed — Defendant provided reinsurance to main insurer, plaintiff provided layer of reinsurance to defendant, and third party was broker — Plaintiff commenced rescission action following product liability claim — Plaintiff did not object to proposed amendments to counterclaim — Crux of defendant's third party claim was well known, and proposed amendments added nothing new, and merely provided greater detail and particulars — Confusing aspect of claim could be cured in amendment process, and third party could raise contributory fault and res judicata in its defence.**

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| --- |
| Application by the defendant to further amend its counterclaim and third-party claim. The action arose from a complex reinsurance program. Primary liability coverage was provided to the insured company by another insurance company. The defendant provided reinsurance for 50 per cent of the American home layer, and the defendant's layer was wholly reinsured by the plaintiff. The third party acted as a broker for the liability insurance. The insured acquired a company that manufactured and sold roof tile, which turned out to have major defects that led to warranty claims and litigation. The liability claims were pursued under the primary/umbrella coverage, and the insurer at first denied coverage but settled after litigation ensued. The defendant agreed it was required to pay some amounts to the insured through its reinsurance layer, but became insolvent after making a partial payment. The defendant claimed coverage from the plaintiff, who denied the claim. Prior to 1993, the reinsurance policy between the defendant and plaintiff contained a follow the settlement clause but, thereafter, it did not. The plaintiff commenced this action for rescission of the policy on the basis of material misrepresentation and non-disclosure of tile defects. The defendant counterclaimed for rectification. The defendant also made a third-party claim against the broker. The defendant alleged the follow the settlement clause was left out through a clerical error and mutual mistake. The defendant's rectification claim was dismissed at summary trial. The plaintiff had also claimed against the insured company, but that claim was dismissed on consent. The trial proceeded and the plaintiff's claim for rescission was dismissed, judgment for indemnification was granted to the defendant, and the defendant was granted conditional judgment against the third party. The plaintiff's appeal was successful and a new trial was ordered. The plaintiff took no position on this application, but the third party objected on the basis the defendant failed to plead material facts, was attempting to raise new causes of action after the limitation period had expired, and res judicata applied.  HELD: Application allowed.  There was no real objection to the counterclaim amendments, so they were allowed. Some elements of the proposed third-claim amendments were confusing, but this could be remedied during the amendment process. The proposed amendments merely provided greater detail and particulars to the ***negligence*** claims. The third party was sophisticated and could not claim not to understand the nature of the claim. The law on liability of brokers was well-established, and the defendant's pleadings sufficiently set out a cause of action. The pith and substance of the defendant's complaint against the third party was well-known from the start; it was based on an alleged failure to communicate material information to the plaintiff to avoid policy rescission, and failure to include the follow the settlement clause. The proposed amendments added no further claims. The third party could raise contributory fault and res judicata in its defence. |

**Counsel**

Counsel for the Plaintiff and Defendant by Counterclaim: Michael D. Parrish.

Counsel for the Defendant: Stuart B. Hankinson, Q.C., Ruth E. Promislow, Charlotte Teal (A/S).

Counsel for the Third Parties: Robert S. Anderson, Q.C., Scott A. Dawson, Catherine George.

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| **N.P. KENT J.** |

**Introduction**

**1**  The defendant Camarin Limited ("Camarin") applies to further amend two of its pleadings in this case, namely, (1) its counterclaim against the plaintiff Swiss Reinsurance Company ("Swiss Re") and (2) its Third Party Notice issued against the various Aon entities named as third parties.

**2**  Swiss Re neither consents to nor opposes the application to further amend the Counterclaim but rather purports to "take no position".

**3**  The Aon third parties oppose the application protesting that, among other things:

1. Camarin has failed to plead all the material facts necessary to found a claim in ***negligence***;
2. Camarin is attempting to assert new causes of action which are barred by long-expired limitation periods; and
3. Camarin is wrongly pleading matters already decided by previous judgments in this case, thereby running afoul of the doctrines of issue estoppel and *res judicata*.

**4**  For the reasons that follow the proposed amendments are allowed and further case management directions are issued.

**Factual Background**

**5**  This action arises out of claims totaling in excess of $25 million on policies of reinsurance issued in the years 1993 and 1995 to 1998. The reinsurance was part of a complicated liability insurance program for McMillan Bloedel Ltd. ("MB"), now Weyerhaeuser Company Ltd., and all of its subsidiary or affiliated companies, and applied to "all operations anywhere in the world".

**6**  The "layers" of the relevant insurance coverage were as follows:

1. the "primary" and "umbrella/drop-down" layer of coverage was provided by American Home Assurance Company ("American Home"), part of the AIG insurance group;
2. 50% of the American Home layer was then reinsured by Camarin, a captive reinsurance company incorporated in Barbados and an indirect subsidiary of MB; and
3. the Camarin layer of reinsurance was itself wholly reinsured by Swiss Re.

**7**  MB had its head office in Vancouver. Not surprisingly, given the breadth and sophistication of its organization and operations, it employed an experienced risk manager who was involved in structuring and supervising MB's complicated insurance program.

**8**  Aon Reed Stenhouse Inc., generally referred to in the pleadings in this case as "Aon Vancouver", acted as MB's Vancouver-based insurance broker for the purposes of securing the various insurance policies required as part of MB's insurance program, including the policies referred to above. Aon Vancouver is part of a worldwide Aon group of companies providing, among other things, risk management and insurance consulting and brokering services. The three other Aon companies named as third parties in this lawsuit and generally referred to in the pleadings as "Aon London" are or were Aon affiliates located in London who assisted in the placement of Camarin's reinsurance policies with Swiss Re.

**9**  The precise legal nature of the relationship between Camarin and the Aon third parties is very much in issue in these proceedings.

**10**  In 1993 MB's U.S. subsidiary acquired an Oregon company, American Cemwood Corporation ("Cemwood"). Cemwood manufactured and sold in the North American market a certain type of concrete/fibre roofing tile. The tiles turned out to have major defects which gave rise to widespread warranty claims and ultimately numerous lawsuits throughout the United States including at least four class actions against Cemwood and MB.

**11**  The liability claims were eventually presented to American Home for coverage under the primary/umbrella layer of MB's insurance program. Coverage was initially denied by American Home and coverage litigation ensued. Ultimately however, the liability and coverage litigation was settled by way of a payment in the "Richison" class action by American Home in the sum of approximately US $70 million, portions of which were allocated to each of the five primary/umbrella liability policies referred to above.

**12**  American Home sought indemnity from Camarin pursuant to the reinsurance coverage extended by the latter. Camarin appears to have agreed that it is obligated to pay $24.9 million U.S. to American Home. It has apparently paid $13.9 million U.S. of that amount, however Camarin has since become insolvent and has not paid the remaining balance.

**13**  Camarin's reinsurance policy with Swiss Re for 1991 and 1992 included a "follow the settlements" clause. This is a clause which effectively obligates a reinsurer to abide by the decision of the underlying insurer (the "reinsured") to acknowledge liability, quantum and coverage for the underlying loss. Absent a "follow the settlements" clause or other favourable specific policy wording concerning settlements, in order for a reinsurer such as Swiss Re to be liable on its reinsurance policy, the reinsured insurance company (here, Camarin) must prove on a balance of probabilities that:

1. the original insureds (here MB/Cemwood) would have been liable in the underlying tort litigation (here the Richison class action) and:
2. an award would have been made of damages of a sort insured under both the primary/umbrella and the reinsurance policies issued for each applicable policy year.

For practical purposes, this test, which has now been endorsed by the Court of Appeal in this case, essentially requires:

1. a "trial within a trial" of both the liability and quantum issues in the same manner as the original plaintiff in the underlying tort proceedings would have had to prove its case against the original insureds in the jurisdiction where the suit was brought (*i.e.*, in this case, the class action against MB/Cemwood in the California court); and
2. proof that the underlying insurance policies provided coverage for all or some of the liability and damages that would have been imposed in the original tort proceedings.

**14**  The Swiss Re reinsurance policies issued to Camarin for the years 1993 and 1995 to 1998 did not contain any "follow the settlements" clause. Whether the Aon third parties have any liability to Camarin for the absence of a "follow the settlements" clause in the policies is very much in issue in these proceedings.

**15**  Camarin claimed coverage for its exposure to American Home under the reinsurance policies issued by Swiss Re for the years 1993 and 1995 to 1998. Swiss Re denied the claim. It then instituted the present proceedings seeking rescission of the policies on the basis of alleged material misrepresentation and non-disclosure of the Cemwood tile defect exposures and litigation. Swiss Re claims that, had it been provided with this information in a timely and appropriate manner, it would never have agreed to issue the reinsurance policies for the years in question.

**16**  For its part, Camarin seeks to enforce coverage under the Swiss Re reinsurance policies and seeks damages on that account. It also issued third-party proceedings against the Aon entities blaming the latter for any misrepresentations or non-disclosure that may have occurred and for failing to include a "follow the settlements" clause in the policies.

**Procedural Background**

**17**  Swiss Re issued its original Statement of Claim in this matter in June 2002. It sued not only Camarin but also MB. It sought a declaration that the Swiss Re policies were void for material misrepresentation and non-disclosure. As against MB, it also sought a declaration that "McMillan Bloedel may not take, directly or indirectly, any of the benefits of the aforesaid policies of reinsurance". As against both defendants, it claimed "damages for negligent or fraudulent misrepresentations".

**18**  Camarin filed its Statement of Defence and Counterclaim against Swiss Re in November 2003.

**19**  MB also filed its Statement of Defence in November 2003. Among other things, it pointed out that it was never a party to any of the reinsurance policies and it denied that it owed any disclosure duties to Swiss Re.

**20**  Also in November 2003, each of MB and Camarin issued a Third Party Notice against the Aon entities.

**21**  In their initial pleadings each of Camarin and the Aon third parties alleged that:

1. the "follow the settlements" provision was always intended to have been part of the Swiss Re policies and that it was a "clerical error" by one or more of the Aon entities that resulted in the clause being "inadvertently omitted" from the policies when they were issued;
2. the 1993 Renewal Slip respecting that year's coverage provided that the terms and conditions of the previous year's policy would remain unchanged. The Slip was signed by Swiss Re signifying their agreement to these terms, however the clerical error resulted in the "follow the settlements" clause being omitted; and
3. all of this amounted to a "mutual mistake" on the part of Camarin and Swiss Re and hence the post-1992 policies should be rectified to include the "follow the settlements" clause.

**22**  Camarin's counterclaim against Swiss Re included a claim for rectification of the policies to insert a "follow the settlement" clause. In June 2007 Camarin applied for summary trial of the rectification claim. The Aon third parties supported the claim. Swiss Re opposed. All parties agreed that the issue of rectification was appropriately dealt with by way of a summary trial. The implications of that decision may not have been fully considered.

**23**  In August 2007, Justice Burnyeat issued his judgment on the summary trial application. He concluded there was no common intention between the parties that a "follow the settlements" clause would be included in the 1993 or 1995 to 1998 policies. The claim for rectification was therefore dismissed.

**24**  No appeal was taken from the summary trial ruling. The parties are thus bound by the findings of fact made at the time. The implications of "litigating by slices" now come to the fore.

**25**  There is another procedural step that was taken in the action and which may have implications for the re-trial of this case, whether as *res judicata* or otherwise.

**26**  On July 14, 2008, while the trial of the case was ongoing before Mr. Justice Burnyeat, a consent order was entered dismissing "the within proceedings as against the defendant Weyerhaeuser Company Limited." The order provided that "such dismissal be for all purposes of the same force and effect as if the judgment dismissing this action against the defendant Weyerhaeuser Company Limited had been pronounced following a trial of this action upon the merits." All parties to the litigation formally consented to the order.

**27**  As discussed earlier, the original Statement of Claim issued by Swiss Re named MB (Weyerhaeuser) as a defendant. That claim was subject to various amendments but the action proceeded to trial in March 2008 based on a Second Further Amended Statement of Claim issued by Swiss Re on March 6, 2008. The pleading alleged numerous misrepresentations and non-disclosures by MB (and Camarin) in breach of a duty of care to advise Swiss Re of all material facts respecting possible exposure under the reinsurance policies. These were and are the misrepresentations and non-disclosures relied upon by Swiss Re in support of its claim for rescission of the insurance policies in question.

**28**  Questions arise, ones which may not have been considered by the parties to date, respecting the implications of the consent dismissal order referred to above. For example, does that order amount to a decision on the merits that MB did not in fact make any "innocent or negligent" misrepresentation or nondisclosure? If so, what might be the implications of that court order for the re-trial of Swiss Re's claim for rescission?

**29**  In any event, trial of the remaining claims proceeded before Justice Burnyeat over a period of 80 days between March-July 2008 and judgment was reserved. Judgment was released in July 2012 at which time:

1. Swiss Re's claim for rescission of the reinsurance policies was dismissed;
2. judgment was granted in Camarin's favour on the counterclaim for indemnification under the reinsurance policies; and
3. Camarin was granted "conditional" judgment against the Aon third parties for negligent failure to include a "follow the settlement" clause in the policies (to be entered only in the event of a successful appeal by Swiss Re on the counterclaim).

**30**  Both Swiss Re and Aon appealed the trial judgment. The appeal was not heard for almost three years. The Court of Appeal's judgment was issued on November 13, 2016. The appeals were allowed and a new trial was ordered of Swiss Re's action, Camarin's counterclaim, and the third-party proceedings against the Aon entities.

**31**  The case was thereafter assigned to me for judicial management and trial. The new trial has been set for 100 days during April-August 2018. A detailed "Case Plan Order" was issued on March 7, 2017. Some 48 directions were given respecting pleadings (including amendments), document discovery, examinations for discovery and depositions, expert reports, and the conduct of the trial.

**32**  Swiss Re amended its pleadings on April 18, 2017 by way of a "Third Further Amended Statement of Claim". On June 15, 2017 Camarin filed a "Second Further Amended Statement of Defence" (to the Swiss Re claim). Those amendments proceeded by consent.

**33**  Camarin now seeks to further amend its counterclaim against Swiss Re and also its Third Party Notice to the Aon entities. Swiss Re "takes no position" on the amendments. However the Aon third parties opposed and the matter proceeded to a hearing before me on August 24, 2017.

**The Proposed Camarin Amendments**

**34**  There is little that is controversial in Camarin's proposed Further Amended Counterclaim against Swiss Re. Indeed, Swiss Re does not oppose the amendments.

**35**  The Aon third parties purport to object to the amendments because of the proposed removal of certain paragraphs related to the (now moot) rectification claim. These include the allegations referred to in paragraph 21 above respecting an Aon "clerical error" that resulted in the "follow the settlements" provision being "inadvertently omitted" from the policies.

**36**  In reply, Camarin advises that,"If it would assist in moving matters forward, Camarin is prepared to agree that the removal of these paragraphs will not preclude Aon from advancing whatever arguments it would have sought to advance had this amendment not be made." This is hardly a concession. It follows in any event from the rectification summary trial decision as, indeed, do the findings of fact made in that judgment about the dealings and communications between the parties in the placement and issuance of the five reinsurance policies in question.

**37**  The application to further amend Camarin's Counterclaim against Swiss Re is granted.

**38**  I would, however, note one aspect in the amended pleading which is going to require clarification in due course. This relates to the "policy" of reinsurance provided by Camarin to American Home. Some as yet unanswered questions arising with respect to that reinsurance might include:

1. Since, as counsel have advised, no formal policy was actually issued by Camarin to American Home, in what fashion has this reinsurance obligation been documented? Bearing in mind that Camarin is a Barbados company which, counsel advised, was not registered to do insurance business in British Columbia (or Canada), what is the law governing the reinsurance obligation? What are the terms and conditions of coverage? Is the coverage even enforceable?
2. Since the Swiss Re reinsurance policy was issued in London by an insurer domiciled in Switzerland and for the benefit of a reinsured (Camarin) domiciled in Barbados, what is the law governing the interpretation and enforcement of the coverage? For parties domiciled in Barbados, Switzerland or London, what law governs their conduct (or shortcomings) in the placement of the reinsurance each year?

**39**  Aon's objections to Camarin's proposed Amended Third Party Notice are more substantial. They include:

1. the pleading has been substantially expanded and is now disorganized, prolix and confusing;
2. the amendments seek to add new causes of action long after the expiration of any applicable limitation period and, in light of "irreparable prejudice" to the Aon third parties, the amendment should not be permitted at this late date;
3. in any event, the proposed amended pleading fails to allege all the material facts necessary to support the specific causes of action claimed; and
4. the amendments seek to withdraw "admissions" made by Camarin (the "clerical error") and purport to allege material facts which are in conflict with the findings made by the court in the rectification summary trial.

**40**  I am inclined to agree that some elements of the proposed amended pleading are somewhat confusing. Several points to notice in this regard include:

1. the title and date of the Amended Statement of Claim is wrong and has already been superseded by the pleading filed on April 18, 2017. So too with respect to the Amended Statement of Defence which has been superseded by the pleading filed June 15, 2017. These references should be updated;
2. the prayer for relief seeks "contribution or indemnity" from Aon in respect of the Swiss Re claims against Camarin. That claim is now limited to rescission and is not one that would ordinarily be subject to contribution or indemnity from a third party; and
3. to the extent Camarin "repeats, pleads and relies on the facts alleged in" other pleadings, it imports confusion and ambiguity, particularly insofar as different definitions are used to describe the various participants (there are at least three different definitions of "Aon" in the various pleadings).

**41**  These possibly confusing syntax problems are easily remedied, particularly now that the court has granted leave for Camarin to further amend its Counterclaim and Statement of Defence. They should be remedied by Camarin before the Amended Third Party Notice is filed.

**42**  While the other objections raised by Aon are more substantive in nature, I nonetheless find that they have no merit.

**43**  Aon argues that the proposed amendments raise new causes of action which did not form part of the earlier trial and which are barred by long-expired limitation periods. Camarin's reply, with which I agree, is that the proposed amendments merely provide greater detail and particularization of the ***negligence*** claims contained in the original Third Party Notice and that all of the matters now sought to be added to the claim were exhaustively canvassed in evidence and argument at the first trial.

**44**  Insurance brokers are licensed professionals. In British Columbia, their conduct is regulated by the Insurance Council of British Columbia which has promulgated a Code of Conduct setting out minimum standards for competence and the "practice of the business of insurance". Among other things, the Code requires brokers:

1. to recognize the fiduciary nature of their obligations to insureds and insurers;
2. to conduct adequate fact-finding and to carefully evaluate their clients' insurance needs;
3. to make reasonable inquiries into the risk and to provide full and accurate information to insureds and insurers alike;
4. to fully inform clients about the insurance available in the marketplace so as to enable informed decisions regarding the coverage to be obtained; and
5. to properly place the insurance coverage as instructed by the client.

**45**  Aon is a sophisticated insurance broker with considerable expertise in its field. It does not lie in their mouths to claim that they did not or do not understand the nature of Camarin's complaint which has given rise to the litigation between them and which, after all, has already been exhaustively canvassed and argued in the first trial.

**46**  The law respecting an insurance broker's potential liability to clients has been well-known in Canada for at least 40 years since the seminal decisions of *Fine's Flowers Ltd. et al. v. General Accident Assurance Co. of Canada et al*. [*(1977), 17 O.R. (2d) 529*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0NM-00000-00&context=) (C.A.) and *Fletcher v. Manitoba Public Insurance Co*. [*(1990), 74 D.L.R. (4th) 636*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6011-00000-00&context=) (S.C.C.). While, generally speaking, liability requires a breach of duty on the part of the broker, the basis of liability can involve one or more of contract, tort or equity.

**47**  The Third Party Notice originally issued against Aon was not as well particularized as the proposed amended pleading, but it clearly alleged:

1. a retainer between Camarin and the Aon entities (whether as a general group or in an agent/sub-agent context);
2. duties of care and skill on Aon's part and implied by law with respect to communication on Camarin's behalf to Swiss Re (among others); and
3. similar duties respecting the placement/ implementation of appropriate reinsurance coverage for Camarin's own obligations as a reinsurer.

**48**  These pleadings were more than sufficient to found a brokers' liability claim under Canadian common law, whether in one or more of contract, tort or equity.

**49**  The pith and substance of Camarin's complaint about Aon has been clear from the start. As Aon well knows, Camarin faults Aon for:

1. failing to communicate all material information to Swiss Re necessary to avoid the policy rescission at a later date; and
2. failing to include a "follow the settlements" clause in the reinsurance policies to permit a "flow-through" to Swiss Re of any reinsurance liability that Camarin might have to American Home.

The proposed amendments to the Third Party Notice do not add any claims of law which were not already contemplated by the original pleading. They simply provide better particulars which mostly reflect the realities arising from the first trial and the appeal of that decision.

**50**  Subject to the syntax revisions referred to above, Camarin's application to amend its Third Party Notice against the Aon entities is granted. That Amended Third Party Notice must be filed and served within 14 days of the release of these reasons for judgment.

**51**  The Aon third parties are also granted leave to file within 30 days of service of Camarin's pleading any Further Amended Statement of Defence considered necessary to respond to the Camarin amendments including, without limitation, any defences based on contributory fault and matters claimed to be *res judicata* as a result of the summary trial rectification judgment and/or the consent order dismissing the previous proceedings against Weyerhaeuser Company Limited.

**52**  The costs of these amendment applications shall be in the cause.

**Further Case Management Directions**

**53**  I have raised a number of questions which may not have been considered by the parties and which may have implications for the re-trial of this case. They include:

1. the findings of fact in the August 2007 judgment respecting summary trial of the rectification claim and the extent to which certain matters may be *res judicata*;
2. the similar implications of the July 2008 consent order dismissing the proceedings as against Weyerhauser Company Limited; and
3. the governing law applicable to Camarin's "policy" of reinsurance and also to the conduct of parties domiciled outside Canada.

**54**  The Court directs the parties to consider these questions, to exchange their respective views before the next case management conference in this case, and to attend that conference prepared to inform the Court, as succinctly as possible, what might be their respective positions (and perhaps agreements) on these matters. In particular, but without limiting the generality of the foregoing, if the parties are unable to agree, each must attend the case management conference with a detailed list of the findings of fact arising from the August 2007 summary trial by which the parties are said to be bound for the purposes of the re-trial.

**55**  As well, the parties are directed to forthwith discuss the manner in which the "trial within a trial" and the related underlying coverage determination referred to in paragraph 13 above is proposed to be conducted at the re-trial. The parties must attend the next case management conference prepared to inform the Court of the procedures proposed in that regard and to discuss what further directions or accommodations may be necessary on such matters.

N.P. KENT J.

**End of Document**

[***Thompson v. Canada (Attorney General), [2008] B.C.J. No. 848***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2HF-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

M.J. Allan J.

Heard: April 14-15, 2008.

Judgment: May 8, 2008.

Docket: S052565

Registry: Vancouver

**[2008] B.C.J. No. 848** | 2008 BCSC 582 | 56 C.C.L.T. (3d) 315 | 85 B.C.L.R. (4th) 78 | [2009] 1 W.W.R. 310 | 2008 CarswellBC 932 | 167 A.C.W.S. (3d) 321

Between Lisa Darlene Thompson, Andrew William Adams, Bruce Vincent Adams and Steven Dale Adams, Plaintiffs, and Attorney General of Canada, Her Majesty the Queen in right of the Province of British Columbia, Attorney General of British Columbia, Mike Pfeifer, Fred Bott, Fraser Health Authority, Lois Felkar, Steve DiCastri, and Estate of Bryan Bruce Heron, deceased, Defendants

(35 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Actions — Causes of action — Right of action — Parties — Capacity to sue or be sued — Striking out parties — Determination of a Special Case — Plaintiffs' action arose out of the murder by Heron of his wife and his mother-in-law at the Mission Memorial Hospital — Master granted the defendants' application to state a Special Case to the court — Question was whether plaintiff, who did not witness the murder or its aftermath had a viable claim for psychiatric injuries — Court answered the question in the negative — There were no decisions in British Columbia where a plaintiff had succeeded in recovering damages for psychiatric illness unless he or she witnessed the event or its immediate aftermath.**

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| The court was asked to determine a Special Case following the defendants' successful application for such an order. The plaintiffs' action arose out of the murder by Heron of his wife and his mother-in-law, Adams, on May 20, 2003 at the Mission Memorial Hospital. The plaintiffs were the siblings of Sherry Heron and children of Adams. They sued for damages under the Family Compensation Act for pecuniary losses that flowed from the death of their mother. They also claimed for psychological or psychiatric injuries that they allege arose from the aftermath of the shooting. The plaintiff Lisa Thompson had the largest claim for such injuries. In December 2007, a Master granted the defendants' application to state a Special Case to the court pursuant to Rule 33 to determine a legal issue: whether the plaintiff Lisa Thompson had a viable claim for psychiatric injuries. Lisa Thompson was the sister of Sherry Heron and the daughter of Anna Adams. She was not at the hospital at the time of the shooting. She was currently off work on disability leave. She had been diagnosed as suffering from a number of psychiatric injuries, including post traumatic stress disorder and major depression.  HELD: The court answered the question posed on the Special Case in the negative.  The court was bound by the governing law in British Columbia as set out in the jurisprudence. Despite the unique facts in the case, including the plaintiff's attempts to prevent the tragedy and her subsequent fears for her own and her family's safety during the three days that Heron was at large, Thompson could not establish that the degree of locational proximity required by the jurisprudence. While it was reasonably foreseeable that Thompson would suffer a psychiatric injury, reasonable forseeability was not enough. There were no decisions in British Columbia where a plaintiff had succeeded in recovering damages for psychiatric illness, unless he or she witnessed the event or its immediate aftermath. |

**Statutes, Regulations and Rules Cited:**

Family Compensation Act, *R.S.B.C. 1996, c. 126*,

**Counsel**

Counsel for the plaintiffs: A. Cameron Ward.

Counsel for the defendants AG Canada, AG British Columbia, Mike Pfeifer and Fredd Bott: Helen J. Roberts.

Counsel for the defendants Fraser Health Authority and Lois Felkar: William S. Dick.

Counsel for the defendant Estate of Bryan Bruce Heron, deceased: William J. Harris.

[Editor's note: A corrigendum was released by the Court June 19, 2008; the correction has been made to the text and the corrigendum is appended to this document.]

**Reasons for Judgment**

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| **M.J. ALLAN J.** |

**1**   The plaintiffs' action arises out of the murder by Bryan Heron, of his wife Sherry Heron and his mother-in-law Anna Adams on May 20, 2003 at the Mission Memorial Hospital. The plaintiffs are the siblings of Sherry Heron and the children of Anna Adams. They sue for damages under the ***Family Compensation Act***, *R.S.B.C. 1996, c. 126* for pecuniary losses that flow from the death of their mother. They also claim for psychological or psychiatric injuries that they allege arise from the aftermath of the shooting. The plaintiff Lisa Thompson has the largest claim for such injuries.

**2**  On December 10, 2007, Master Tokarek granted the application of the defendants Fraser Health Authority and Lois Felkar (the "Applicants") to state a Special Case to the Court pursuant to Rule 33 to determine a legal issue: whether the plaintiff Lisa Thompson has a viable claim for psychiatric injuries.

**3**  On March 7, 2008, Master Tokarek settled the terms of the Special Case. Mr. Ward, counsel for the plaintiffs, declined to participate in the drafting of the Special Case, arguing that the *viva voce* evidence of Ms. Lisa Thompson was essential to any determination under Rule 33.

**4**  At the commencement of these proceedings, the action against the defendants Her Majesty the Queen in Right of the Province of British Columbia and Steve DiCastri was dismissed by consent. The plaintiffs' application for extending the time to appeal the December 10, 2007 and March 7, 2008 decisions of Master Tokarek was dismissed. I also dismissed the plaintiffs' application to adjourn this application until the Supreme Court of Canada has released its reasons for judgment in an appeal from the Ontario Court of Appeal in ***Mustapha v. Culligan of Canada Ltd.*** [*(2006), 84 O.R. (3d) 457*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FCK4-G1TP-00000-00&context=), [*275 D.L.R. (4th) 473*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FCK4-G1TP-00000-00&context=), leave to appeal to S.C.C. allowed, [*[2007] S.C.C.A. No. 109*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SH1-JCBX-S3F5-00000-00&context=) (heard on March 18, 2008).

**5**  The Court is asked to determine a Special Case which has been stated as follows:

Can Lisa Thompson maintain an action in ***negligence*** against any of the Defendants to recover compensation for psychiatric injuries she suffered as a consequence of the deaths of Sherry Heron and Anna Adams?

**6**  The Applicants are supported by the remaining defendants although Mr. Harris made no submissions on behalf of his client, the Estate of Bryan Heron, deceased. The plaintiffs oppose this application.

**Background:**

**7**  The material facts are set out in the Special Case:

Material Facts

For the purpose of this Special Case, the parties agree on the following material facts:

1. The Plaintiff Lisa Thompson is the sister of Sherry Heron, and the daughter of Anna Adams.
2. In April 2003, Sherry Heron was admitted to Mission Memorial Hospital, and diagnosed with multiple sclerosis. At this time, Sherry Heron was married to Bryan Heron, and the two resided together. Mr. Heron was a long-time employee of the Corrections Branch of the Province of British Columbia.
3. On or about May 13, 2003, Sherry Heron disclosed to Lisa Thompson and Anna Adams that she wished to divorce Mr. Heron, but that she was fearful of Mr. Heron because he had threatened harm in the event that Ms. Heron left him.
4. Immediately following this conversation, Lisa Thompson informed staff at Mission Memorial Hospital of Mr. Heron's threats. In the company of her husband and brother, Lisa Thompson also attended at the RCMP detachment in Mission and disclosed the same information. Sherry Heron was interviewed by an RCMP constable, but no charges against Mr. Heron were recommended as a result of this investigation.
5. Sherry Heron subsequently retained a family law lawyer to file a divorce action, and also an application for a restraining Order against Bryan Heron. A restraining Order was granted on May 20, 2003.
6. On May 20, 2003, Bryan Heron was served with the divorce petition and restraining Order while on duty as a correctional officer at the Fraser Regional Correctional Centre. Mr. Heron left work before the completion of his shift, went to the Mission Memorial Hospital and fatally shot Sherry Heron and Anna Adams. Mr. Heron then left the Hospital.
7. Three days later, as the police were closing in on Mr. Heron's location, Mr. Heron shot himself and died of self-inflicted gunshot wounds.
8. Lisa Thompson was not at the Hospital at the time of the shooting of Sherry Heron and Anna Adams, and did not witness these events. Ms. Thompson did not attend the Hospital after the shooting, and did not see the bodies of Sherry Heron or Anna Adams.
9. Lisa Thompson heard about the shooting incident while at home the same day. Friends of Lisa Thompson telephoned Ms. Thompson's husband and advised there had been a shooting incident at the Hospital. Lisa Thompson took her son to a neighbour's house. Later that day, the family attended an RCMP detachment and Lisa Thompson gave a statement to the police. Ms. Thompson requested police protection, and she and her family were put in a hotel until Bryan Heron's body was found three days later.
10. Lisa Thompson is currently off work on disability leave. She has been diagnosed as suffering from a number of psychiatric injuries, including post traumatic stress disorder and major depression. Lisa Thompson has been receiving psychiatric treatment from Dr. H.V. Gopinath since June 2003. Attached as Appendix "A" is Dr. Gopinath's May 14, 2007 report on Lisa Thompson's current psychiatric condition. [Editor's note: Appendix A was not attached to the copy received by LexisNexis Canada and therefore is not included in the judgment.]
11. The Plaintiffs allege in this lawsuit that each of the Defendants failed in their duty to protect Sherry Heron and Anna Adams from the foreseeable risk of injury at the hands of Bryan Heron. Lisa Thompson also alleges the Defendants breached the duty of care owed to Ms. Thompson, and that the Defendants are liable for her resulting psychiatric injuries.
12. For the purpose of this Special Case only and without prejudice to the parties' positions at trial, the parties assume that each of the Defendants breached the relevant standard of care in failing to take steps to prevent the fatal shootings, that Lisa Thompson suffers the injuries described by Dr. Gopinath in Appendix "A", and that those injuries were caused by the murders of Sherry Heron and Anna Adams. [Editor's note: Appendix A was not attached to the copy received by LexisNexis Canada and therefore is not included in the judgment.]
13. Given the foregoing assumed facts, the Special Case stated for the Court is as follows:

*Can Lisa Thompson maintain an action in* ***negligence*** *against any of the Defendants to recover compensation for psychiatric injuries she suffered as a consequence of the deaths of Sherry Heron and Anna Adams?*

**8**  Mr. Ward advised the Court that contrary to the preamble of the Special Case as stated, he did not agree to those material facts. However, as Master Tokarek pointed out on March 7, 2008, Mr. Ward did not suggest any changes to the defendants' draft of those facts.

**The issues:**

**9**  Ms. Roberts, counsel for the Attorney General of Canada and for Pfeiffer and Bott (the "RCMP Defendants"), adopted the submissions of Mr. Dick, counsel for the Fraser Health Authority and Lois Felkar (the "Hospital Defendants"), who defined the issues as follows:

1. Are the plaintiff's psychological injuries reasonably foreseeable?
2. If the plaintiff's psychiatric injuries are reasonably foreseeable, can the plaintiff satisfy the proximity requirements contemplated in the leading decisions?

**The law:**

**10**  It is unnecessary to canvass the evolution of liability for psychiatric injury at common law. Suffice it to say that liability in tort for what was previously referred to as "nervous shock" has evolved at different rates in different jurisdictions. Originally, psychiatric injuries were considered too remote to be compensated unless they were accompanied by physical injury or impact. However, the law developed to allow recovery against a negligent tortfeasor for psychiatric injury suffered by a plaintiff who witnessed an accident or its immediate aftermath involving another person usually a spouse or a child; e.g.: ***McLoughlin v. O'Brian***, [1982] 2 All E.R. 298, [1983] 1 A.C. 410 (H.L.); ***Nespolon v. Alford*** [*(1998), 40 O.R. (3d) 355*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1K3-00000-00&context=), [*161 D.L.R. (4th) 646*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1K3-00000-00&context=) (C.A.), leave to appeal refused [*[1998] S.C.C.A. No. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-JFKM-60JS-00000-00&context=), 122 O.A.C. 200 (note).

**11**  The law in this area has progressed unevenly in the United Kingdom and Canada. However, it appears that, until the Supreme Court of Canada pronounces otherwise, the law in B.C. has been settled in two cases:

1. ***Rhodes Estate v. Canadian National Railway*** [*(1990), 50 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJYN-B2J8-00000-00&context=), [*75 D.L.R. (4th) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJYN-B2J8-00000-00&context=) (C.A.) is a considered judgment of a five member panel of our Court of Appeal. All five judges agreed that the plaintiff's claim could not succeed. However, four separate judgments were written and it is difficult to discern the ratio. The Court did, however, concur in concluding that to receive compensation for nervous shock, a plaintiff must be physically present at the accident or immediate aftermath. In ***Rhodes***, the plaintiff's son was killed in Alberta in a train accident caused by the defendant's admitted ***negligence***. At the time of the accident, the plaintiff was living on Vancouver Island. She did not witness the accident or its immediate aftermath, although she did attend the site of the train crash several days later. She apparently suffered much inconvenience and distress during that visit. She was not properly directed to the scene of the accident or a memorial service that was held for her son and the other victims. An undertaker later sent her the remains of her son in the mail. She understandably became seriously and chronically depressed after these events. However, the only allegations of ***negligence*** against the railway company concerned the collision itself.
2. In ***Devji v. Burnaby (District)***, [*1999 BCCA 599*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1PY-00000-00&context=), [*70 B.C.L.R. (3d) 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1PY-00000-00&context=), the parents and two sisters claimed damages for post traumatic stress disorder after being informed of the death of their third daughter in a motor vehicle collision and went to the hospital to see her body. The question was identified as whether the law permits the recovery of damages in those circumstances. McEachern C.J.B.C. delivered reasons for the majority and McKenzie J.A. delivered separate reasons concurring in the result.

**12**  Chief Justice McEachern articulated the difficulties inherent in claims for psychiatric injuries. At para. 2, he stated:

Claims for damages for nervous shock (sometimes called post-traumatic stress disorder, or psychological or psychiatric illness or injury) have existed for a long time, and the law has been evolving incrementally. Such claims most commonly arise when a person who is not physically injured suffers psychiatric injury usually as a reaction to a frightening experience or to the injury or death of another person (usually a close relative) as a consequence of the ***negligence*** of another person. Because the plaintiff is not physically injured, and may not even come into contact with the defendant, the psychiatric injury alleged is an extra step removed from the ***negligence*** of the defendant, and difficult questions of proximity and duty of care arise.

**13**  He referred to the policy basis for imposing control mechanisms -- initiated in ***Anns v. Merton London Borough***, [1977] 2 All E.R. 492, [1978] A.C. 728 (H.L.) and adopted by the Supreme Court of Canada in ***Kamloops v. Nielsen***, [*[1984] 2 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2339-00000-00&context=), [*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=). That two-part test requires the court to look at (1) whether there is a sufficiently close relationship of proximity between the parties so that it is in the reasonable contemplation of the alleged tortfeasor that wrongdoing on his or her part will harm the plaintiff, and, if so, (2) whether there are any considerations that ought to negative or limit (a) the scope of the duty, (b) the class of persons to whom the duty is owed, or (c) the damages to which a breach of it may give rise.

**14**  At para. 65, McEachern C.J.B.C. applied that test, stating:

... assuming reasonable foreseeability, the tests to be applied are whether there is a sufficiently close relationship between the plaintiff and defendant to establish a duty of care, and, if so, whether any public policy negates such duty.

**15**  In 2001, the Supreme Court of Canada upheld the two-stage ***Anns*** test 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=), [*[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=). At para. 30, the Court stated:

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.

**16**  At para. 37, the Court noted that the second stage of the test required such considerations as whether recognition of the duty of care would create the spectre of "unlimited liability to an unlimited class."

**17**  The ***Anns*** test for determining whether a person owes a duty of care was recently affirmed by the Supreme Court of Canada in ***Hill v. Hamilton-Wentworth Regional Police Services Board***, [*2007 SCC 41*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B19N-00000-00&context=), [*[2007] 3 S.C.R. 129*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B19N-00000-00&context=) at para. 20.

**18**  There is no question that in B.C. reasonable foreseeability of psychiatric harm alone is not sufficient to impose liability on a tortfeasor who physically harms a person other than the plaintiff.

**The positions of the parties:**

**19**  In essence, the defendants submit that because the plaintiff lacked "locational proximity" -- that is, she did not witness the shooting or its immediate aftermath -- she cannot recover in ***negligence*** for nervous shock. They point out that such claims have been considered and rejected by our Court of Appeal in ***Rhodes*** and ***Devji***.

**20**  Mr. Ward submits that the facts in this case are distinguishable from those in which a plaintiff simply hears of the tragic death of a close family member. Here, the murder was preceded and followed by alarming and horrifying circumstances. Ms. Thompson actually informed the Hospital Defendants and the RCMP Defendants of Mr. Heron's threats to his wife and actively sought their assistance and protection for her hospitalized sister. After the shootings, Ms. Thompson was terrified for her own safety and that of her family until Mr. Byron killed himself three days later.

**21**  The defendants say that those unique circumstances go to the issue of reasonable foreseeability, and not to proximity.

**22**  Mr. Ward submits that, just as medical science has evolved in the last century, so should the law. For example, in prior years, a "shell-shocked" soldier would be told to keep a stiff upper lip and have another tot of whiskey. Today, that soldier would be diagnosed with post traumatic stress disorder and treated for the real and debilitating psychiatric disorder that "shell-shock" is. Mr. Ward also suggests that there should be no distinction between a disabling psychiatric injury and a physical injury. He says that the "policy-based control mechanisms" imposed to limit recovery are "artificial barriers" created by the courts' unjustified fears that the floodgates of litigation will open and extend recovery to an indeterminate number of people. Mr. Ward cites from Mullaney and Handford *Tort Liability for Psychiatric Damage*, 2nd ed. (Pyrmont: Lawbook co., 2006) at p. 16:

The Australian High Court thus leads the common law world in recognising that psychiatric injuries are as real as physical injuries and that the right to recover should depend essentially on whether such injuries are reasonably foreseeable, freed from artificial and outdated policy restrictions imposed because of a perceived need for additional limits, whether to stem the traditional fear of opening the floodgates, or for any other reason.

**23**  However, Mullaney and Handford also note, at page 16, that Australian legislatures have not shared the same view as the High Court and the law in Australia is no longer uniform. Mr. Ward suggests that the Supreme Court of Canada may clarify and modernize the law when it hands down its judgment in ***Mustapha***. Indeed, it could move the law in the direction that the Australian High Court has taken.

**24**  In ***Mustapha***, the issue was whether a defendant could be liable for damages for psychiatric harm that consisted of an exaggerated reaction by an obsessive person of particular sensibilities to a relatively minor or trivial incident -- the sight of a dead fly in a bottle of consumer water. The trial judge had answered that question in the affirmative, awarding damages of $341,775. The Court of Appeal overturned that award.

**25**  The core issue in ***Mustapha*** relates to the issue of reasonable foreseeability and not to proximity. Mr. Mustapha was "proximately" located in place and time to the offending event. He saw the dead and decomposing flies in his bottle of water. The issue is whether it was reasonably foreseeable that such a hypersensitive individual would suffer grievous psychiatric harm. Blair J.A. stated, at para. 48:

The policy consideration that applies in this case, however, is the following: what is the ambit of liability in psychiatric harm cases where the harm suffered (a) is significantly disproportionate to the relatively inconsequential nature of the incident in question, and (b) is a function of the particular sensibilities of the plaintiff rather than a function of the sensibilities that a person of normal fortitude would demonstrate? This concern is accommodated, in my view, by factoring the "person of normal fortitude and robustness" principle into the reasonable foreseeability equation, as this Court did in ***Vanek***, [*[1999] O.J. No. 4599*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SGB1-F873-B2M6-00000-00&context=).

**26**  The facts in this case are very different. There is nothing to suggest that the plaintiff was not a "person of normal fortitude and robustness" prior to the tragic events. It was arguably reasonably foreseeable that the defendants' breaches of their duty of care would harm the plaintiff.

**27**  The fact that the plaintiff was not present at, or immediately after, the traumatic event that created her psychiatric condition places this case in the ***Rhodes*** and ***Devji*** line of cases. Proximity was not in issue in ***Mustapha*** and the Supreme Court of Canada may or may not deal with that issue.

**28**  Mr. Ward suggests that the outcome would have been different in cases like ***Rhodes*** and ***Devji*** if, before a tragedy involving a train hitting a pedestrian at a blind crossing, the plaintiff mother of that pedestrian had alerted the railroad operators of the danger and urged them to remedy it, but they had ignored her. Mr. Ward suggests those facts would have created the necessary proximity and foreseeability to allow recovery. In Mr. Dick's submission, those warnings would go to the foreseeability issue alone, and not to proximity. For the tortfeasor's duty to arise, there must be proximity in addition to foreseeability.

**29**  Mr. Ward also suggests that this case is distinguishable from ***Rhodes*** and ***Devji*** on the basis that, as a result of the defendants' ***negligence***, after her sister and mother were killed, the plaintiff lived in terror for three days before Mr. Heron's body was found. When I pointed out that the question in the Special Case refers specifically to the psychiatric injuries the plaintiff suffered "as a consequence of the deaths of Sherry Heron and Anna Adams", he replied that the question should not be interpreted narrowly and the question should be read to include "as a consequence of the circumstances of the deaths. ..." That is, the whole 10 day period from May 13, when the plaintiff reported the threats to the defendants, through to May 23, when Mr. Heron took his own life should be considered. The defendants responded that Mr. Ward seeks to raise a separate cause of action for the first time. In his amended statement of claim, there is no reference to any damages the plaintiff suffered as a result of Bryan Heron being at large for the three days after the killings. All of the damage she has suffered is said to result from her reaction to the news of the death of her mother and sister. Dr. Gopinath's report does not refer to any of her psychiatric difficulties arising from this three day period. In his opinion, the plaintiff was severely traumatized by the tragic murders of her mother and sister, resulting in severe PTSD, chronic anxiety with intermittent panic attacks and agoraphobia, and recurrent major depression. The question stated for the Special Case deals only with her psychiatric condition arising from the shock of the deaths of her sister and mother.

**30**  I agree that Dr. Gopinath's opinion, which is appended to the Special Case, does not set out any facts relating Ms. Thompson's psychiatric condition to the three days following the shootings while she was under police protection.

**Conclusion:**

**31**  The tragedy of the killings and their traumatic effect on the plaintiff cannot be overstated. However, I must conclude that I am bound by the governing law in B.C. as set out in ***Rhodes*** and ***Devji***. Despite the unique facts here -- the plaintiff's attempts to prevent the tragedy and her subsequent fears for her own and her family's safety during the three days that Bryan Heron was at large -- Ms. Thompson cannot establish the degree of locational proximity required by those cases.

**32**  Ms. Thompson sought to protect her sister from the terrible event that actually transpired. In my opinion, it was reasonably foreseeable that if the defendants failed to meet the requisite standard of care, that Ms. Thompson would suffer a psychiatric injury. However, I am bound by the law in B.C. that reasonable foreseeability is not enough. The plaintiff's claim is barred by the policy based control mechanisms that limit recovery for psychiatric illness. In B.C., there are no decisions where a plaintiff has succeeded in recovering damages for psychiatric illness unless he or she witnessed the event or its immediate aftermath.

**33**  There is no question that the distinction between seeing a loved one tragically killed and being told of that fact may appear to be an unfair and arbitrary distinction. However, policy-based considerations have limited the ambit of recovery against tortfeasors. In part, that rule is based on the fear that the abolition of such a distinction would "open the floodgates" to a torrent of litigation from psychiatrically or psychologically affected relatives of victims. It is also based on the fear that the abolition of such a distinction would create a perverse incentive for plaintiffs not to recover. Other examples of such "arbitrary" distinctions include the legislative bar against non-pecuniary damages in actions under the ***Family Compensation Act*** and the judicially imposed limit or "cap" on non-pecuniary damages set out by the Supreme Court of Canada in a "trilogy" of cases: ***Andrews v. Grand & Toy Alberta Ltd.*** [*(1978), 83 D.L.R. (3d) 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=); ***Thornton v. Prince George School District No. 57 Board of School Trustee*** [*(1978), 83 D.L.R. (3d) 480*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250X-00000-00&context=); and ***Arnold v. Teno*** [*(1978), 83 D.L.R. (3d) 609*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250Y-00000-00&context=). Such limits cannot be said to be arbitrary in the sense that the limits apply to all plaintiffs. As a result, although a plaintiff such as Ms. Thompson may suffer loss as a result of the defendants' conduct, the law does not permit all losses to be compensated.

**34**  In the result, I find that the answer to the question "Can Lisa Thompson maintain an action in ***negligence*** against any of the Defendants to recover compensation for psychiatric injuries she suffered as a consequence of the deaths of Sherry Heron and Anna Adams?" is "No." I am satisfied that the Special Case was properly brought as the resolution of this issue of law should result in a saving of expense for the parties, a reduction of the time necessary for trial, and hopefully enhance the possibility of settlement of the remaining issues.

**35**  The parties should bear their own costs of this application.

M.J. ALLAN J.

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Corrigendum

Released: June 19, 2008

Corrigendum to the Reasons for Judgment issued advising that there was an error on the first page of the Judgment with respect to counsel, Ms. Roberts, who also acted as counsel for the defendant, the Attorney General of British Columbia. The front page has now been amended to reflect this correction.

**End of Document**

[***0813054 B.C. Ltd. v. Overland West Freight Lines Ltd., [2013] B.C.J. No. 2829***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S4F8-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E.J. Adair J.

Heard: November 18 and 19, 2013.

Oral judgment: November 29, 2013.

Docket: S103468

Registry: Vancouver

**[2013] B.C.J. No. 2829** | 2013 BCSC 2367

Between 0813054 B.C. Ltd., Plaintiff, and Overland West Freight Lines Ltd., and Mandala Custom Homes Inc., Defendants

(67 paras.)

**Case Summary**

**Damages — For torts — Affecting property — Personal property — Application by the plaintiff for summary trial judgment allowed in part — Plaintiff sued Overland West for loss of goods valued at $117,640 and consequential damages of $42,768 — Overland transported fabricated parts for construction of a commercial building for plaintiff — Goods lost in an accident — Plaintiff awarded $117,640 for value of goods and $5,000 as consequential damages — It was reasonably foreseeable that plaintiff would likely incur some additional expenses and costs thrown away as a consequence of the delay involved in replacing the goods lost.**

**Transportation law — Carriers — Contracts of carriage — Bills of lading — Conditions of carriage — Liability — Limitation of liability — Application by the plaintiff for summary trial judgment allowed in part — Plaintiff sued Overland West for loss of goods valued at $117,640 and consequential damages of $42,768 — Overland transported fabricated parts for construction of a commercial building for plaintiff — Goods lost in an accident — Overland not entitled to rely on bill of lading to limit its liability — Bill of lading did not contain description of the particulars of the goods or the weight of the goods and did not comply with Motor Vehicle Act Regulations.**

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| Applications by the defendant Overland West the plaintiff for summary trial judgment. The plaintiff sued Overland for loss of goods valued at $117,640 and consequential damages of $42,768. Overland transported component parts of a prefabricated commercial building that the defendant Mandala Inc. was to build for the plaintiff to operate a retail store. Overland argued that its liability was limited to two dollars per pound actual weight of the goods lost pursuant to the terms of a bill of lading. Mandala had arranged for the shipping of the parts. When Overland issued the bill of lading, the description of the particulars of the goods was incomplete and the weight column was blank. A weight was added after the accident to ensure that Overland's paperwork was complete.  HELD: Plaintiff's application allowed in part.  The bill of lading was not enforceable to limit Overland's liability because it was not completed as required by the Motor Vehicle Act Regulations. It was Overland's obligation to ensure that the bill of lading, with the information required to be completed, was properly issued and showed particulars of the goods in the shipment, including weight and description. Overland's liability was strict and it was not necessary for the plaintiff to prove ***negligence***. Any consequential damages must be based on what was reasonably foreseeable. It would be reasonably foreseeable that someone in the plaintiff's position would likely incur some additional expenses and also some costs thrown away as a consequence of the delay involved in replacing the particular goods lost. Therefore, some rent, some financing costs and some additional expenses were recoverable and were assessed at $5,000. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act Regulations, [*B.C. Reg. 26/58, s. 37.39*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RBP1-F5T5-M13G-00000-00&context=)(1)

**Counsel**

Counsel for the Plaintiff: J.P. Scouten.

Counsel for the Defendant Overland West Freight Lines Ltd.: H.D. Edinger.

Counsel for the Defendant Mandala Custom Homes Inc.: C.R.J. Cook.

**Oral Reasons for Judgment**

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| **E.J. ADAIR J. (orally)** |

**1**   This is a claim for damages arising out of the loss in transit on April 7, 2010 of component parts of a prefabricated commercial building that was being transported by the defendant Overland from Nelson to Fort Nelson. The building had been purchased by the plaintiff from the defendant Mandala.

**2**  There is no dispute that the value of the building components destroyed in the accident is $117,640.59 including taxes.

**3**  Both the plaintiff and the defendant Overland apply for judgment on a summary trial.

**4**  The plaintiff seeks judgment against Overland for the value of the goods lost ($117,640.59). It also seeks consequential damages in the sum of $42,768.70. The plaintiff abandoned its claim for loss of profits.

**5**  Overland says that its liability is limited to $2 per pound actual weight of the goods lost, pursuant to the terms of a bill of lading dated April 6, 2010. It seeks a declaration in that regard and a declaration concerning the actual weight of the goods.

**6**  The defendant Mandala, who designed and manufactured the building components and who was involved in filling out the bill of lading, supports the plaintiff's application.

**7**  All parties agree that, despite some imperfections and conflicts in the evidence, and although a slice (at least) of the litigation would remain, the issues on the applications are suitable for determination on a summary trial, and, particularly in the light of the amount involved, the parties wish to have those issues determined now.

**8**  I agree that, in the circumstances, the issues can be determined on a summary trial and that it would not be unjust to decide the issues raised on the applications.

**9**  The issues are:

1. whether the bill of lading is enforceable by Overland to limit its liability?
2. if the bill of lading is enforceable, what is the weight of the goods lost?
3. if the bill of lading is not enforceable, what damages are recoverable by the plaintiff, and, in particular, are consequential damages recoverable?

**10**  The background facts are, for the most part, straightforward.

**11**  The plaintiff owns and operates a retail store in Fort Nelson under the name "Down to Earth Health Shop." The store sells health food products and ecologically responsible goods such as clothing, housewares, cosmetics and purified water. The plaintiff also operates a café in the store. The plaintiff's principals are Kevin Friesen and Kymberley Gillett, his wife.

**12**  Prior to mid-2010, the plaintiff's business was operated out of leased premises. In 2009, the plaintiff made plans to expand the business to a larger facility and purchased property on 51st Avenue in Fort Nelson, intending to build a new commercial premises there. The plan was to construct the new premises in two phases. Phase 1 was going to consist of a new commercial building to serve as the retail shop and café, and phase 2 was going to be a second building to be built later and connected to the first.

**13**  The plaintiff retained Mandala to custom design and build a prefabricated building for phase 1.

**14**  The plaintiff's plan was to complete the building in time for the new premises to be opened to the public by July 1, 2010. The plan was then to give Mandala the go-ahead to construct the phase 2 building so that it could be completed and open to the public by December 1, 2010. None of these plans was communicated to Overland.

**15**  Although not required to do so, as a courtesy to customers, Mandala sometimes assisted customers with making shipping arrangements. It did so for the plaintiff by contacting Overland.

**16**  Mandala does not have scales capable of weighing materials of the size of the parts of the building. The weight of the materials is not something that is important for Mandala's business. According to Jenny Henri, Mandala's office manager, the expectation is that the trucking company will weigh the load as required, and Mandala is not really interested in getting involved in shipping. Ms. Henri explained that if Mandala is helping to arrange shipping for a customer, Mandala will usually do a "guesstimate" (her word) of the weight, and usually "guesstimates" 40,000 to 50,000 pounds for a 48 to 53 foot flatbed truck.

**17**  On March 22, 2010, Ms. Henri contacted Overland by email requesting a quote for a shipment of a 53 foot trailer load from Nelson (the original email said to Fort St. John, but that is a mistake and nothing turns on it) to Fort Nelson. Ms. Henri estimated the weight as 50,000 pounds and stated that the load would be "prefabricated components for a commercial building." She also indicated that there would be two loads.

**18**  Ms. Henri and Mr. Len Rubner (Overland's Castlegar Terminal manager) exchanged further email messages on March 30 and 31. Mr. Rubner inquired whether the loads were "for sure" 50,000 pounds, and asked whether they needed tarping. Ms. Henri responded that "50,000 is a guess -- we're shipping a prefabricated commercial building." She also confirmed the load would require tarping.

**19**  Arrangements were made between Ms. Henri and Mr. Rubner for Overland to collect the first load on April 6, 2010. Mandala informed Mr. Friesen and Ms. Gillett of the arrangements that had been made, that Mandala would be loading the first shipment on April 6, and that the shipment would be driven to Fort Nelson the following day.

**20**  The loading process typically takes seven to eight hours for a standard home package, and Mandala typically requests that trucks doing the shipping arrive early in the morning. Unfortunately, Overland's truck did not arrive at Mandala until the afternoon on April 6, and, generally speaking, the loading of the shipment did not go smoothly, at least from Mandala's perspective.

**21**  Mr. Darrol Gallagher is the Overland driver who picked up the shipment on April 6 at Mandala. He has provided an affidavit describing the events as he recalled them. He could not recall whether he provided a blank bill of lading to Mandala or whether they already had one, but he said if Mandala did not have one, he would have provided one. He described his observations of the loading and arrangements that were made to tarp the load. He said that after he and a colleague finished tarping the shipment, he left the loading area and went into the Mandala offices. According to Mr. Gallagher, he there "met with" Mr. Chris Armstrong of Mandala and "obtained what appeared to be a completed bill of lading and building plans" for the shipment. He said that "on receiving the bill of lading," he detached and returned a carbon copy to Mr. Armstrong and then drove the shipment to Overland's Castlegar terminal.

**22**  In his evidence, Mr. Armstrong on the other hand described circumstances that started off badly by the late arrival of the Overland truck and deteriorated into frustration, impatience and acrimony. According to Mr. Armstrong, at one point Mr. Gallagher gave him a form to fill out, something that Mr. Armstrong never did because typically such matters were dealt with by Ms. Henri or the office staff. However, by this time, they were no longer around. Mr. Armstrong called asking Mr. Gallagher about the form and what needed to be on it. According to Mr. Armstrong, he and Mr. Gallagher argued over whether the load was going to be tarped, and resolving the tarping issue created more delay, frustration and irritation.

**23**  Mr. Armstrong had filled in some of the information on the bill of lading and signed it. He then left it on his desk and went to see what else could be loaded on to the truck. He felt that he could not complete the form until the truck was fully loaded. It was then well into the evening. Mr. Armstrong and Mr. Gallagher continued to argue about tarping.

**24**  Mr. Armstrong says that he and Mr. Gallagher had a conversation in Mr. Armstrong's office, and by this point Mr. Gallagher was (according to Mr. Armstrong) very angry and exasperated. Mr. Armstrong describes Mr. Gallagher as grabbing the bill of lading off Mr. Armstrong's desk, ripping out a copy, which he threw at Mr. Armstrong, and storming out. As far as Mr. Armstrong was concerned, the document was incomplete. In particular he had not completed the description of the goods and nothing had been filled in in the weight column.

**25**  The accident in which the goods were lost occurred on April 7, 2010.

**26**  There is no dispute that after Mr. Gallagher left Mandala with the bill of lading taken from Mr. Armstrong, and after the accident on April 7, 2010, Mr. Rubner added some information to the bill of lading. The circumstances are described in Mr. Meehan's affidavit (at paras. 27 and following, and Mr. Rubner confirms the facts stated there are true. Specifically, Mr. Rubner wrote the words "Pre-fab Warehouse" and inserted a weight in the column "weight subject to confirmation." Mr. Rubner initially inserted a weight of 40,000 pounds, essentially what is referred to in the evidence as a "cube weight." However, that weight was "whited-out" and a weight of 20,000 pounds was inserted instead.

**27**  After the accident, Overland made arrangements to collect the entirety of the shipment from the accident site. The components were then weighed at the Castlegar Terminal in a process described by Mr. Meehan and confirmed by Mr. Rubner (who was directly involved). Essentially, Mr. Rubner and a colleague weighed one unit of each item recovered, and then multiplied that weight by the total number of that particular unit that Mandala said was in the shipment. As a result of this process, Overland concluded that the total weight was 18,826 pounds.

**28**  In August 2010, Mandala shipped a replacement shipment to the plaintiff, through another carrier. There is no actual weight of that shipment. However, there is a cube weight estimated on the bill of lading. There is also a declared value noted on the bill of lading. The fact that the bill of lading contains a declared value means that the actual weight is less important because the carrier's liability will be based on the declared value, not weight.

**29**  Even though Overland took concrete steps to obtain a reliable weight of the goods lost, Overland's evidence concerning the actual weight is not without problems. Based on Overland's evidence, the wall sections in total weigh the most. However, only one wall section out of 44 was actually weighed. The wall sections were not uniform in size, and, in the evidence, Overland does not identify which wall section was in fact weighed or explain how the wall section that was weighed was picked.

**30**  On the other hand, neither the plaintiff nor Mandala ever weighed the components of the shipments (either the original or the replacement shipments) at any time. At best, Mandala's witnesses have expressed opinions and conclusions about weight, based on unknown or flimsy foundations, or based on statements in documents that are not admissible for their truth. Some of the problems are illustrated in Ms. Henri's affidavit.

**31**  I turn then to a discussion of the issues.

**32**  The first issue is whether Overland can rely on the terms of the bill of lading to limit its liability.

**33**  Both the plaintiff and Overland rely on s. 37.39(1) of ***Motor Vehicle Act Regulations***, *B.C. Reg. 26/58*, which provides in relevant part that:

37.39 (1) Subject to this Part, if freight is accepted for shipment by or on behalf of a carrier who operates a business vehicle within the meaning of section 237 (a) or (c) of the Act, the carrier must, at the time of that acceptance, issue or cause to be issued a bill of lading in accordance with the following requirements:

1. a bill of lading issued under this subsection must show the following:
2. the name and address of the consignor (shipper);
3. the date of the shipment;
4. the originating point of the shipment;
5. the name of the originating carrier;
6. the names of connecting carriers, if any;
7. the name and address of the consignee (receiver of goods);
8. the destination of the shipment (if different from the address of the consignee);
9. particulars of the goods in the shipment, including weight and description;
10. a bill of lading issued under this subsection must also contain the following:
11. a provision stipulating whether the goods are received in apparent good order and condition, or otherwise;
12. a space to show the declared value of the shipment;
13. a space to indicate whether transportation charges are prepaid or collect;
14. a space in which to note any special agreement between the consignor and the carrier;
15. a statement in conspicuous form to indicate (if such is the case) that the carrier's liability is limited by a term or condition of the carrier's applicable schedule of rates or by any other agreement with the consignor;
16. a statement of notice of claim as provided for by Article 12 of the Specified Conditions of Carriage set out in paragraph (c);
17. a bill of lading issued under this subsection must be signed by the consignor or the consignor's agent and the originating carrier or that carrier's agent and must contain or incorporate by reference all the following conditions of carriage:

**Specified Conditions of Carriage**

...

Article 9: Subject to Article 10, the amount of any loss or damage for which the carrier is liable, whether or not such loss or damage results from ***negligence***, is to be computed on the basis of the value of the goods at the place and time of shipment (including the freight and other charges if paid and the duty if paid or payable and not refundable) unless a lower value has been represented in writing by the consignor or has been agreed on between the parties to this bill of lading, or is determined by the classification or tariff on which the rate is based, in any of which events such lower value is the amount that governs the computation of the maximum liability of the carrier.

Article 10: The amount of any loss or damage computed under Article 9 must not exceed $2 per pound ($4.41 per kilogram), computed on the total weight of the shipment, unless a higher value is declared on the face of the bill of lading by the consignor.

...

Article 18: Subject to Article 19, any alteration, addition or erasure in the bill of lading must be signed or initialed by the consignor or the consignor's agent and the originating carrier or that carrier's agent, and unless so acknowledged is without effect, and this bill of lading is enforceable according to its original tenor.

Article 19: It is the responsibility of the consignor to show correct shipping weights of the shipment on the bill of lading if completed by the consignor. Despite Article 18, failure to do this makes the bill of lading subject to correction in this respect by the carrier.

**34**  Mr. Edinger, Overland's counsel, argues that Overland satisfied its obligations under the ***Regulations*** to issue a bill of lading by giving the bill of lading to Mandala to complete. If it was incomplete, and in particular if it was incomplete because the bill of lading did not show a weight, that does not affect the enforceability of the limitation of liability or Overland's ability to rely on that limitation.

**35**  Mr. Edinger points to Article 19 of the "Specified Conditions of Carriage," which not only permits Overland (the carrier) to alter the bill of lading in respect of the weight despite the absence of a signature or initial from the consignor or the shipper, but which also, in his submission, places the responsibility on the consignor or its agent (in this case, Mandala) to show the correct shipping weight when the consignor completes the bill of lading, as Mandala did in this case. Mr. Edinger submits that the plaintiff cannot rely on Mandala's failure to state the weight in order to avoid the limitation of liability contained in the bill of lading, given the language of Article 19.

**36**  On the other hand, Mr. Scouten, for the plaintiff, says that, pursuant to the ***Regulations***, the legal obligation to issue a bill of lading rests with the carrier (in this case, Overland), and that the ***Regulations*** further require (per s. 37.39(1)(a)) that the bill of lading show specific information, in particular, particulars of the goods in the shipment, including the weight and description. He says that, on the facts, the bill of lading was incomplete in this respect and the omissions were not inconsequential.

**37**  Mr. Scouten argues further that Article 19 should not be interpreted in the way Mr. Edinger argues, and that the words "if completed by the consignor" have as their object the words "correct shipping weights," not (as is implicit in Mr. Edinger's argument) "the bill of lading".

**38**  For my purposes, the basic legal principles are summarized in ***Paine Machine Tool Inc. v. Can-Am West Carriers Inc.***, [*2003 BCCA 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G51B-00000-00&context=). The ***Regulations*** require a bill of lading to be issued by the carrier (see ***Paine***, at paras. 15 and 16), and further, they impose on the carrier the burden of issuing the bill of lading showing specified facts and containing other information about the shipment (see ***Paine***, at para. 28).

**39**  In principle, the ***Regulations*** should be adhered to unless it is proved that the parties agreed to other terms for their contract: see ***Paine***, at para. 25.

**40**  In my opinion, the evidence does not support the conclusion that Overland and Mandala (as the plaintiff's *de facto* agent) agreed to other terms, and the bill of lading must be read in the context of the requirements of the ***Regulations***. In that light, Overland was required to adhere to the ***Regulations***, particularly if it wishes to rely on a limitation of its liability.

**41**  I conclude that the bill of lading is not enforceable to limit Overland's liability to $2 per pound, because it was not completed as required by the ***Regulations***. I accept Mr. Armstrong's evidence that it was Overland's driver (Mr. Gallagher) who gave him Overland's bill of lading form. I find that, although Mr. Armstrong did sign the bill of lading, he did not consider it to be complete when Mr. Gallagher took it from him. Thus, although there is technical compliance with s. 37.39(1)(c) with respect to the signature of the consignor or the consignor's agent, I find that in fact Mr. Armstrong did not intend to sign and provide to Overland an incomplete document.

**42**  It was Overland's obligation (pursuant to the ***Regulations***) to ensure that the bill of lading, with the information required to be completed, was properly issued. Section 37.39(1)(a)(viii) requires that the bill of lading must show particulars of the goods in the shipment, including weight and description. The ***Regulations*** make a distinction between weight and declared value. The ***Regulations*** simply require that there be a space to show the declared value, but the weight must be shown. When Mr. Gallagher left Mandala on April 6 with the bill of lading, the description of the particulars of the goods was incomplete and the weight column was blank.

**43**  I do not agree with Mr. Edinger's submission that the omission of the weight in this bill of lading is at the inconsequential end of the spectrum of omissions. As Mr. Meehan explained, Overland does not treat the absence of a statement of weight as inconsequential. A weight (initially a cube weight of 40,000 pounds) was added after the accident to ensure that Overland's paperwork was complete. This indicates that Overland recognized that, when the bill of lading was collected form Mandala, it was not complete and important information was missing.

**44**  Moreover, I agree with Mr. Scouten's construction of Article 19 of the Specified Conditions of Carriage. Mr. Edinger's construction immediately runs into difficulties where the completion of the bill of lading is a joint effort. How much of the form would have to be filled in by the consignor before it would be considered as a whole to be "completed by the consignor"? 50%? something more, or something less?

**45**  Mr. Scouten's interpretation avoids such problems because the consignor or the consignor's agent is given responsibility with respect to a specific item: weight. If the consignor or its agent fails to show the correct shipping weight, then the weight -- that is, the weight shown -- is subject to correction "in this respect" by the shipper. The contract of carriage can be altered in that regard and the alteration is enforceable by the carrier despite the absence of a signature or initial from the consignor or its agent. Otherwise, amendments or alterations to the bill of lading require evidence -- in the form of a signature or initial -- of acceptance by the consignor or its agent, pursuant to Article 18.

**46**  Here, however, there was nothing filled in by the shipper in the weight column. There was therefore nothing that could be "subject to correction." Overland gains no assistance from Article 19.

**47**  I conclude therefore that Overland did not issue a bill of lading as required by the ***Regulations***, and it would be inappropriate for Overland to be allowed to rely on the benefits of the limitation of liability when it failed to comply with the obligations that the ***Regulations*** impose.

**48**  In view of my conclusion on the first issue, it is unnecessary for me to address the second, namely, what is the actual weight.

**49**  I turn then to damages.

**50**  Overland's liability is strict and it is not necessary for the plaintiff to prove ***negligence***. There is no issue concerning the value of the lost goods. The dispute concerns the consequential losses claimed.

**51**  The particulars are set out in Mr. Friesen's affidavit, at para. 50. Mr. Scouten says that (with the possible exception of the heating costs, and the claim for lost profits, which has been abandoned), the amounts set out in para. 50 of Mr. Friesen's affidavit are recoverable as consequential damages.

**52**  Mr. Edinger submits that nothing is recoverable because the amounts claimed are too remote. Alternatively, he submits that only a relatively modest amount would be recoverable as damages resulting from the delay, and nothing more.

**53**  The basic principles are set out in, for example, ***B.D.C. Ltd. v. Hofstrand Farms Ltd.***, [*[1986] 1 S.C.R. 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2399-00000-00&context=), at paras. 24 and following, and in ***Lengert Machinery Sales Ltd. v. Kordyban Transport Ltd.***, [*[1968] B.C.J. No. 19*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JF75-M2DX-00000-00&context=) (C.A.), at para. 5. They involve the application of the well-known rules in ***Hadley v. Baxendale***, 156 E.R. 145.

**54**  Here, Overland had no knowledge of any special circumstances respecting the plaintiff. Indeed, Overland had virtually no knowledge about the plaintiff or its circumstances generally. Overland never dealt directly with the plaintiff. Overland knew only that it was being asked to ship component parts of a commercial building to Fort Nelson.

**55**  In those circumstances any consequential damages must be based on what a reasonable person would be taken to know in the ordinary course of things (this is the first rule in ***Hadley v. Baxendale***) or, in other words, what would be reasonably foreseeable.

**56**  On this point I agree generally with Mr. Edinger's alternative submissions.

**57**  Overland knew that it was transporting component parts of a commercial building, and I think a reasonable person would be taken to know, in the ordinary course of things, that a commercial building is most likely going to be used in the operating and running of a business. However, I do not see the expenses claimed in Mr. Friesen's affidavit at para. 50(c) as falling within what would be reasonably foreseeable. The heating expenses described in subparagraph (e) are expenses that would have been incurred if the building had been erected as planned, since the plan was to have the business up and operating. They are not damages caused by the loss of the goods.

**58**  On the other hand, in my view, it would be reasonably foreseeable that someone in the plaintiff's position would likely incur some additional expenses and also some costs thrown away as a consequence of the delay involved in replacing the particular goods lost; therefore, some rent, some financing costs and the type of expenses described in Mr. Friesen's affidavit at para. 50(b). Although somewhat rough and ready, I therefore assess consequential damages at $5,000.

**59**  In summary, the plaintiff will therefore have judgment against Overland for $122,640.59 ($117,640.59 plus $5,000), together with court order interest.

**60**  Unless counsel wish to make submissions, costs will follow the event. And I wish to say that I am indebted to counsel for their well-prepared material and their helpful submissions.

**61**  Do counsel wish to make any submissions concerning costs?

**62**  MR. SCOUTEN: I have no submissions today.

**63**  THE COURT: Is there anything further that we need to deal with this morning?

**64**  MR. EDINGER: I don't think so, except I think at the end of the day it would be my obligation to take the binders away from you, My Lady.

**65**  THE COURT: Well, Mr. Edinger, I have marked up the contents of the binders, so I will keep them.

**66**  MR. EDINGER: I am happy with that. I didn't bring quite a big enough bag to bring them anyway, so I am happy with that result. Thank you, My Lady.

**67**  THE COURT: Thank you.

E.J. ADAIR J.

**End of Document**

[***Ackley v. Audette, [2015] B.C.J. No. 1565***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GKS-NM31-FGY5-M2B2-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.A. Skolrood J.

Heard: March 30-April 2 and April 7-9, 2015.

Judgment: July 23, 2015.

Docket: M104849

Registry: Vancouver

**[2015] B.C.J. No. 1565** | [*2015 BCSC 1272*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61W2-00000-00&context=) | [*21 C.C.L.T. (4th) 227*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61W2-00000-00&context=) | [*[2015] I.L.R. I-5776*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61W2-00000-00&context=) | [*256 A.C.W.S. (3d) 237*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61W2-00000-00&context=) | [*2015 CarswellBC 2086*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61W2-00000-00&context=)

Between Joel Robert Michael Ackley, Plaintiff, and Marc Daniel Audette, Defendant

(204 paras.)

**Counsel**

Counsel for the Plaintiff: D. Hay, M. Quinn, G. Lam (Articling Student).

Counsel for the Defendant: D. Darman, D. Perry.

**Reasons for Judgment**

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

**Introduction**

**1**  Late in the evening on June 8, 2010, the defendant, Marc Audette, after finishing work, drove to a Subway restaurant located in a shopping plaza in Coquitlam, B.C. to buy a sandwich. As he got out of his car and walked towards the entrance to the restaurant, he was accosted by the plaintiff, Joel Ackley, who was hanging around outside with some friends.

**2**  By his own admission, Mr. Ackley had been drinking and he made some derogatory comments about Mr. Audette's appearance. Words were exchanged between the two men both inside and outside of the restaurant. The incident culminated with Mr. Audette's vehicle striking Mr. Ackley, knocking him down and running over him (the "Incident").

**3**  Mr. Ackley suffered a fractured pelvis, significant abrasions and related soft tissue injuries as a result of the Incident. He alleges that Mr. Audette intentionally struck him with his vehicle or, alternatively, that Mr. Audette was negligent. He claims non-pecuniary damages, past wage loss, loss of future earning capacity, costs of future care and special damages. He also claims punitive damages.

**4**  Mr. Audette has denied liability. While acknowledging that his vehicle struck Mr. Ackley, he denies that he acted intentionally or recklessly. He says that it was Mr. Ackley who initiated the altercation and who created the circumstances leading to Mr. Ackley's injuries. Mr. Audette submits further that the injuries sustained by Mr. Ackley have largely resolved.

**Summary of the Evidence**

**The Plaintiff**

**5**  Mr. Ackley is currently 24 years old. He was 19 at the time of the Incident.

**6**  He was born in Ontario and lived there until he moved with his family to Vancouver when he was 16 and entering grade 10. Mr. Ackley described an active youth in which he played numerous sports, including rep level hockey.

**7**  According to Mr. Ackley, he found the move to Vancouver difficult as he had trouble settling in and making friends. He experienced anxiety and panic attacks for which he received treatment in the form of counselling and medication.

**8**  He attended Charles Best School in grade 10 and then CABE Secondary, an alternative school for another year. Thereafter he attended "A Chance to Choose," a 15 week program designed to provide young people with employment skills and experience. He did not complete high school.

**9**  Mr. Ackley started working when he was 18. He started part time with DNA Electric Ltd. ("DNA"), a commercial electric company for which his father works as a foreman. He also worked as a part time delivery man for Lordco, an automobile parts company.

**10**  Mr. Ackley worked at DNA on a part time basis in 2007 and 2008. It is apparent from employment records submitted into evidence that he only had one shift at DNA in 2009 and then did not work there again until September of 2010, after the Incident. He was not employed at the time of the Incident. Mr. Ackley did not provide a clear explanation as to why he was not working at that time.

**11**  Mr. Ackley's mother, father and younger brother also testified. His mother, Heather Ackley, described her son as a very active teenager who participated in many sports and who enjoyed socializing with his friends.

**12**  She said that when the family moved to B.C. in 2006, Mr. Ackley found the transition difficult. She said that it took him approximately six months to settle in. She confirmed that Mr. Ackley experienced anxiety following the move and that they arranged anxiety-related treatment with Mr. Dr. James.

**13**  Mrs. Ackley agreed that prior to the Incident, Mr. Ackley, in her words, "drank and experimented with alcohol".

**14**  Jordan Ackley is Mr. Ackley's younger brother. He is currently 19 years old and employed as an apprentice electrician with DNA.

**15**  Jordan Ackley testified that Mr. Ackley was very active and outgoing as a teenager. They both played a lot of sports and he said that Mr. Ackley was always very fit. He described his brother as the sort of person who "always put a smile on everyone's face".

**16**  Jeff Ackley is Mr. Ackley's father. He confirmed much of what Mrs. Ackley and Jordan Ackley said about Mr. Ackley's active lifestyle before the Incident.

**17**  Jeff Ackley is a foreman employed by DNA. He testified about the physical requirements of being a commercial electrician.

**The Defendant**

**18**  Mr. Audette is currently 25 years old. He was 20 at the time of the Incident.

**19**  Mr. Audette has lived in Coquitlam, B.C. for most of his life. He currently lives there with his parents. He graduated high school in 2007.

**20**  Following high school, he did one year of engineering at Simon Fraser University. He then took a year off before returning to school at Douglas College in the teacher training program. He is in his fourth year of that program and his current intention is to become a physical education teacher.

**21**  Mr. Audette also works for the City of Coquitlam as a life guard and swim teacher, which he has done for about 10 years.

**The Incident**

**22**  Mr. Ackley testified that on June 8, 2010, he met some friends at a park in Coquitlam and had some beers. While he was uncertain about how much he had to drink, he agreed that during his examination for discovery he said that he had eight beers and two shots during the evening.

**23**  At about 7:30 or 8:00 pm, the group left the park to meet up with some other friends in front of a grocery store located in the same shopping plaza as the Subway restaurant. The whole group then walked across the plaza to the Subway where the Incident occurred.

**24**  Mr. Ackley agreed in cross-examination that he was somewhat intoxicated, although he said that he was "coming down" as he had stopped drinking and had gotten something to eat at the Subway.

**25**  According to Mr. Ackley, Mr. Audette drove up in his car and as he was walking towards the Subway, Mr. Ackley commented on the fact that Mr. Audette had dreadlocks. Mr. Ackley said he called Mr. Audette a "wannabe Ziggy Marley". He said he was showing off for his friends and trying to be funny.

**26**  According to Mr. Ackley, Mr. Audette mumbled something in response that he did not hear. Mr. Ackley then followed Mr. Audette into the restaurant because he wanted to know what Mr. Audette had said. Mr. Ackley said Mr. Audette then told him to get away or he would get hurt. Further words were exchanged and then Mr. Ackley left the restaurant. As he was leaving, he told Mr. Audette that he should leave through the back door rather than come out the front where Mr. Ackley and his friends were. Mr. Ackley denies that he threatened Mr. Audette or that he was looking for a fight.

**27**  Mr. Audette then exited the restaurant through the same door as Mr. Ackley. Mr. Ackley said Mr. Audette was talking at him and called him a "bitch". He said that Mr. Audette walked back to his car, arriving at the passenger side and then walking around the back to get to the driver side door. Mr. Ackley met him at the driver side door just as Mr. Audette got in. Mr. Ackley said he initially grabbed the door to stop Mr. Audette from closing it. However, he saw Mr. Audette reach down to the passenger side and was concerned he was going to pick something up so Mr. Ackley slammed the car door shut, banged on the hood and walked away.

**28**  He said that as he did, he heard a screech and his friends yelled at him to turn around. As he did, he saw the lights of Mr. Audette's car and he was struck. He said he blacked out and when he came to he was lying under the car which then ran over him as it moved to leave.

**29**  Just in front of the spot where Mr. Audette's car was parked and where Mr. Ackley was struck is a slightly raised concrete plant bed containing some shrubbery. According to Mr. Ackley, when he was struck by the car, it carried him across the planter and he came to rest on the other side.

**30**  In cross-examination, Mr. Ackley was taken to his evidence given on examination for discovery in which he described the Incident differently. There, he said that he was waiting in line at the Subway when Mr. Audette came into the restaurant and that Mr. Audette was behind him in line. Mr. Ackley said he does not remember giving those answers but says that the version of events he gave at trial is the proper one.

**31**  Mr. Audette also testified about the Incident. He said that on June 8, 2010 he worked until about 10:15 pm. When his shift ended, he was hungry so he drove to the Subway restaurant which he knew would be open. He estimates that he arrived at about 10:25 pm.

**32**  Mr. Audette said that when he got out of his car and walked toward the door of the restaurant, there were a number of people loitering in front of the restaurant. Mr. Audette did not know any of the people. Mr. Ackley was one of the people in the group.

**33**  As Mr. Audette approached the restaurant, Mr. Ackley started to say rude things to him about his hair. Mr. Audette said that he had recently put his hair into dreadlocks that were still quite short and sticking out.

**34**  Mr. Audette said that he told the people with Mr. Ackley that they should take care of their friend and it was apparent to Mr. Audette that Mr. Ackley was drunk. It was Mr. Audette's impression that Mr. Ackley was trying to pick a fight with him.

**35**  Mr. Audette entered the Subway and ordered a sandwich. He said that Mr. Ackley followed him into the restaurant and continued to say rude things to him. He said that Mr. Ackley asked him why he had his hair like that and if he knew that his girlfriend was sleeping with a short-haired guy.

**36**  According to Mr. Audette, he swore at Mr. Ackley and told him to leave him alone.

**37**  Mr. Ackley was the first to leave the restaurant. Mr. Audette said that as Mr. Ackley left, he told Mr. Audette that he should leave through the rear door. Mr. Audette interpreted this as a threat. He again thought that Mr. Ackley wanted to fight him.

**38**  Mr. Audette paid for his sandwich and then left the restaurant through the same door that he had entered. When asked why he did not leave through the other door, he said that he did not want to give Mr. Ackley the satisfaction of knowing that he was scared.

**39**  Mr. Audette was also asked why he did not fight Mr. Ackley if that is what Mr. Ackley wanted. Mr. Audette said that he is not much of a fighter and that he was also worried that Mr. Ackley had friends there who might join in. As he said, "no good would have come of it".

**40**  When he left the restaurant, Mr. Audette walked to his car. He said that Mr. Ackley followed him and was pushing him in the back and still yelling and swearing at him. Mr. Ackley had also removed his shirt which reinforced in Mr. Audette's mind that Mr. Ackley wanted to fight.

**41**  When Mr. Audette got to his car, he said that Mr. Ackley first tried to prevent him from opening the door. Mr. Audette was however able to open the door and get in. As he did, he said that Mr. Ackley told him he was going to "fuck up your car".

**42**  Mr. Audette then pulled the door shut. He said that Mr. Ackley "went berserk" and was hitting his car on the driver's side window and on the front hood. Mr. Audette said that he was concerned that Mr. Ackley was going to break the window. Mr. Ackley was wearing a ring and photographs entered into evidence show visible marks from the ring on the window of Mr. Audette's car.

**43**  Mr. Audette said that throughout the time from when he was confronted by Mr. Ackley in front of the restaurant, followed into the restaurant and then followed to his car, he was terrified. He said he felt panic, anxiety and fear and he could not understand why this was happening. He denied however that he was angry at Mr. Ackley.

**44**  Mr. Audette testified that once he shut the car door, he put the car into reverse and backed up about ten feet. He then turned the steering wheel to the left, intending to turn through the stall where he had been parked and exit the parking lot. He said that while he was backing up, Mr. Ackley was still beside his car on the driver's side. He said that as he accelerated forward, Mr. Ackley turned to run back towards where his friends were in front of the restaurant. In doing so, he moved directly in front of Mr. Audette's car. Mr. Audette said that he swerved to the right to try to miss Mr. Ackley which is what caused him to go through the planter. Mr. Audette said that he gave his car more gas than he intended and as such he accelerated quite quickly.

**45**  Mr. Audette said that he could not avoid Mr. Ackley who was initially pushed by the front of the car then he fell under it as the car went over the bushes in the planter.

**46**  Mr. Audette said that he did not stop the car, but rather drove away. He said he was panicked by what had happened and did not know if he had killed Mr. Ackley.

**47**  As he was driving away, Mr. Audette called his friend Brian Redwood and told him what had happened. Mr. Redwood told him he needed to return to the scene and give his version of what had happened. He then drove to the house of another friend. In relatively short order, Mr. Audette met up with Mr. Redwood and they returned to the scene, arriving back at about 11:00 pm. Mr. Audette was then interviewed by the police back at the RCMP station.

**48**  Mr. Audette denied that he intentionally ran over Mr. Ackley. He said that his intention when he arrived at the Subway restaurant was simply to buy a sandwich and go home.

**49**  It was put to Mr. Audette in cross-examination that his evidence at trial differed in some respects from what he told the RCMP on the night of the Incident. At several points during the interview, he said that he did not know exactly what had happened, for example he did not know how Mr. Ackley ended up in front of his car or why he drove through the bushes.

**50**  Mr. Audette acknowledged that his evidence given at trial was clearer and more detailed than what he told the RCMP but said that during the interview he was very frazzled and still quite upset. He denied the suggestion put to him that the version given to the police lacked details because he had not yet invented his story.

**51**  He also acknowledged that he told the police that he is a pretty big guy, that he takes kick-boxing and that he could have "beat the crap" out of Mr. Ackley in the restaurant. Nonetheless, he said that he was intimidated and scared by Mr. Ackley's actions. He maintained however that he never lost his temper.

**52**  Two other witnesses who were present at the time of the Incident also testified.

**53**  Nicole Huddleston was one of the people that met Mr. Ackley in Glenfield Park in Coquitlam. She said that she was not drinking but agreed that Mr. Ackley was and that he was the most intoxicated one in the group.

**54**  She said that the group left the park and went to the Subway in Coquitlam, arriving around 9:00-9:30 pm. While they were hanging around in front of the Subway, Mr. Audette drove up in his car. Ms. Huddleston said that as he went to enter the restaurant, Mr. Ackley directed a comment towards him, calling him Ziggy Marley. She said that Mr. Ackley was the only person in their group who said anything to Mr. Audette and that she does not recall Mr. Audette saying anything in response.

**55**  Mr. Ackley followed Mr. Audette into the Subway. A young man named Jeremy, who was in their group, also went into the restaurant. Ms. Huddleston stayed outside.

**56**  She said that Mr. Ackley was inside the restaurant for about five minutes and was the first one to come back outside. When Mr. Audette came outside, Mr. Ackley followed him to his car. Ms. Huddleston said she followed Mr. Ackley. When asked why she did so, she said that she went to get Mr. Ackley so there would be no issue. She denied that Mr. Ackley was trying to fight Mr. Audette, but agreed that she was concerned that a fight might develop.

**57**  Ms. Huddleston said she saw Mr. Audette get into his car then saw Mr. Ackley strike the driver's side door. Mr. Ackley also struck the hood of Mr. Audette's car. When this was occurring, Ms. Huddleston was approximately three to four feet away, standing adjacent to the planter box.

**58**  According to Ms. Huddleston, Mr. Audette backed his car up briefly, then moved it forward and struck Mr. Ackley. Mr. Ackley had turned away and was looking back towards the Subway. She said that the car carried Mr. Ackley on the hood through the planter box and that he then fell under the car on the other side.

**59**  Marissa Boyer also testified. She is a former girlfriend of Mr. Ackley although they had broken up prior to the date of the Incident.

**60**  Ms. Boyer testified that she was at Glenfield Park on June 8, 2010 with a group of people, including Mr. Ackley. Many in the group were drinking. Ms. Boyer said that she had two drinks of vodka mixed with pop. She agreed that Mr. Ackley was drinking and that he was intoxicated.

**61**  At some point the group left the park and went to the Subway restaurant. While they were hanging around out front, Mr. Audette drove up in his car. As he got out and went to enter the restaurant, Mr. Ackley said something to him about his hair and called him Ziggy Marley.

**62**  Ms. Boyer said that Mr. Audette was angry, told Mr. Ackley to shut up and called him a name. She said that Mr. Ackley followed Mr. Audette into the restaurant and that she went in too. More words were exchanged and then Mr. Ackley and Ms. Boyer left after about two minutes. Mr. Audette came out after about five minutes.

**63**  According to Ms. Boyer, when Mr. Audette came out, he spoke to Mr. Ackley and told him to follow him to his car. She said that Mr. Ackley and Mr. Audette then walked together towards Mr. Audette's car and that Mr. Ackley was laughing. While they were at the car, Ms. Boyer said that she did not see Mr. Ackley hit the car door but she agreed that he did strike the hood.

**64**  She said that Mr. Audette then got into his car, shut the door, rolled up his window, put the car in drive and accelerated forward. She said that Mr. Ackley had walked away and was on the other side of the planter with his back turned to the car. She said that the car came through the planter and struck Mr. Ackley. She said it looked like he was initially bent backwards by the impact and then was sucked under the car.

**65**  Brian Redwood also testified. Mr. Redwood was not present when the Incident occurred but he confirmed that Mr. Audette telephoned him shortly afterwards and that he returned with Mr. Audette to the scene. He said that when he met up with Mr. Audette, he appeared distraught and shaken up.

**The Plaintiff's Injuries and Post-Incident Activities**

**66**  The most serious injuries suffered by Mr. Ackley were fractures to his pelvis. He also suffered significant abrasions and bruising to his pelvic and hip areas.

**67**  Mr. Ackley remained in the hospital for four days. When he was released, he was confined to a wheelchair and was initially bedridden. At the family home, his bedroom was located upstairs in a loft and Mr. Ackley was unable to climb the stairs so he was carried up and down by his father and brother. For the first while, he also needed help getting dressed and going to the bathroom.

**68**  Mrs. Ackley testified that for the first week after Mr. Ackley returned home, she, her husband and her mother had to regularly change the bandages on Mr. Ackley's abrasions. She described it as a very traumatic process for all of them. After the first week, they got some in-house nursing assistance.

**69**  Mr. Ackley said that he used the wheelchair virtually all of the time for the first month after the Incident. Then, as he got more mobile, he would use a crutch or cane for support.

**70**  Mr. Ackley attended physiotherapy for six sessions commencing about three months after the Incident.

**71**  Mr. Ackley said that he tried to return to playing hockey in September of 2010. He signed up for the same recreational men's team that he had played with in the past. He said that he played until the pain stopped him. The evidence in fact established that Mr. Ackley also registered to play hockey in 2011 and 2012, which was confirmed by the team manager. Statistics maintained by the league and posted online indicate the he played 62 games in the 2010-2012 period. Mr. Ackley tried to downplay how much he played, suggesting that other players often wore his jersey.

**72**  Mr. Ackley returned to work at DNA in September 2010. He said that he did very light duties and often had assistance. His father was a foreman at DNA and arranged for the light duties. Mr. Ackley said that he could perform light duties like sweeping, but that still caused him pain. He had difficulty bending over or pulling. He said he would often leave work early due to the pain.

**73**  Mr. Ackley worked at DNA from September 2010 to May 2011 when he said he stopped due to the pain and to a work slowdown. According to his employment records, he worked a total of 436.90 hours from September to December 2010 and a further 535.90 hours from January to May 2011. He then resumed work at DNA in February 2012 and continued through until July 2014. He worked 1505.40 hours in 2012, 1440.80 hours in 2013 and 610.60 hours in 2014.

**74**  Mr. Ackley said that he stopped work in July 2014 because he could no longer do the work due to his pain.

**75**  In January of 2014 he was accepted in to the BCIT electrical apprenticeship program and he expected to attend classes at BCIT from October to December 2014 for the theoretical component of the apprenticeship. However he did not attend the classes as he was not working and he said that he could not afford it. He has since been accepted again for classes beginning August of 2015.

**76**  Mr. Ackley said that he wants to take the classes to complete what he started in terms of his apprenticeship, even though he does not believe that physically he is able to work as an electrician.

**77**  Mr. Ackley says that he continues to experience pain in his hips and back, as well as related emotional issues. He testified that the injuries sustained in the Incident changed his life dramatically. He used to be very active and play a lot of sports, but is no longer able to do so. He says that he cannot do any heavy lifting and he worries about his future and his ability to obtain employment. He says his confidence has been diminished.

**The Medical Evidence**

***Dr. Michael Gilbart***

**78**  Dr. Michael Gilbart is an orthopaedic surgeon who examined Mr. Ackley at the request of his counsel. Dr. Gilbart has subspecialty training in disorders of the shoulders, hips and knees and is a leading practitioner in the field of hip arthroscopic surgery.

**79**  Dr. Gilbart examined Mr. Ackley on September 8, 2011 and the results of his examination are set out in a report of the same date.

**80**  On the date of his examination, Dr. Gilbart diagnosed Mr. Ackley as having the following conditions:

1. Musculoligamentous lumbar strain;
2. Lateral compression pelvis fracture with bilateral superior and inferior pubic ramus fractures, anterior cortex sacral fracture (now healed);
3. Residual chest, pelvis and bilateral soft tissue pain; and
4. Bilateral CAM-type femoral acetabular impingement.

**81**  With respect to the pelvic fractures, Dr. Gilbart described Mr. Ackley as having suffered a "significant crush injury". He noted that while the fractures have healed, Mr. Ackley continues to experience pain in his hip and groin, particularly on the left side.

**82**  The CAM-type femoral acetabular impingement identified by Dr. Gilbart refers to the presence of a bony prominence or bump in the hip joint, something that he says is relatively common in the general population and was likely present prior to the Incident. Such a condition is often asymptomatic, but it can also be associated with tears in the labrum, which is the cartilage rim attaching to the hip socket, which Dr. Gilbart said can be caused by trauma.

**83**  Dr. Gilbart opined that because Mr. Ackley did not have any pelvis or hip pain prior to the Incident, it is likely that his ongoing pain was caused by the Incident.

**84**  It is Dr. Gilbart's view that Mr. Ackley would not likely benefit from surgical intervention, specifically a hip arthroscopy, even if it were established that he had a labral tear. According to Dr. Gilbart, this is because Mr. Ackley also reports pain in his pelvis and low back thus hip surgery is unlikely to relieve all of his symptoms. That said, Dr. Gilbart says that Mr. Ackley would benefit from an MRI arthrogram of the left hip, which would include an injection of a local anesthetic which would assist in determining how much of Mr. Ackley's pain is emanating from the hip and how much from his pelvis.

**85**  Dr. Gilbart described Mr. Ackley's prognosis as guarded.

***Dr. Ralph Belle***

**86**  Dr. Ralph Belle is an orthopaedic surgeon who also examined Mr. Ackley at the request of his counsel. That examination took place on June 20, 2014 and the results are set out in a report of the same date.

**87**  In general, Dr. Belle reports similar findings to Dr. Gilbart. The central point of departure between the two doctors is that Dr. Belle is of the opinion that Mr. Ackley's main complaints of pain and stiffness are emanating from his hip joints and that surgical intervention in the form of a hip arthroscopy would likely have positive results.

**88**  Similar to Dr. Gilbart, Dr. Belle recommends further investigation in the form of an MRI and the injection of an anesthetic. Again, the purpose of the anesthetic would be to temporarily eliminate the hip pain in order to determine how much if any pain was emanating from the pelvis and/or low back.

**89**  Dr. Belle also comments on Mr. Ackley's ongoing mechanical low back pain and suggests that he would benefit from a formal aggressive strengthening program.

***Dr. Richard Kendall***

**90**  Dr. Richard Kendall is an orthopaedic surgeon who examined Mr. Ackley on January 15, 2014 at the request of the defendant. The results of his examination are set out in a report of the same date.

**91**  Dr. Kendall's description of Mr. Ackley's injuries is similar to that of Dr. Gilbart and Dr. Belle. He noted that Mr. Ackley's pelvic fractures have healed, but that he continues to experience significant stiffness of the hips. However, in Dr. Kendall's view, there is nothing to suggest that Mr. Ackley sustained an injury to the hip joints and he is unlikely to experience arthritic changes within the hip joints in the future. Dr. Kendall described Mr. Ackley's ongoing residual pain as being of uncertain origin. Unlike, Dr. Gilbart and Dr. Belle, Dr. Kendall suggests that it is unlikely that further investigation will shed any light on the sources of his pain.

**92**  Dr. Kendall also suggests that Mr. Ackley is deconditioned and that a more aggressive program of exercise and rehabilitation would likely improve his symptoms.

**93**  Dr. Kendall authored a second report dated November 27, 2014 based on a review of additional medical records. In this report, Dr. Kendall notes Mr. Ackley reported a deterioration of his condition for unexplained reasons. Having reviewed Dr. Belle's report, Dr. Kendall changed his view and agrees with Dr. Belle's recommendation about further investigation of Mr. Ackley's hip using the injection of an anesthetic.

**94**  Dr. Kendall subsequently provided a third report dated March 6, 2015 to comment on Dr. Gilbart's report. In this report, Dr. Kendall notes that none of the investigations recommended by Dr. Gilbart have been pursued but he agrees with Dr. Gilbart there is little evidence that the hip pathology is the cause of Mr. Ackley's pain. According to Dr. Kendall, Mr. Ackley's widespread pain is likely soft tissue in nature.

***Dr. Ramak Shadmani***

**95**  Dr. Ramak Shadmani is Mr. Ackley's family doctor. She saw him for the first time after the Incident on June 16, 2010. She noted that he was unable to walk due to pain and instability in his pelvis. He also presented with bruising and abrasions over the left side of his scalp, both arms, his pelvis, hips and upper thighs.

**96**  Much of Dr. Shadmani's report consists of rather cryptic entries relating to various office visits made by Mr. Ackley which are of minimal assistance. She does provide a diagnosis, as of August 10, 2014, the date of her report, that Mr. Ackley suffered soft tissue injuries to his chest, upper arms, lower back and hips as well as several fractures of his pelvis bone. She indicated that he was still suffering from chronic low back and hip pain. She expressed the view that the prognosis for a full recovery is poor.

***Dr. Anthony Oshun***

**97**  Dr. Anthony Oshun is a psychiatrist who practices at Eagle Ridge Hospital. He saw Mr. Ackley in the hospital on May 7, 2014. Mr. Ackley had been brought to the hospital the previous day by his parents who were concerned that he was hallucinating and being aggressive. Dr. Oshun said that Mr. Ackley told him during his interview that he had lost his driver's licence a few days previously and then had lost his job the following day.

***Dr. Owen James***

**98**  Dr. Owen James is a clinical psychologist. Dr. James confirmed that he saw Mr. Ackley for a number of sessions beginning in January of 2009 to deal with anxiety issues. Dr. James has not seen Mr. Ackley since May of 2010.

**Additional Expert Evidence**

***Shannon Smith***

**99**  Shannon Smith is an occupational therapist who conducted two work capacity evaluations of Mr. Ackley at the request of his counsel, one on June 26, 2013 and a subsequent one on September 20, 2014. Her findings are set out in reports dated July 31, 2013 and September 30, 2014.

**100**  Ms. Smith's opinion is based on an interview with Mr. Ackley as well as the results of various functional capacity tests that he undertook on June 26, 2013. She then considered the occupational requirements of an electrician as set out in the National Occupational Classification (NOC) and said as follows in her first report:

The results of this assessment show Mr. Ackley is not ideally suited to the full physical demands of this work, however he is currently incorporating a number of work style modifications and experiencing some degree of symptom aggravation in order to remain in the work place. Specifically, Mr. Ackley does not meet the demands for kneeling or crouching and he compensates for this limitation by stooping to perform low level work and taking breaks from sustained stooping as necessary.

...

It is my impression from Mr. Ackley that he is afforded some level of informal accommodation on behalf of the employer (I note his father is the Major Foreman and Mr. Ackley has worked for the company since the age of 16). As indicated above, this includes taking breaks as needed and leaving early during periods of symptom aggravation. His ability to continue to perform this work on a full time basis is dependent on him being able to effectively manage and tolerate his symptoms on an ongoing basis and being able to continue to implement work style modifications/ adaptations that reduce his exposure to aggravating postures.

**101**  Ms. Smith went on to note that Mr. Ackley has apparently not had any guidance from a rehabilitation professional with respect to an appropriate exercise regime and she recommended consultation with a physiotherapist to determine if improvements could be achieved through an active exercise program.

**102**  Ms. Smith assessed Mr. Ackley again on September 24, 2014. On the basis of that assessment, she was of the opinion, as stated in her second report, that "Mr. Ackley's ability to meet the physical demands of [his] work has become further compromised. In her view, as of the date of that assessment, Mr. Ackley does not meet the physical demands of work as an apprentice electrician. According to Ms. Smith, Mr. Ackley would benefit from participation in an active exercise program supervised by a kinesiologist.

**103**  In her evidence at trial, Ms. Smith noted that Mr. Ackley had very poor core strength and flexibility and that these could be improved through active exercise. She cautioned however that it was difficult to predict how much improvement in Mr. Ackley's condition would result from such a program.

***Derek Nordin***

**104**  Derek Nordin is a vocational evaluator who prepared a vocational assessment report dated August 18, 2014. The assessment was based on an interview with Mr. Ackley as well as the results of various tests administered by Mr. Nordin. Both the interview and the testing took place on August 21, 2014.

**105**  In his report, Mr. Nordin referred to Ms. Smith's opinion that Mr. Ackley is not ideally suited to the full physical demands of the work of an apprentice electrician. He noted as well, however, a concern that even without the Incident and Mr. Ackley's resulting injuries, it was questionable whether Mr. Ackley would have been able to function as an electrician and to complete the theoretical portion of his apprenticeship due to very weak math skills.

**106**  Mr. Nordin provided a comparison of estimated annual earnings for electricians as well as for other similar trades which according to Mr. Nordin would not require the same strong academic abilities as an electrician. He also provided estimates of earnings for truck drivers and delivery and courier drivers based, as I understand it, on Mr. Ackley's statement to him that he was hoping to obtain employment as a scrap metal truck driver through a friend. I note that Mr. Ackley did not testify in court about any such position.

***Robert Carson***

**107**  Robert Carson is an economist. He prepared two reports at the request of counsel for Mr. Ackley. The first, dated November 10, 2014, provides projections of past and future earnings, and the second, dated February 27, 2015, provides a methodology for calculating projected future care costs. I will return to Mr. Carson's evidence when addressing the relevant heads of damage.

***Wayne Jeffrey***

**108**  Wayne Jeffrey is a forensic toxicologist. Based on a blood sample obtained from Mr. Ackley at Royal Columbian Hospital at 23:09 on June 8, 2010, Mr. Jeffries estimated that Mr. Ackley's blood alcohol level would have been between 185 to 194 milligrams of alcohol in 100 millilitres of blood at the time of the Incident. He testified about typical effects of such a concentration including slurred speech, stumbling gait, an inability to choose between alternatives presented to him, loss of judgment, loss of reaction time, loss of fine motor control and loss of coordination. He also opined that a person with that alcohol level might have a distorted or compromised memory of events when in a sober state.

**Analysis**

**Credibility**

**109**  As can be seen from the above, while the essential facts surrounding what occurred on June 8, 2010 are largely uncontradicted, Mr. Ackley and Mr. Audette do differ somewhat in their versions of the exact details of the Incident.

**110**  Madam Justice Dillon provided very helpful guidance for assessing credibility when faced with conflicting stories in *Bradshaw v. Stenner,* [*2010 BCSC 1398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2V4-00000-00&context=), aff'd [*2012 BCCA 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24KX-00000-00&context=):

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

[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), [*12 Alta. L.R. (3d) 298*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9321-FC1F-M53V-00000-00&context=) at para. 13 (Alta. Q.B.)). I have found this approach useful.

**111**  Mr. Ackley's presentation at trial was different from the image of him on the night of the Incident created by the evidence. At trial, Mr. Ackley was polite, measured and appeared to be making best efforts to accurately and truthfully give his evidence.

**112**  That said, there are aspects of Mr. Ackley's evidence that simply are not credible. For example, he repeatedly denied that he was trying to incite a fight with Mr. Audette or that he was bullying or intimidating him. He said that he followed Mr. Audette into the Subway simply to hear what Mr. Audette had said to him. Similarly, he said that when he and Mr. Audette arrived back at Mr. Audette's car, he initially stopped Mr. Audette from closing the door so that he could continue to talk to him. He characterized his striking the window and hood of Mr. Audette's car as more playful than intimidating.

**113**  This evidence is not believable and reflects a tendency on Mr. Ackley's part to downplay his actions on the night of the Incident. It is clear on all of the evidence that Mr. Ackley was the instigator of the Incident and the aggressor throughout. For example, Ms. Huddleston said she followed Mr. Ackley to the car because she was worried that a fight would occur. It is also clear that Mr. Ackley removed his shirt while waiting for Mr. Audette to emerge from the Subway. That is behaviour more consistent with someone looking to fight than simply carry on a conversation.

**114**  Mr. Audette also presented as a polite and thoughtful young man who gave his evidence in a straight forward manner. However, there were aspects of his evidence that were also problematic, most notably, his denial that he was ever angry at Mr. Ackley. I accept that Mr. Audette was intimidated and likely frightened by Mr. Ackley but it is difficult to accept that there was not an element of anger present as well.

**115**  That said, where Mr. Ackley and Mr. Audette differ in their versions of what occurred, I prefer the evidence of Mr. Audette. His description of the Incident, and in particular of Mr. Ackley's conduct, has a greater air of reality about it and is more consistent with the preponderance of probabilities than that given by Mr. Ackley.

**Liability**

**116**  As noted above, there is no issue that Mr. Audette's vehicle struck and injured Mr. Ackley.

**117**  Mr. Ackley alleges that Mr. Audette acted intentionally. He submits that Mr. Audette was clearly angry and that it was this anger that caused him to accelerate his vehicle directly at Mr. Ackley. He says the fact that Mr. Audette left the scene and contemplated fleeing to Mexico is consistent with Mr. Audette having acted intentionally. If it was truly an accident, Mr. Ackley submits that Mr. Audette would have called the police himself and would have remained at the scene.

**118**  I do not accept that Mr. Audette intentionally ran over Mr. Ackley. While I have rejected Mr. Audette's evidence that he was not angry, the fact that he was angry with Mr. Ackley does not lead to a finding that he intentionally ran him over. I accept Mr. Audette's evidence that his intention was to get away from Mr. Ackley and that, in order to do so, he backed up his car and then put it in to drive in order to manoeuver around Mr. Ackley.

**119**  Ms. Huddleston's evidence supports this finding in that she testified that Mr. Audette backed up before moving forward and striking Mr. Ackley. Ms. Boyer did not testify that Mr. Audette backed up first but her evidence is inconsistent with the balance of the evidence on a number of points and is of minimal assistance.

**120**  While he may not have acted intentionally in striking Mr. Ackley, I nonetheless find that Mr. Audette was negligent in the operation of his vehicle. He knew that Mr. Ackley was in the vicinity of the vehicle and he conceded that moving back into the parking space that he had just vacated was an unpredictable move. He also acknowledged stepping on the accelerator with more force than he intended.

**121**  In the circumstances, Mr. Audette was negligent and his ***negligence*** caused Mr. Ackley's injuries.

**122**  Mr. Audette however raises a number of defences that he submits absolve him of liability, even in the face of a finding of ***negligence***. I will address these defences in turn.

***Volenti Non fit Injuria***

**123**  Mr. Audette seeks to invoke the doctrine of *volenti non fit injuria* and submits that Mr. Ackley, through his conduct, voluntarily accepted the risk that he would be injured. Mr. Audette in fact goes further and submits that Mr. Ackely created the risk by engaging in threatening behaviour, impeding Mr. Audette from entering his vehicle, pounding on the vehicle and then crossing in front of the vehicle when it moved forward.

**124**  Mr. Ackley cites *Kreutziger v. Kreutziger* [*(1991), 58 B.C.L.R. (2d) 184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-F8KH-X1GM-00000-00&context=) (S.C.) and *Brietzke v. Lazariuk,* 1988 CarswellBC 3499 (S.C.) as examples of where the courts have found the actions of pedestrians in relation to a vehicle to fall within the doctrine.

**125**  The doctrine of *volenti non fit injuria*, otherwise known as voluntary assumption of risk, is premised on the "moral supposition that no wrong is done to one who consents" and, because it is a complete bar to recovery, courts have found it "only applies in situations where the plaintiff has assumed both the physical and legal risk involved in the activity" (*Crocker v. Sundance Northwest Resorts Ltd*., [*[1988] 1 S.C.R. 1186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23K3-00000-00&context=) at 1201-1202).

**126**  To establish *volenti*, it must be "clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any ***negligence*** on the defendant's part" (*Dube v. Labar*, [*[1986] 1 S.C.R. 649*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-239W-00000-00&context=) at 658). The test was further explained by the Court in *Dube* as follows (658-659):

The acceptance of risk may be express or may arise by necessary implication from the conduct of the parties, but it will arise, in cases such as the present, only where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to.

... To permit the defence to succeed on facts showing merely that the plaintiff knew of the risk and yet chose to undergo it is inconsistent with the decisions of this Court, *supra*, which require not merely knowledge, but express or necessarily implied acceptance of the risk of harm without recourse to law by the plaintiff, along with an inference that the defendant, for his part, took no responsibility for the plaintiff's safety.

**127**  Here, it is clear that Mr. Ackley was the aggressor and, it can be said, voluntarily engaged in a confrontation with Mr. Audette. However, the evidence does not go so far as to support a finding, or even an inference, that Mr. Ackley knowingly accepted the risk that Mr. Audette would run him over with his car or that Mr. Ackley was waiving any recourse to the law in the event of injury.

**128**  The *volenti* doctrine does not assist Mr. Audette.

***Ex Turpi Causa***

**129**  Mr. Audette also seeks to invoke the doctrine of *ex turpi causa.* He submits that Mr. Ackley should not be permitted to benefit, by way of an award of damages, for his own immoral or illegal conduct.

**130**  In *Hall v. Hebert,* [*[1993] 2 S.C.R. 159*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-60C8-00000-00&context=), the Supreme Court addressed the policy underpinnings of the *ex turpi causa* doctrine in these terms (179-180):

I conclude that there is a need in the law of tort for a principle which permits judges to deny recovery to a plaintiff on the ground that to do so would undermine the integrity of the justice system. The power is a limited one. Its use is justified where allowing the plaintiff's claim would introduce inconsistency into the fabric of the law, either by permitting the plaintiff to profit from an illegal or wrongful act, or to evade a penalty prescribed by criminal law. Its use is not justified where the plaintiff's claim is merely for compensation for personal injuries sustained as a consequence of the ***negligence*** of the defendant.

**131**  As reflected in this passage, McLachlin J. (as she then was), speaking for the majority, drew a distinction between compensatory damages recoverable by a plaintiff for personal injuries suffered as a consequence of tortious conduct, and a profit or gain obtained from illegal conduct.

**132**  While I do not read *Hall* as foreclosing entirely the possibility that *ex turpi causa* can ever be invoked in a personal injury claim, it is clear that the doctrine has limited application and is restricted to those cases in which the damages claimed can clearly be characterized as profits for the plaintiff's illegal conduct.

**133**  This limitation applies to the facts of this case. While I have found that Mr. Ackley was the aggressor in the Incident, his claim for damages arises not as a direct result of his own illegal or immoral conduct, but by reason of the ***negligence*** of Mr. Audette. As such, the doctrine of *ex turpi causa* has no application.

***Agony of the Moment***

**134**  Mr. Audette cites a number of cases in which drivers faced with emergency situations were found not liable when their evasive actions resulted in an accident: *Gill Estate v. Canadian Pacific Ltd.,* [*[1973] S.C.R. 654*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B04B-00000-00&context=), *Robbins v. Webb,* [*2011 BCSC 1073*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22TR-00000-00&context=), aff'd [*2012 BCCA 233*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3WC-00000-00&context=) and *Brook v. Tod Estate,* [*2012 BCSC 1947*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X35C-00000-00&context=). The rationale for these decisions is the so-called "agony of the collision", as summarized in *Carswell's Manual of Motor Vehicle Law*, Volume III, 3rd edition at page 22:

... a driver acting in an emergency created by another vehicle or by some extraneous fact cannot be expected to exercise nice judgment and prompt decision, and mere errors of judgment in such circumstances may often be excusable ...

**135**  In my view, these cases are distinguishable. In the present case, while Mr. Audette was no doubt frightened and intimidated by Mr. Ackley, by the time Mr. Audette was in his car with the door closed, any imminent threat had subsided. Moreover, while I accept his evidence that he was intending to leave the scene and escape Mr. Ackley, the evidence did not establish that proceeding as he did was the only course of action open to him. Mr. Audette did testify that the exit from the parking lot was in the direction that he intended to drive, but there was no evidence establishing that there was no other available route to that exit. For example, there was no evidence that Mr. Audette was blocked from backing up his vehicle further and thus avoiding the need to drive through the parking stall and around Mr. Ackley in order to exit. Based on the evidence, there was no emergency compelling him to act quickly or drive towards that exit.

**136**  In the circumstances, this is not a case in which Mr. Audette's actions were the result of an "agony of the moment" decision.

***Contributory Negligence***

**137**  Mr. Audette submits that if none of the above defences operate to absolve him completely of liability then, at a minimum, Mr. Ackley must be found contributorily negligent.

**138**  In *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. 25, Mr. Justice Tysoe adopted the description of contributory ***negligence*** set out in John G. Fleming, *The Law of Torts,* 9th ed. (Sydney: LBC Information Services, 1998) at 302 as follows:

Contributory ***negligence*** is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default, in bringing about his injury. The term "contributory ***negligence***" is unfortunately not altogether free from ambiguity. In the first place, "***negligence***" is here used in a sense different from that which it bears in relation to a defendant's conduct. It does not necessarily connote conduct fraught with undue risk to *others*, but rather failure on the part of the person injured to take reasonable care of himself in his *own* interest. ... Secondly, the term "contributory" might misleadingly suggest that the plaintiff's ***negligence***, concurring with the defendant's, must have contributed to the *accident* in the sense of being instrumental in bringing it about. Actually, it means nothing more than his failure to avoid getting hurt...

[Emphasis in original; Footnotes omitted.]

**139**  Where it is shown that a plaintiff was contributorily negligent, then the court must also consider the proper apportionment of liability as between the parties. In this regard, s. 1(1) of the ***Negligence*** *Act,* *R.S.B.C. 1996, c. 333*, provides:

If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

**140**  In *Karran v. Anderson,* [*2009 BCSC 1105*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-624K-00000-00&context=), Mr. Justice Cohen described the approach to apportionment in these terms:

[106] The ***Negligence*** *Act*, [*R.S.B.C. 1996, c. 333, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B066-00000-00&context=)(1), requires that apportionment of liability must be made on the basis of "the degree to which each person was at fault". As stated in *Cempel v. Harrison Hot Springs*, [*[1998] 6 W.W.R. 233*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=), [*43 B.C.L.R. (3d) 219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=) at para. 19 (C.A.), the assessment to be made is of degrees of fault, not degrees of causation, with "fault" meaning blameworthiness. Courts must gauge the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all of the circumstances.

[107] In assessing the respective fault and blameworthiness of the parties as contemplated in *Cempel,* courts are to evaluate the extent or degree to which each party departed from the standard of care each party owed under the circumstances: *Alberta Wheat Pool v. Northwest Pile Driving Ltd.,* [*2000 BCCA 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=) at para. 46. Finch J.A. (as he then was) described the range of blameworthiness, as follows:

Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

**141**  Mr. Audette cites a number of cases in which the courts have apportioned liability between the driver of a vehicle and a pedestrian based on the conduct of the pedestrian. Perhaps the closest on the facts to this case is *Mori v. Weeks,* [*2001 BCSC 1094*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23Y9-00000-00&context=) where the defendant's vehicle struck the plaintiff while the defendant was trying to get away from the plaintiff. The plaintiff had picked up the defendant without her permission during a water fight which upset the defendant. When the defendant subsequently went to leave in her car, the plaintiff tried to open the door and he banged on her window. As the defendant backed up to leave, the bumper of her car struck the plaintiff's knee.

**142**  Mr. Justice Wilkinson apportioned liability 40% to the plaintiff and 60% to the defendant driver, stating:

[28] As to the plaintiff, his misconduct must not only be considered at the boulevard at the time the defendant began backing up to leave the party. The whole series of events leading up to that moment, and the part played by the plaintiff, has to be looked at.

...

[38] In any event, it is obvious that in the circumstances he did not take sufficient care to remove himself from the area and to avoid the car. That might be so for any pedestrian in a similar situation. Here, where he had put the defendant in her state of emotional upset and concern for herself, and where he knew her emotional state, he has to accept considerably more responsibility for what happened than an unknowing pedestrian would.

**143**  These comments are particularly apt in the circumstances of this case. I find that Mr. Ackley's conduct viewed in its entirety evidences a failure on his part to take reasonable care for his own safety. His actions created the circumstances that led directly to his injuries. Whether at the time of impact he moved directly in front of Mr. Audette's car, as Mr. Audette says, or he had turned and was walking away, as he alleges, in either case he failed to exercise reasonable care in light of the circumstances that he again created.

**144**  That said, Mr. Ackley was a pedestrian and Mr. Audette was in his car, leaving Mr. Ackley in the more vulnerable position. Although Mr. Ackley may have instigated and controlled the situation until Mr. Audette entered his car, once Mr. Audette began operating his vehicle he posed a potential risk to any bystanders and was required to exercise reasonable caution and restraint. Moreover, as I have found, Mr. Audette's action in moving back into the parking space that he had just vacated was unpredictable and the evidence did not establish that there was no other route by which he could have exited the scene. Finally, Mr. Audette's testimony indicates that he suspected that Mr.Ackley was intoxicated and at the very least appreciated that he was acting erratically. Given this understanding of the situation, a reasonable driver would not have rapidly accelerated his vehicle as Mr. Audette did.

**145**  In the circumstances, Mr. Audette must bear a greater share of the liability for the Incident. Accordingly, I apportion liability 60% to Mr. Audette and 40% to Mr. Ackley.

**Damages**

***Findings of Fact as to Mr. Ackley's Condition***

**146**  There is no question that Mr. Ackley suffered significant injuries as a result of the Incident. While the most serious of those injuries, the pelvic fractures, healed over the course of the following months, the evidence uniformly established that Mr. Ackley continues to experience pain in his hips, pelvis and low back some five years after the Incident. It is also apparent that he continues to experience some emotional and psychological difficulties. I am satisfied on the evidence that these ongoing issues were caused by the Incident.

**147**  I accept that the Incident has had a significant impact on Mr. Ackley's enjoyment of life as well as on his future employment opportunities. However, I do not find that the impacts are as extensive as he claims. For example, it is clear that he returned to playing hockey relatively soon after the Incident and his attempt to explain away the apparent number of games played was unconvincing. Similarly, his evidence about his work history after the accident was vague and he has offered no explanation as to why he has not sought alternate employment since leaving DNA in May of 2014.

***Non-Pecuniary Damages***

**148**  Mr. Ackley submits that an award of non-pecuniary damages in the amount of $135,000 is appropriate given the nature of his injuries and their lasting impact. Mr. Ackley cites *Tarasevich v. Samsan,* [*2013 BCSC 1914*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23PB-00000-00&context=) and *Slocombe v. Wowchuk,* [*2009 BCSC 967*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0H8-00000-00&context=) in support of his position.

**149**  Mr. Audette submits that a more reasonable award for non-pecuniary damages is in the range of $50,000-70,000, citing *Anderson v. Kozniuk,* [*2014 BCSC 1206*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B12P-00000-00&context=), *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=) and *Biggar v. Felker,* [*2002 BCSC 998*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G327-00000-00&context=).

**150**  I do not propose to review the facts of the cases relied on by the parties but I have read and considered them, along with the general principles governing awards of non-pecuniary damages established by the authorities: see *Stapley v. Hejslet,* [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) at paras. 45-46.

**151**  Applying those principles to my findings as set out in paras. 146 and 147, I conclude that an appropriate award on non-pecuniary damages is $100,000.

***Past Wage Loss***

**152**  Mr. Ackley claims for past income loss based on the premise that but for the injuries sustained in the Incident, he would have completed an electrical apprenticeship and worked as an electrician. This premise also forms the basis for his claim of lost future earning capacity, which I will address below.

**153**  Mr. Ackley relies on the report of Mr. Carson who opines that the gross income for an apprentice electrician from the date of the Incident, June 8, 2010, to trial would have been $166,332. Mr. Ackley acknowledges however that some deduction must be made to that amount to reflect the fact that Mr. Ackley was not employed at the date of the Incident. Mr. Ackley submits that a reasonable figure for past income loss is $100,000, which includes the above deduction as well as notional income tax. From that amount, he subtracts his actual net earnings of $58,195 resulting in a claim for $41,805.

**154**  Mr. Audette acknowledges that Mr. Ackley was unable to work for a period following the Incident but notes that he returned to work at DNA in September of 2010. He worked at DNA until May 2011 when he said he stopped due to pain and a work slowdown. He resumed work at DNA in February 2012 and continued until July 2014.

**155**  As can be seen, there are significant gaps in Mr. Ackley's pre-trial employment history, which have not been adequately explained. For example, it is not entirely clear why he left work at DNA in May 2011 given that he has referred to both pain and a work slowdown. In particular, it is unclear whether he left work voluntarily or was laid off. To the extent that he says pain was an issue, there is nothing in the medical evidence to establish a change or worsening of his condition at that time.

**156**  Mr. Ackley does not explain how it came about that he returned to work in February 2012 nor does he explain what he did in the interim period to attempt to find employment other than at DNA.

**157**  Mr. Ackley's evidence is also vague about why he left DNA in July of 2014. While he attributes this to an increase in pain, there is no clear explanation of how or if his condition changed at that time so as to prevent him from doing work that he had performed over the previous two plus years since resuming employment with DNA in February 2012.

**158**  Mr. Audette also points to the fact that Mr. Ackley lost his driver's licence in May of 2014 and that he told Dr. Oshun that he lost his job after losing his licence. Dr. Shadmani also records Mr. Ackley telling her on July 16, 2014 that he had lost his job.

**159**  Lastly, Mr. Ackley gave no evidence of attempts to find work since leaving DNA in July of 2014. He did register for the theoretical component of the electrical apprenticeship, with classes scheduled for the fall of 2014 but he did not attend as he said he could not afford it. He has since re-registered and says that he intends to take the classes beginning in August of 2015.

**160**  Given Mr. Ackley's uneven work history and the absence of a clear explanation for why he was not working at the time of the Incident and why he left DNA in May of 2011 and again in July of 2014, it is unrealistic to assume that but for the Incident, he would have completed his electrical apprenticeship and worked as an electrician. To proceed on such an assumption overstates what his likely income would have been from the date of the Incident to trial, even with the deductions proposed by his counsel.

**161**  Having said that, the assessment of damages for past wage loss is not focussed solely on the question of what a plaintiff would have earned during the period in question given that claims for income loss, both past and future, are in fact claims for loss of earning capacity (*Rowe v. Bobell Express Ltd.,* [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at para. 30; *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).

**162**  Where the alleged loss of earning capacity is premised on a hypothetical event, which in this case is Mr. Ackley's stated objective of becoming an electrician, the court must assess the likelihood of that event occurring. This point is made clear by the Court of Appeal 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=) where Madam Justice Rowles held that a party need not prove a past hypothetical event on a balance of probabilities. At para. 31, Madam Justice Rowles cited the following passage from that Court's previous decision in *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:

*Athey v. Leonitte* [*[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=), relied on by the plaintiff, held that past events such as ***negligence*** and causation between fault and injury must be proved on a balance of probabilities and thereafter treated as certainties. However, Mr. Justice Major stated (at para. 27) that hypothetical events need not be proved on a balance of probabilities, and they are simply to be given weight according to their relative likelihood. In assessing hypothetical events there is no reason to distinguish between those before trial and those after trial. In making an allowance for contingencies the trial judge was assessing the hypothetical events that could have [a]ffected the plaintiff's employment earnings, according to the assessment to their relative likelihood.

[emphasis in *Smith.*]

**163**  As Madam Justice Rowles held at paras. 36-37, the court must first be satisfied on a balance of probabilities that the ***negligence*** of the defendant caused the plaintiff's loss. Once that threshold test is met, the court must then assess the likelihood that the event said to give rise to the loss would in fact have occurred.

**164**  Here, I have no difficulty finding on a balance of probabilities that the injuries sustained in the Incident due to Mr. Audette's ***negligence*** impaired Mr. Ackley's capacity to earn income. I also accept Ms. Smith's evidence that given his condition, Mr. Ackley is unable to function as an electrician. However, as stated, it is unrealistic to assume that but for the Incident Mr. Ackley would have become an electrician. Based on his work history, his failure to complete grade 12 and his weak academic skills, as tested by Mr. Nordin, I think it is more reasonable to assume that there was at best a 50% likelihood of Mr. Ackley successfully qualifying as an electrician.

**165**  Applying this likelihood to Mr. Ackley's claim for past income loss leads to the following analysis. Mr. Carson's figure of $166,332, being the amount that Mr. Ackley could have earned as an electrician from the date of the Incident to trial, is reduced to $83,166 to reflect the 50% likelihood of that occurring. That figure is then reduced for income tax, and I accept Mr. Ackley's figure of 20% for this purpose. This takes the figure to $66,532.80. From that mount is subtracted Mr. Ackley's actual net earnings of $58,195, leaving a balance of $8,337.80.

**166**  This amount however likely undervalues Mr. Ackley's impaired earning capacity. Had he not realized his objective of becoming an electrician, it is likely that he would have pursued other remunerative employment and his ability to do so was impaired by the Incident. He is entitled to be compensated for that impairment.

**167**  Recognizing that an award of damages for income loss involves an assessment rather than a precise calculation, I think a reasonable award for past income loss in the circumstances of this case is $15,000.

***Loss of Future Earning Capacity***

**168**  The principles governing an award of damages for loss of future earning capacity are well known and have been articulated by the Court of Appeal in numerous decisions. In *Morgan v. Galbraith,* [*2013 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M12P-00000-00&context=), the Court, citing its earlier decision in *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) [*Perren*], described the approach to be taken by the trial judge as follows at para. 53:

... in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach...or the capital asset approach...

[Emphasis in original.]

**169**  The earnings approach is generally appropriate where the plaintiff has some earnings history and where the court can reasonably estimate what his/her likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=), [*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=) 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*]. While there is a more mathematical component to this approach, the assessment of damages is still a matter of judgment not mere calculation.

**170**  The capital asset approach, which is typically used in cases in which the plaintiff has no clear earnings history, involves consideration of a number of factors such as whether the plaintiff:

1. has been rendered less capable overall of earning income from all types of employment;
2. is less marketable or attractive as a potential employee;
3. has lost the ability to take advantage of all job opportunities that might otherwise have been open; and
4. is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown 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=), [*35 A.C.W.S. (2d) 96*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) at para. 8 (S.C.) *Gilbert* at para. 233.

**171**  Mr. Ackley submits that he has an established earnings history that can be used to assess his future income loss using the earnings approach. Again, he bases his claim on the premise that but for the injuries sustained in the Incident, he would have completed his apprenticeship as an electrician and would have pursued a career in that field. He points to the fact that both his father and his brother are electricians, suggesting that it is the "family business".

**172**  Mr. Ackley again relies on the report of Mr. Carson who has provided a present value calculation of the future income of males employed as electricians as well as present value calculations of future incomes for other occupations such as truck drivers, delivery drivers, and various unskilled and semi-skilled occupations. Mr. Carson's figure for career earnings as an electrician, net of all labour market contingencies, is $1,900,323. His comparative calculations indicate, for example, that if Mr. Ackley was re-employed as a delivery driver, he would earn $825,891 less over his working life than he would earn as an electrician, in present day dollars. The difference would be $1,048,523 if Mr. Ackley can only engage in unskilled occupations with medium or light strength requirements. As a further alternative scenario, if Mr. Ackley loses $30,000 per year in income due to his injuries, Mr. Carson calculates his loss to be $899,130 to $966,000 depending on his age of retirement (65, 67 or 70).

**173**  Mr. Ackley submits that the evidence establishes that he is incapable of working in his chosen occupation as an electrician and that based on the vocational testing and physical capacity testing, the range of alternate occupations open to him is limited. He seeks damages in the amount of $875,000.

**174**  Mr. Audette submits that Mr. Ackley has failed to prove that there is a real and substantial possibility of a future income loss. He submits that the evidence does not establish that Mr. Ackley is incapable of working and points to the fact that Mr. Ackley did work for significant periods of time following the Incident. Mr. Audette submits further that it is very unlikely that Mr. Ackley would have qualified as an electrician given his poor math skills. Lastly, Mr. Audette submits that, in any event, Mr. Ackley is capable of functioning in occupations other than as an electrician, for example as a truck driver, where the wages are comparable to those earned by electricians.

**175**  I find that, on the evidence, Mr. Ackley has established a real and substantial possibility that his earning capacity has been impaired as a result of the injuries suffered in the Incident. The issue then is how to quantify his loss.

**176**  Once again, Mr. Ackley's claim for loss of future earning capacity is based on the hypothetical proposition that but for the Incident, he would have become an electrician. I accept that Mr. Ackley is not able to function as an electrician due to his injuries but, as stated above, I have found that the likelihood of that hypothetical event occurring is at best 50%.

**177**  The evidence is unclear as to what other occupations are open to Mr. Ackley and he gave no evidence about alternative careers that interest him or that he thinks he can function in. However, taking account of Ms. Smith's opinion of his physical capacity and Mr. Nordin's opinion of his vocational aptitudes, it is reasonable to assume that Mr. Ackley is capable of some employment falling within the category of "unskilled occupations with medium or light strength requirements" identified in Mr. Carson's report. According to Mr. Carson, career earnings in this category would be $851,800.

**178**  Using the 50% likelihood that Mr. Ackley would have become an electrician and applying that to Mr. Carson's career electrician earnings of $1,900,323 results in a figure of $950,161.50. Assuming that Mr. Ackley is capable of earning income of $851,800 in an unskilled position, the difference is $98,361.50.

**179**  I would round this figure up to $100,000 and award Mr. Ackley damages in this amount which, in my view, is fair and reasonable to both parties (*Miller v. Lawlor,* [*2012 BCSC 387*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62BF-00000-00&context=) at para. 109).

***Cost of Future Care***

**180**  In *Tsalamandris v. McLeod,* [*2012 BCCA 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24BC-00000-00&context=) at paras. 62-63, the Court of Appeal confirmed the well-established test for future care damages emanating from *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=):

[62] The test for assessing future care costs is well-settled: the test is whether the costs are reasonable and whether the items are medically necessary: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at page 78; affirmed [*(1987), 49 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3X3-00000-00&context=) (C.A.):

1. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.

[63] McLachlin J., as she then was, then went on to state what has become the frequently cited formulation of the "test" for future care awards at page 84:

The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable.

**181**  Mr. Ackley relies on the recommendations of Dr. Gilbart, Dr. Belle and Dr. Kendall, as well as his family doctor Dr. Shadmani, who all say that Mr. Ackley would benefit from a dedicated and focussed program of physiotherapy and exercise.

**182**  Mr. Ackley submits that an annual cost of $1,000, which he characterizes as a rough estimate of occasional physiotherapy, an annual gym membership and the cost of periodic medications, is reasonable. Projected over the balance of Mr. Ackley's lifetime results in a claim for $33,542 using Mr. Carson's present day value multiplier.

**183**  Mr. Audette submits that given Mr. Ackley's history, it is unlikely that he would pursue or utilize any of the treatment options proposed by the doctors and that the court should therefore decline to make any award under this head.

**184**  I accept Mr. Ackley's evidence that his failure to engage in a regular exercise program in the past was due in part to a lack of resources to pay for such a program. I also accept that he is sincere in wanting to do what is necessary to improve his overall condition.

**185**  I also accept that, on the evidence, some form of active rehabilitation program is warranted. I note in particular Ms. Smith's recommendation in her second report that Mr. Ackley "would benefit from participation in an active exercise program supervised by a kinesiologist."

**186**  While there is no evidence quantifying the cost of such a program, I think that Mr. Ackley's "rough estimate" of $1,000 per year is reasonable. However, there is no basis in the evidence for awarding that amount over the course of Mr. Ackley's entire life. A more likely course of treatment is a number of supervised sessions followed by a self-directed program as recommended by Dr. Kendall.

**187**  Using Mr. Carson's multiplier, $1,000 per year over five years amounts to $4751. In the circumstances, I find $5,000 to be a reasonable award for future care costs.

***Special Damages***

**188**  Mr. Ackley has submitted a claim for special damages in the amount of $1,949.55. Mr. Audette agrees with the list of special damages presented with the exception of one item, labelled Xbox Live, and certain prescriptions for Ativan. Mr. Audette says that Mr. Ackley's use of Ativan, which is an anti-anxiety medication, pre-dates the Incident.

**189**  Mr. Ackley agrees that the Xbox item was included by mistake but submits that the Ativan prescriptions, issued after the Incident, relate to anxiety caused by the Incident.

**190**  I agree with Mr. Ackley and award special damages in the amount of $1,882.36.

***Mitigation***

**191**  Mr. Audette submits that Mr. Ackley has failed to mitigate his damages by not following treatment recommendations made by various doctors. He cites the following well-known passage from *Chiu v. Chiu,* [*2002 BCCA 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X381-00000-00&context=):

[57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in ***Janiak v. Ippolito***, [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=).

**192**  Mr. Audette notes that both Dr. Gilbart and Dr. Belle recommended the diagnostic procedure of injecting an anesthetic into Mr. Ackley's hip in order to better determine the source of his pain. That has not been done and Mr. Ackley offered no explanation for why not.

**193**  Mr. Audette points as well to the recommendations of Dr. Belle, Dr. Shadmani and Ms. Smith about the need for Mr. Ackley to pursue a more aggressive exercise and strengthening program.

**194**  Mr. Ackley again testified that he has not engaged in a more directed exercise program due to a lack of funds. I accept that this is partially true but it does not fully explain Mr. Ackley's failure to take steps to improve his condition.

**195**  However, the programs suggested by the various doctors were very general in nature and it is not apparent that the recommendations of Dr. Belle and Dr. Gilbart were ever passed on to Mr. Ackley given that they were made in medical-legal reports submitted to his counsel.

**196**  In the circumstances, Mr. Audette has not established that Mr. Ackley failed to follow specific treatment recommendations made to him or that, had he done so, his damages would have been reduced.

**197**  I therefore decline to make any reduction to Mr. Ackley's damages for a failure to mitigate.

***Punitive Damages***

**198**  Mr. Ackley advances a claim for punitive damages. He cites *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=) where the Supreme Court endorsed the use of punitive damages in exceptional cases in which compensatory damages would not adequately deter and punish outrageous conduct.

**199**  Mr. Ackley summarizes his position in his written submissions as follows:

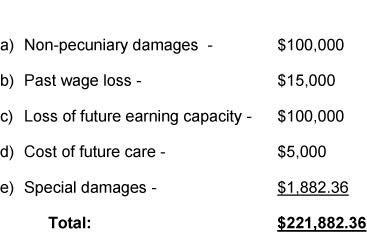
...an award of compensatory damages in this matter is insufficient to achieve individual deterrence and punishment or to signal public deterrence. The defendant's conduct in this case was by any standard outrageous. It is the plaintiff's position that this court ought to deter and punish this conduct and that the absence of criminal charges, the primary vehicle of punishment, necessitates an award of punitive damages to address the defendant's vindictive, malicious and violent act of road rage.

**200**  Mr. Ackley's position is premised in large measure on his belief that Mr. Audette ran him over on purpose. I have found that not to be the case. It is true that Mr. Audette fled the scene, which showed poor judgment on his part, but he did return soon after and dealt with the authorities.

**201**  In my view, Mr. Audette's negligent conduct in striking Mr. Ackley with his car does not warrant an award of punitive damages, particularly in light of the fact that Mr. Ackley created the circumstances that led to the Incident.

**Conclusion**

**202**  In summary, Mr. Ackley has proven the following damages:



**203**  Mr. Ackley is entitled to recover 60% of this amount, or $133,129.42, from Mr. Audette in accordance with the apportionment of liability as set out in these reasons.

**204**  Subject to any submissions that the parties wish to make, Mr. Ackley is entitled to 60% of his costs at scale B pursuant to s. 3(1) of the ***Negligence*** *Act*.]

R.A. SKOLROOD J.

**End of Document**

[***Clayton v. Barefoot, [2018] B.C.J. No. 282***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RRK-9081-JCBX-S0HC-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

C.L. Forth J.

Heard: January 9-12, 15-17, 2018.

Judgment: February 20, 2018.

Docket: M151468

Registry: Victoria

**[2018] B.C.J. No. 282** | [*2018 BCSC 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5T7K-NNJ1-JB7K-22D4-00000-00&context=)

Between Chelsea Dawn Hope Clayton, Plaintiff, and Ernest Alvin Barefoot, Defendant

(243 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Soft tissue — Action by Clayton for damages for personal injuries sustained in a motor vehicle accident allowed — Clayton was rear-ended by a vehicle driven by the defendant Barefoot, who admitted liability — Clayton suffered soft tissue injuries in the accident and she continued to suffer constant pain in her lower back — The accident had caused a significant change in her ability to work in labouring jobs and to participate in recreational activities — There was no evidentiary basis for a percentage reduction in the amount of non-pecuniary damages because of Clayton's pre-existing conditions — Clayton was awarded $438,798 in damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Pre-existing medical conditions — Cost of future care — Loss of earning capacity — Loss of housekeeping ability — Retroactive loss of income — Special damages — Non-pecuniary loss — Pain and suffering — Affecting recreational activities — Action by Clayton for damages for personal injuries sustained in a motor vehicle accident allowed — Clayton was rear-ended by a vehicle driven by the defendant Barefoot, who admitted liability — Clayton suffered soft tissue injuries in the accident and she continued to suffer constant pain in her lower back — The accident had caused a significant change in her ability to work in labouring jobs and to participate in recreational activities — There was no evidentiary basis for a percentage reduction in the amount of non-pecuniary damages because of Clayton's pre-existing conditions — Clayton was awarded $438,798 in damages.**

**Damages — Assessment of damages — Duty to mitigate — Pre-existing conditions — Thin or crumbling skull rule — Action by Clayton for damages for personal injuries sustained in a motor vehicle accident allowed — Clayton was rear-ended by a vehicle driven by the defendant Barefoot, who admitted liability — Clayton suffered soft tissue injuries in the accident and she continued to suffer constant pain in her lower back — The accident had caused a significant change in her ability to work in labouring jobs and to participate in recreational activities — There was no evidentiary basis for a percentage reduction in the amount of non-pecuniary damages because of Clayton's pre-existing conditions — Clayton was awarded $438,798 in damages.**

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| Action by Clayton for damages for personal injuries sustained in a motor vehicle accident. On June 18, 2013, Clayton was stopped at a stop sign when she was rear-ended by a vehicle driven by the defendant Barefoot. Barefoot admitted liability for the accident. Clayton was born in June 1987. Her employment history included working at a number of heavy-duty manual labour jobs. At the time of the accident, she was working two jobs. The first job involved caring for two disabled mentally-challenged men and for the second job she was an on-call labourer for the District of Saanich. Since the accident, Clayton had continued with the first job but had not returned to work at Saanich. Clayton took the position that she suffered soft tissue injuries to her neck, shoulder area, and lower back as a result of the accident. The most significant ongoing injury was to her lower back. Before the accident, she was physically very active and healthy. She submitted that her ongoing back symptoms affected her occupation, future occupational choices, her home life, and activities. Barefoot conceded that Clayton was injured in the accident, but he disagreed with her about the nature, extent, and seriousness of the injuries. Barefoot submitted that Clayton had suffered from depression since her mid-teens and carried the gene for Huntington's Disease (HD) and, as a result, would have had limitations in her personal and professional lives even if the accident had not occurred. Barefoot also submitted that Clayton had failed to mitigate her damages.  HELD: Action allowed.  Clayton suffered soft tissue injuries to her neck, shoulders, and lower back. She had substantially recovered from the neck and shoulder injuries but she continued to suffer pain in her lower back on a constant basis. Before the accident, Clayton was an active young woman. The accident had caused a significant change in her ability to work in labouring jobs and to participate in recreational activities. There was no evidentiary basis for a percentage reduction in the amount of non-pecuniary damages because of Clayton's pre-existing conditions. There was also no basis to support a failure to mitigate. Clayton was awarded $438,798 in damages, which included $130,000 in non-pecuniary damages, $1,700 for past lost income, $225,000 for loss of future earning capacity, $3,928 in special damages, and $78,170 for the cost of future care, including loss of housekeeping capacity. |

**Statutes, Regulations and Rules Cited:**

Insurance (Vehicle) Act, [*R.S.B.C. 1996, c. 231, s. 83*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5YP5-7N61-F8KH-X2KN-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: F. Kenneth Walton, QC, Paula J. Bowering, A. Mujtabah, Articled Student.

Counsel for the Defendant: Eric J. Wagner, Sandy Ferraby.

**Reasons for Judgment**

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

**Introduction**

**1**  The plaintiff, Chelsea Clayton, was injured in a motor vehicle accident that occurred on June 18, 2013. She was driving south on Canada Avenue in Duncan, British Columbia, and was stopped at a stop sign about to make a right-hand turn onto Government Street when she was rear-ended by a vehicle driven by the defendant, Ernest Barefoot. Ms. Clayton commenced this action against the defendant, the owner and driver of the vehicle, seeking damages for the injuries she sustained in the accident. The defendant has admitted liability for the accident.

**2**  The defendant concedes that Ms. Clayton was injured in the accident and suffered some physical injuries as a result. However, the defendant disagrees with the plaintiff about the nature, extent, and seriousness of the injuries she claims were caused by the accident.

**3**  The defendant alleges that Ms. Clayton suffered from pre-existing conditions and has failed to mitigate her damages.

**Issues**

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

1. What are the nature, extent, and duration of the injuries suffered by Ms. Clayton as a result of the accident?
2. What is the appropriate award for general damages for pain and suffering?
3. Should there be a reduction of the award of non-pecuniary damages for the pre-existing conditions Ms. Clayton had?
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 the cost of future care?
7. What is the appropriate award for special damages?

**Background**

**5**  Ms. Clayton was born on June 26, 1987 and raised in Shawnigan Lake, BC. She completed Grade 12 in 2005, obtained her level one first aid qualification in 2009, and took an online course in early childhood education from Northern Lights College in 2012. She obtained her licence to practice as an early childhood education assistant in May 2013. She has also obtained certificates related to jobs in manual labour, such as a fall hazard, a boom operator, and a traffic control flagger.

**6**  Her employment history includes working at a number of heavy-duty manual labour jobs in the fields of landscaping, structural steel work, and house-building. She also had experience working as a cashier and childcare provider.

**7**  At the time of the accident, she was working two jobs: the first, caring for two disabled mentally-challenged men for Integra Support Services Inc. ("Integra"), and the second, as an on-call labourer for the District of Saanich ("Saanich"). Since the accident, she has continued working for Integra but she has not returned to work at Saanich.

**8**  While growing up, Ms. Clayton was very active, participating in a swim club in which she was the top in BC for 100 metre breast stroke in her age group, a dance school, and a variety of water sports.

**9**  As a young woman, she enjoyed a number of recreational activities including baseball, water sports, boot camp, hiking, and camping.

**10**  At the time of the accident, she was living with a partner but had no children. She does not intend to have children as a result of carrying the gene for Huntington's disease ("HD") that she inherited from her father.

**11**  On June 18, 2013, Ms. Clayton was driving a 1995 Chevrolet Sonoma, a light pick-up truck, on Canada Avenue in Duncan, BC, with one of her clients as a passenger, when she stopped at a stop sign. While stopped she was hit from behind by a Dodge Dakota truck driven by the defendant, Mr. Barefoot.

**12**  Ms. Clayton's vehicle suffered damage to the rear. The estimate of the repair costs was $1,879.89.

**13**  Ms. Clayton testified that when she was hit from behind, her vehicle was pushed forward. She pulled over and got out to speak to the other driver. Her primary concern immediately after the accident was the condition of her client. Police and ambulance attended and Ms. Clayton and her client attended at the hospital. She noticed a pain in her left lower back.

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

**Plaintiff's Position**

**14**  As a result of the accident, Ms. Clayton suffered soft tissue injuries to her neck, shoulder area and lower back, along with headaches. The most significant ongoing injury was to the lower back.

**15**  Prior to the accident, Ms. Clayton was physically very active and healthy. She had suffered from depression since being a teenager, but that condition was under control with the use of antidepressants. She had also been diagnosed with having the gene for HD but she was not suffering from any symptomology from that disease.

**16**  Ms. Clayton testified that the pain and stiffness in her neck and shoulder lasted for about a month and then resolved. Her headaches were significant in the first month but are now connected to when her lower back flares up. She continues to have symptoms of low back pain on a daily basis. Her treating physicians testified that she had developed chronic low back pain which impacts her on a daily basis.

**17**  Ms. Clayton submits that her ongoing back symptoms affect her occupation, future occupational choices, home life, and activities. She is precluded from returning to any labouring job or any job that requires sustained sitting or standing.

**18**  Ms. Clayton admits that no claim is advanced for any depression, anxiety, or other mental health conditions in this action.

**Defendant's Position**

**19**  The defendant concedes that Ms. Clayton sustained soft tissue injuries to as a result of the accident. The defendant says that most of the injuries have resolved significantly, if not entirely, leaving Ms. Clayton with continuing symptoms of lower back pain and some symptoms, such as headaches and radiating pain into her leg, that seem related to the lower back pain. Symptoms seem to be aggravated by physical activities such as lifting, twisting, and pulling.

**20**  The defendant submits that Ms. Clayton has suffered from depression since her mid-teens and carries the gene for HD, and as a result, would have had limitations in both her personal and professional lives and would have had an increased need for care at an earlier date than a person without her pre-accident burdens of depression and HD.

**Applicable Law**

**21**  In order to establish that the accident caused her injuries, Ms. Clayton must prove on a balance of probabilities that but for the accident she would not have suffered the injuries of which she complains.

**22**  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.

**23**  A plaintiff is not required to establish that the defendant's ***negligence*** was the sole cause of his or her injuries. The tortfeasor must take his or her victim as the tortfeasor finds them, and the tortfeasor is liable even if other causal factors, for which the defendant is not responsible, result in the victim's losses being more severe than they would be for the average person. At the same time, the tortfeasor need not put the victim in a better position than the victim would have been in but for the accident, and need not compensate the victim for the effects of a pre-existing condition that the victim would have experienced in any event: see *Snell; Athey* at paras. 32-35; *Woelders v. Gaudette*, [*2016 BCSC 1066*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K27-9R71-JWBS-63Y8-00000-00&context=) at para. 123. In considering whether a pre-existing condition would have impacted the plaintiff in the future, regardless of the defendant's ***negligence***, the court may take into account if there was a "measurable risk" which may reduce the overall award: *Gohringer v. Hernandex-Lazo et al.*, [*2009 BCSC 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S44K-00000-00&context=) at para. 92, citing *Athey* at para. 35.

**Application of the Law to the Facts**

**24**  Ms. Clayton testified that when she was hit from behind, her vehicle was pushed forward. She was able to get out of her vehicle and exchange information with the other driver. She immediately felt pressure between her legs and lower back and she felt pain.

**25**  She attended at the hospital with her client. At the hospital, she felt a great deal of pain in her left lower back. Her mother attended at the hospital and drove her home. At home her back and shoulder were really sore.

**26**  The next day, Ms. Clayton attended her family doctor, Dr. Dhanoa. At the time, Ms. Clayton was complaining of some pain in her shoulder and pain in her back. The doctor prescribed muscle relaxants and rest. Ms. Clayton was not able to return to work at Saanich.

**27**  Dr. Dhanoa's clinical notes confirm that Ms. Clayton attended on June 19, 2013, complaining of pain in her shoulders and lower back. He noted a reduction in the range of movement in both shoulders, and diagnosed Ms. Clayton with soft tissue contusions and sprain of the left spine and shoulders bilaterally. He recommended that she take anti-inflammatories.

**28**  In July 2013, Dr. Marina Sapozhnikov took over the family practice of Dr. Dhanoa. Dr. Sapozhnikov, an expert in family medicine, prepared two reports and testified at trial on behalf of the plaintiff. Dr. Sapozhnikov began treating Ms. Clayton on July 26, 2013 and remains her family doctor. At the July 2013 visit, Ms. Clayton reported that her pain had not improved. The pain was mostly localized in the lower central back, occasionally radiating down the back of her left leg. The doctor referred her to physiotherapy and massage therapy.

**29**  Dr. Sapozhnikov saw Ms. Clayton on an ongoing basis, and her opinion is that she has developed chronic lower back pain radiating into her left leg that limits her functioning at work and in activities of daily living. There are also flare-ups of pain in the lower back, which further limit Ms. Clayton's functioning.

**30**  Dr. Sapozhnikov opined that Ms. Clayton was unable to return to her previous occupation with Saanich and was limited, due to chronic lower back pain, from prolonged standing, lifting, and carrying heavy objects. Her opinion was that Ms. Clayton would remain with a certain degree of chronic pain and would continue to require intermittent massage and physiotherapy to help with pain control. She did not anticipate, even with treatment, that Ms. Clayton would make a full recovery.

**31**  Ms. Clayton sought treatment for her injuries. She attended physiotherapy, massage therapy, chiropractic treatment, acupuncture, nerve block treatment, botox injection therapy, and prolotherapy. The treatments were of little assistance and at most provided some short-term relief. She has also used a variety of pain and anti-inflammatories to try to relieve her pain. These have provided limited relief. The prolotherapy treatments are particularly painful, and after a treatment, she is in excruciating pain for two to three days and is limited in her activities for about ten days.

**32**  Ms. Clayton has had one treatment with platelet rich plasma ("PRP") at the end of October 2017. This treatment has helped a little. She plans to return for a further PRP treatment sometime in the next month or so.

**33**  Dr. Lynne MacKean, a specialist in physical medicine and rehabilitation, provided an expert report and testified at trial on behalf of the plaintiff. Dr. MacKean began treating Ms. Clayton on May 6, 2015, following a referral from Dr. Sapozhnikov. At the initial appointment, Dr. MacKean diagnosed Ms. Clayton with a left lumbosacral sprain injury with involvement of the left sacroiliac joint and surrounding tissues. She recommended that Ms. Clayton see Dr. Jannice Bowler for prolotherapy and a referral was made. She also recommended that Ms. Clayton go ahead with pool therapy, which Ms. Clayton agreed to try.

**34**  On July 27, 2017, Dr. MacKean reassessed Ms. Clayton for the purposes of a medical-legal assessment. At that visit, Ms. Clayton reported ongoing pain in the lumbosacral region, left sacroiliac joint region, left buttock, and posterior thigh. The pain will go down into her left calf and occasionally into her left foot. There was no pain reported in the neck, upper back, or mid back. Ms. Clayton reported having prolotherapy and a botox injection into her left buttock region. The therapy only provided temporary relief.

**35**  Dr. MacKean's opinion was that Ms. Clayton suffered a left lumbosacral and sacroiliac joint sprain injury with referred pain into the left posterior thigh and calf region. She opined that Ms. Clayton had reached the point of maximum medical improvement given that she was now four years' post-motor vehicle accident. She recommended that Ms. Clayton proceed with the PRP injection that Dr. Bowler recommended. She further recommended that if the PRP injection does not work, consideration be given for her to attend a pain clinic for sacroiliac joint nerve blocks. If the nerve blocks work, then she would be a candidate for radiofrequency rhizotomy, performed by an anesthesiologist. This procedure is covered by MSP. This treatment can sometimes be successful in reducing pain.

**36**  Dr. MacKean opined that Ms. Clayton was able to continue working as a home-support worker but that she cannot return to work in early childhood education, in manual labour, or as a flag person for Saanich.

**37**  Dr. MacKean confirmed her recommendation that Ms. Clayton attend pool or aqua therapy so she could exercise in a reduced weight-bearing environment.

**38**  In cross-examination, she agreed that she was not aware that Ms. Clayton had been diagnosed with having the marker for HD. However, she testified this would not change her opinion because she would not be in a position to provide any expert evidence on this condition. She testified that a neurologist is the specialist that would treat such a condition.

**39**  She further testified that pool therapy would have assisted with Ms. Clayton's level of fitness but would not have resolved her back problem. Her view is that physiotherapy, massage treatments, and chiropractor treatments are helpful to manage the pain symptoms while a patient is recovering, but over time, those treatments become less effective to help with the recovery.

**40**  Dr. Jannice Bowler, an expert in family medicine with additional training in the treatment of musculoskeletal pain, provided a report and testified at trial on behalf of the plaintiff. Dr. Bowler began treating Ms. Clayton on June 19, 2015, following Dr. MacKean's referral. Dr. Bowler treated Ms. Clayton on five occasions in 2015, with an initial injection into her back and buttock muscles followed by four prolotherapy injections. Prolotherapy is injections of dextrose that are administered to the SI joint and surrounding ligaments to help stimulate and heal the area. The prolotherapy provided some temporary relief to Ms. Clayton.

**41**  In 2017, Ms. Clayton returned to Dr. Bowler, reporting that the prolotherapy effects had lasted almost a year, providing less frequent buttock and left leg pain and fewer flare-ups. She reported that her pain had returned in the previous six months and that her attendance at a personal training program seemed to have aggravated her pain. In 2017, Ms. Clayton had four more prolotherapy treatments and one nerve block injection. Dr. Bowler's opinion was that Ms. Clayton should try PRP injections to the lower back area to provide a stronger stimulus for healing.

**42**  Dr. Bowler diagnosed Ms. Clayton with a left sacroiliac and sacrotuberous ligamentous injury from the motor vehicle accident. She opined that there is a substantial probability that Ms. Clayton will always have a degree of permanent pain. Some treatments could resolve or diminish her pain. She opined that Ms. Clayton can no longer manage her previous employment of physical labour, and that prolonged sitting or standing will precipitate pain. She is restricted from some recreational activities, such as wakeboarding or tubing, and her sleep is interrupted.

**43**  Dr. Bowler recommended ongoing PRP injections and prolotherapy, and a gym or exercise program. Massage and intramuscular stimulation may also be helpful as passive modalities.

**44**  Dr. Bowler recommended that Ms. Clayton engage a personal trainer for a personal fitness program. Ms. Clayton followed that advice and took 24 sessions over approximately one year. She saw no improvement.

**45**  In October 2017, Dr. Bowler injected the PRP. It is too early to know the impact of this treatment. The purpose of the injection is to help build up collagen in the damaged tissues. Dr. Bowler testified that she would recommend PRP or prolotherapy for Ms. Clayton but not both at the same time. The treatments may improve the pain, but it is unlikely Ms. Clayton will return to her pre-accident condition.

**46**  Ms. Clayton was assessed by Bruce Jackson, occupational therapist, for a functional capacity evaluation on July 15 and 16, 2015. Mr. Jackson provided a functional capacity evaluation report and testified at trial on behalf of the plaintiff. The testing supported that Ms. Clayton had significantly limited tolerance for crouching, stooping, and kneeling. She further demonstrated fair to poor dynamic balance and poor agility when transitioning from crouching and kneeling to standing.

**47**  Mr. Jackson's view was that past occupations such as steel building assembler/labourer, landscaping worker and flag person are occupations that Ms. Clayton could not safely and reliably manage. The occupation of childhood educator assistant is one that would not be a practical option since Ms. Clayton has limited tolerance to stoop, crouch, and kneel. He opined that Ms. Clayton would most likely succeed at meeting the occupational physical/functional demand requirements of a home/community support worker.

**48**  Dr. R. Douglas Hamm, doctor of occupational medicine, provided two reports and testified at trial on behalf of the plaintiff. Dr. Hamm assessed Ms. Clayton on October 1, 2015 to provide an opinion on the cause of Ms. Clayton's physical deficiencies as reported in the functional capacity assessment of Mr. Jackson dated August 18, 2015. Dr. Hamm opined that Ms. Clayton has a post-traumatic left sacroiliac strain and left sacrotuberous strain, pre-existing mood disorder, pre-existing expanded HD allele and class 2 obesity. He opined that Ms. Clayton is not fit to work at physical demands greater than a limited strength level, and, as such, is not fit to undertake work as a construction labourer, steel building labourer, or landscape labourer. She also cannot tolerate work as a flag person because of the limitation for prolonged standing. Work as a daycare worker or early childhood education worker would be problematic due to crouching and bending activities.

**49**  He opined that Ms. Clayton's opportunities in the open labour market in all types of heavy strength jobs would be constrained due to her low back pain tolerance. He testified that Ms. Clayton would have serious limits to her lifting capacity if this is a regular part of her job but that she can do occasional work of a heavier demand.

**50**  Ms. Clayton was assessed by Niall Trainor, vocational rehabilitation consultant, on November 20, 2015. Mr. Trainor provided a vocational rehabilitation assessment report and testified at trial on behalf of the plaintiff. He opined that Ms. Clayton is now precluded from most of the alternative occupations that were premorbidly available to her as an able-bodied worker. This includes working as a municipal labourer. She is able to continue with her work as a home support worker with the accommodation that she is not required to perform the more onerous aspects of domestic activities.

**51**  Mr. Trainor recommended that Ms. Clayton pursue a college diploma in the social services field to consolidate her position as a social and community service worker.

**52**  He testified that her greatest strength had been her physical abilities, and, since the accident, she has been precluded from doing lucrative physical labouring jobs. She still has strong social skills.

**53**  Ms. Clayton was assessed by Sharyle Jewett, an occupational therapist, for an occupational therapy assessment and rehabilitation plan with future costs, on August 16, 2017. Ms. Jewett prepared a report and testified at trial on behalf of the plaintiff. She made a number of current and future recommendations to assist Ms. Clayton in maintaining a reasonable level of functioning now and in the future.

**54**  Dr. Michael S. Piper, orthopedic surgeon, assessed Ms. Clayton on behalf of the defendant on July 26, 2016. Dr. Piper prepared a report and testified at trial via a videotaped deposition. Ms. Clayton reported to this doctor that she was continuing to have symptomatology in an off and on type of pattern. She will have periods of time when she is quite comfortable and others when she continues to experience pain in her left buttock. Very occasionally, the pain will radiate down her left leg to her knee. She has not needed to take time off work in the past few months and she continues to work regularly.

**55**  Dr. Piper opined that as a result of the accident Ms. Clayton suffered a moderately severe soft tissue injury to her lumbar spine region. He recommended an active muscle-strengthening and muscle-stretching program directed toward her abdominal musculature and her lumbar paraspinal musculature. His opinion was that with the involvement of a personal trainer and an active muscle-stretching and muscle-strengthening program, her symptoms should gradually become progressively less limiting, and she should ultimately make a full recovery.

**56**  Dr. Piper testified that Ms. Clayton had limitations in forward and lateral flexion compared to a normal young healthy person. She also had some limitation in the passive straight leg raising of both her left and right legs. He noted no muscle wasting, which can arise from a lack of use. His view was that she should or could make a full recovery and that this outcome was more likely than not given that she was a fit, healthy, young woman and given the body's natural tendency to heal. He opined that the majority of soft tissue injuries resolve in time.

**57**  None of the experts who testified had any concerns with Ms. Clayton exaggerating her symptoms or otherwise testing in an unreliable manner.

**58**  Ms. Clayton has not been able to return to her past recreational activities and has gained weight. She has tried to reduce her weight, but physical activity causes her pain. She is restricted in the household duties she can carry out. She spends more time at home and avoids social outings because of the pain.

**59**  As a result of the chronic low back pain, she has given up on pursuing a job at Saanich or any other labouring job.

**60**  All the doctors who examined Ms. Clayton agree that she was injured in the accident.

**61**  Based on my review of the medical evidence, I find that Ms. Clayton suffered soft tissue injuries to her neck, shoulders, and lower back. While she has substantially recovered from the neck and shoulder injuries, she has been left with chronic lower back pain.

**62**  The majority of the medical experts support that Ms. Clayton will suffer chronic low back pain for the remainder of her life. She has tried a variety of treatments, and none of them has offered lasting relief.

**63**  Accordingly, I find on a balance of probabilities that as a result of the accident Ms. Clayton will continue to suffer from chronic low back pain with flare-ups of more intense pain.

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

**64**  Ms. Clayton seeks an award of between $120,000 and $170,000. The defendant submits that the appropriate award for general damages is $40,000 to $90,000 prior to any deductions for the pre-existing conditions. The defendant submits that the appropriate amount for Ms. Clayton is $50,000 considering the necessary deductions.

**Applicable Law**

**65**  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.

**66**  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.

**67**  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=)).

**68**  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.

**69**  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.

**70**  Ms. Clayton relies on *Manoharan v. Kaur*, [*2016 BCSC 692*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JN4-S1R1-FGJR-235T-00000-00&context=); *Severud v. Smit*, [*2016 BCSC 1021*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K0Y-G9P1-DYMS-61NK-00000-00&context=); *Gulati v. Chan*, [*2015 BCSC 431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60G5-00000-00&context=); *Kristiansen v. Grewal*, [*2014 BCSC 623*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-622X-00000-00&context=); *Hans v. Chahal*, [*2013 BCSC 1575*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B2G2-00000-00&context=); and *Hanson v. Yun*, [*2013 BCSC 2313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S4CG-00000-00&context=), to support the argument that the appropriate award for general damages is in the range of $120,000 to $170,000. In a number of those cases, the plaintiff suffered multiple and more severe injuries than Ms. Clayton.

**71**  The defendant relies on *Lally v. He*, [*2016 BCSC 2187*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M96-JNP1-FFFC-B409-00000-00&context=); *Kyrylov v. Maroke*, [*2016 BCSC 2076*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M67-1F81-JW5H-X004-00000-00&context=); *Michael v. Bayfield*, [*2014 BCSC 1602*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G068-00000-00&context=); *Dewitt v. Takacs*, [*2008 BCSC 314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1B4-00000-00&context=); and *Loveys v. Fleetham*, [*2012 BCSC 358*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-628C-00000-00&context=), to support the argument that the appropriate award for general damages should be between $40,000 and $75,000. In my view, the impacts of the injuries in these cases were much less than the impact of the injuries on Ms. Clayton, both in terms of severity and persistence of symptoms. Further, I note that the plaintiff in *Loveys* was 44 years old at the time of her accident, whereas Ms. Clayton was only 26 at the time of hers; and that the plaintiff in *Dewitt* was 42 years old at the time of his accident, and his injuries were not so severe as to prevent him from continuing his work as a steel fabricator.

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

**Application of Law to the Facts**

**73**  As stated earlier, Ms. Clayton suffered soft tissue injuries to her neck, shoulders, and lower back. She suffered from frequent headaches for about one month after the accident. She now gets headaches once a month. Her neck was sore for about two weeks after the accident and it has not been a problem since. Her right shoulder was sore and tender for about one month, and she has not had a problem since. She continues to suffer pain in her lower back on a constant basis.

**74**  Her back pain is daily, and she has a really bad day once every one to two weeks. During a bad day her pain is severe. She will get muscle spasms in her lower back that can cause shooting pain down her left leg. If she sits or stands for too long, the pain will cause her to "buckle". She uses a body pillow daily and medication to help her cope with the pain. As a result of the pain, she has difficulty sleeping as she is often woken up in pain.

**75**  She has seen improvement in her standing and sitting tolerance since the accident. She can sit for about one hour but is not comfortable doing so. She can stand for about an hour but she senses that the pain from standing is getting worse.

**76**  She finds it exhausting being in pain and having to explain herself to others. She was strong and independent in the past.

**77**  Ms. Clayton testified over two days. It was clear that she had difficulty sitting, even with the assistance of a heating pad, and on a number of occasions would stand leaning on the witness podium. She testified in a credible fashion.

**78**  Before the accident, she was an active young woman. She was engaged in a number of recreational activities and was highly regarded by all of her employers that testified. She had engaged in a number of physically demanding occupations and had excelled at them.

**79**  Kyle Pennock, her current partner and son of her former employer, Travis Pennock, testified that since the accident, he has observed her as being in constant back pain on a daily basis. She will spend time lying on the bed and couch. He has felt heat coming off her lower back. He testified that the prolotherapy treatment is very painful for Ms. Clayton, as she is not permitted to take any pain medication prior to the therapy. Upon her return from work on Wednesdays, she is in pain and needs to go to bed or the couch and recoup for two to three days. She and Kyle are restricted from travelling in the car because sitting hurts her back, and they have likewise avoided any plane trips. The only activities she does are short walks on flat surfaces. She is restricted in the housework she can do and cannot fold clothes, sweep the floor, or do dishes. When Kyle is out of town for work, Ms. Clayton's mother comes over to assist.

**80**  Heather Buss, her mother, testified that prior to the accident her daughter loved life, was in great health, and was very vibrant and outgoing. She was the most ambitious of her four children. On the day of the accident, Ms. Buss was called from the Duncan Hospital. She attended and found her daughter crying, very upset, and complaining of a lot of back pain. She went home with her daughter and stayed a few days until she was mobile. Since then she has visited quite often to do the laundry, to house clean, and to wash the toilets and bathtubs because her daughter's pain is so bad. She often sees her daughter lying down on the couch with a heating pad. Her daughter has not made much progress, as she is in pain even after walking. Her daughter's activities are restricted to trying to walk her dog. She cannot sit or stand for long; her condition requires her to frequently get up and walk around.

**81**  Bruce Dearborn, her former employer at What A Steel Erector, testified as to her work capabilities before the accident. Ms. Clayton worked as a metal building erector for Mr. Dearborn's company in 2010, 2011, 2012, and for a short contract in 2013, all prior to the accident. He described the work as very physically demanding. Ms. Clayton's work ethic was dedicated and she was always ready for work with lots of incentive and drive. He would not hesitate to employ her again if she could physically do the job.

**82**  Travis Pennock, her former employer at TKP Services Inc., testified that Ms. Clayton was a very confident individual who excelled at and was passionate in working to support disabled clients. He described her as being naturally gifted working in this field. She exceeded his expectations of her. She was able to take the clients on a wide variety of physical activities, such as recreational walks, hiking, bowling, and other sports activities. After the accident, Ms. Clayton shared with him her pain; he could also observe her pain by the way she was sitting and walking. There was one occasion in September of 2017 when she called him to assist her because she was in such pain. He attended at her home and helped her into his vehicle. She was in such extreme pain that en route to the hospital, he called 911 and drove her to an ambulance station. Mr. Pennock has concerns with Ms. Clayton's ability to work with aggressive clients as a result of her ongoing back issues.

**83**  Jody Bedwell, a former co-worker at the District of Saanich, testified to how Ms. Clayton took her under her wing and showed her the ropes when she started at Saanich. She described Ms. Clayton as a very smart and hard worker who took pride in what she did.

**84**  Ashley Ball, a former employer and friend, testified to Ms. Clayton's level of activity before the accident. They played baseball together and she described Ms. Clayton as being one of the most skilled female players. They attended a boot camp, hiked, and walked together. Her health was excellent and she was very active and athletic. Ms. Ball hired Ms. Clayton to work at her daycare and she described her as energetic and a great role model for the children. She was able to quickly pick up the job. Ms. Ball testified that she has seen a drastic change in Ms. Clayton since the accident. She has observed the level of pain in her face, in her voice, and in her ability to walk. She appears to be in constant pain. She does not leave the house without a heating pad. The activities they now do together are short walks, many of which have to be cut short because of Ms. Clayton's discomfort.

**85**  Nicole Finlayson, former personal trainer, testified to the 24 sessions of personal training she did with Ms. Clayton, commencing in June 2016 and ending in August 2017. She described that Ms. Clayton attended all sessions and participated fully but that there were some exercises that she was restricted from doing because of back pain. Despite Ms. Clayton making a good effort, there was no improvement after the sessions.

**86**  Christy Sudyko, her current supervisor at Integra, testified that Ms. Clayton would only be permitted to work with non-aggressive clients because of her back condition. She has accommodated Ms. Clayton by allowing her to leave early from shifts and courses and have her shifts exchanged if needed. Ms. Clayton was promoted to team lead at the site and in that position she can set her own schedule and pass on tasks to others. She testified that Ms. Clayton is a great worker and gets along well with the residents she supports. She also recalls seeing Ms. Clayton limping and wincing after the accident and her return to work.

**87**  Kathy McCarvill, former on-call supervisor at Saanich, testified to how much she liked Ms. Clayton. She was bubbly and happy to be at work. She was an excellent worker and departments requested her.

**88**  Henry Bendall, her uncle and a Saanich employee, testified that Ms. Clayton's health prior to the accident was great. He does recall seeing her on one occasion after the accident when she had come out of a physio appointment and she was barely moving.

**89**  All of the lay witnesses testified to the degree of pain and discomfort that Ms. Clayton has on an ongoing basis. The evidence of Ms. Clayton, the treating medical professionals, and the lay witnesses are all consistent. I am convinced that Ms. Clayton's complaints are a true reflection of a continuing injury. There was no evidence to suggest otherwise.

**90**  The accident caused a significant change in Ms. Clayton's ability to work in labouring jobs and participate in recreational activities. She is precluded from all types of physically demanding jobs and cannot return to her job as a labourer at Saanich. She has not been able to return to any recreational activities except for walking.

**91**  The medical opinions support that she may have some degree of recovery, but the majority opinion is that her condition is permanent and unlikely to resolve.

**92**  I have reviewed the cases provided and in assessing the particular circumstances of this plaintiff, I am of the view that the appropriate award for non-pecuniary damages is $130,000.

**Should there be a Reduction of her Non-Pecuniary Damages for her Pre-existing Conditions**

**93**  Ms. Clayton had two pre-existing conditions prior to the accident, the first being depression and the second her diagnosis of carrying the gene for HD.

**94**  The plaintiff submits that neither of these are now affecting her life and there is no evidence to support that these conditions will impact her in the future.

**95**  The defendant submits that in combination, the two pre-existing conditions should result in a reduction of 25% of the non-pecuniary damages given the severe nature of impairment that will arise once HD becomes active.

**Applicable Law**

**96**  In *Athey* at para. 35, the Court discussed the "crumbling skull" doctrine, and noted that if there is a "measurable risk" that a pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence***, then this can be taken into account in reducing the overall award.

**97**  In *Gabor v. Boilard*, [*2015 BCSC 1724*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H2B-YKT1-FGY5-M3ST-00000-00&context=) at para. 545, Ballance J. neatly summarized the application of this principle:

[545] A pre-existing condition, whether latent or active, is part of the plaintiff's original condition. However, a deduction in certain heads of damages will not necessarily follow from the mere existence of a plaintiff's pre-existing symptoms. The evidence must establish the existence of a measurable risk that the pre-existing condition would have resulted in a loss to the plaintiff in the future without the defendant's ***negligence***. Only then is that risk of loss taken into account in the assessment and will serve to reduce the award of certain heads of damages: *Athey* at para. 35; *Sangha v.* Chen, [*2013 BCCA 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M0W0-00000-00&context=); *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=); *Moore v. Kyba*, [*2012 BCCA 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2HF-00000-00&context=), at para. 43. 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: *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=).

**98**  In addition, the pre-existing condition "does not have to be manifest or disabling at the time of the tort to be within the ambit": *Gohringer v. Hernandez-Lazo et al*, [*2009 BCSC 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S44K-00000-00&context=) at para. 92, citing *Barnes v. Richardson*, [*2008 BCSC 1349*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3MY-00000-00&context=) at para. 89, aff'd [*2010 BCCA 116*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X12X-00000-00&context=) [*Barnes*].

**99**  I find that Ms. Clayton's situation should be analyzed within the ambit of the above-cited principles. As a result, I shall assess the measurable risk and likelihood that Ms. Clayton's pre-existing conditions will affect her in the future.

**Depression**

**100**  Ms. Clayton has suffered from depression since she was a teenager. She has been treated with a variety of antidepressants since her diagnosis. The medications have been successful. There have been periods when her depression was well controlled and other times when it was not. There is no evidence that supports that Ms. Clayton has been impacted by her depression in respect to her jobs. She has successfully held a number of jobs and she has not had to leave any of them because of mental health issues.

**101**  She has been very successful in the last few years in her work with disabled adults at Integra. She has been working full-time at that occupation.

**102**  She testified that she recently decided to get off the antidepressants since she wanted instead to handle the issue herself along with the assistance of a counselor.

**103**  There is no medical evidence that supports that her mental condition has in any way impacted her ability to function or work. As Dr. Hamm noted, her mood disorder did not limit her, and, at the time he assessed her, it had no functional impact. Dr. Sapozhnikov, her family doctor, testified that Ms. Clayton's depression was fluctuating and for long periods it was well controlled.

**104**  As such, there is no basis to reduce the non-pecuniary award due to the pre-existing depression.

**Huntington's Disease**

**105**  The evidence on HD was very limited and was canvassed primarily during Ms. Clayton's evidence, in cross-examination of some of the experts, and in some reports that were part of the family doctor's chart.

**106**  There was no expert in HD called, and no opinion evidence tendered. It would have been a great assistance to the Court to have such an expert called to provide appropriate expert opinion evidence on this disease and the potential impact on Ms. Clayton.

**107**  In *Healey v. Chung*, [*2015 BCCA 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GBX-BXM1-FGRY-B3H5-00000-00&context=) at paras. 19-20, the Court of Appeal outlined the law pertaining to the use of clinical consulting reports at trial:

[19] It is well established that clinical consulting reports, without more, may not be admitted for the validity of opinions expressed in them. 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=), [*325 D.L.R. (4th) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B31M-00000-00&context=), this court observed:

[42] New Rule 11-6 expands on what an expert was required to state under old Rule 40A, but does not alter the general principle that it is essential for the trier of fact to know the basis of an expert opinion so that the opinion can be evaluated. The Rule has a dual purpose. The second purpose is to allow the opposing party to know the basis of the expert's opinion so that they or their counsel can properly prepare for, and conduct, cross-examination of the expert, and if appropriate, secure a responsive expert opinion. Thus, the result of these reasons would be the same if this case had arisen under the new Rules. There is nothing in these Rules touching directly on the question of the admissibility of hearsay evidence in expert reports.

[20] While there is, perhaps, room for some latitude in determining whether a document meets the requirements of the Rules, for example as to including the address and expertise where those are capable of easy determination based upon the information in the document, the essential components of qualifications, education, experience, information and assumptions on which the opinion is based, the instructions given, and the research, must be included to justify receipt of the report as an exception to the hearsay rule. This conclusion is consistent with authorities addressing the admissibility of opinion or consulting reports included in clinical records: *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=); *Cunningham v. Slubowski*, [*2003 BCSC 1904*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B2D8-00000-00&context=); and *F.(K.E.) v. Daoust* [*(1995), 3 B.C.L.R. (3d) 128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M26K-00000-00&context=), [*34 C.P.C. (3d) 393*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M26K-00000-00&context=) (C.A.). In *F.(K.E.)*, Mr. Justice Hutcheon said, in relation to R. 40A of the *Rules of Court*, which was less demanding in the content of an admissible expert report than current R. 11-6(1):

[13] I can only say that what occurred was most unsatisfactory. The admissibility into evidence of the written reports of experts is an exception to the usual rule that witnesses be examined and cross-examined in open court. The exception was introduced into this Province in 1976 by way of an amendment to the *Evidence Act*. Certain safeguards were and are provided including the delivery of the report some days before trial (now at least 60 days) and a statement of the qualifications of the expert. The safeguards did not operate in this case.

...

[15] Other than the information on her letterhead we know nothing of the qualifications of Dr. Sivertz. No order was made to dispense with the requirement of Rule 40A(5)(b).

...

[20] Whatever the explanation, I am of the view that the plaintiff did not consent to the admissibility of Dr. Sivertz's report under the provisions of Rule 40A. I am further of the view that in the circumstances of this case the report ought not to have been admitted as an opinion on the vital question of causation.

**108**  The evidence from Ms. Clayton was:

1. her father inherited the gene for HD and he took his own life;
2. her aunt, grandfather, and great-grandfather all died and had HD;
3. her father first developed prominent symptoms in his 40s and died on February 24, 2010;
4. she has the gene for HD that she obtained from her father;
5. her father's CAG (cytosine-adenine-guanine) repeat was 44;
6. a daughter inheriting the gene from her father would usually see an increase in the number of CAG repeats;
7. her CAG repeat was 41, and since it is over 40, she can expect to develop symptoms. The lower the CAG repeat, the less quickly the symptoms come on. Since her CAG repeat is lower than her father's, her onset might not happen as soon for her as it did for her father;
8. she decided not to have children since there is a 50/50 chance that she would pass the gene on to her child. She did not want her child to experience what she experienced watching her father;
9. there has been a lot of research, and just recently a gene silencing drug has been tested. It does not cure HD but it does quiet it;
10. she has no symptoms of the disease; and
11. she understands that at some point in her life HD will set in, but the doctors cannot say when.

**109**  The evidence on HD from the medical experts who testified was as follows:

1. Dr. Sapozhnikov, family doctor, testified that Ms. Clayton was gene-positive but there are no absolutes with HD. It is quite an unpredictable disease. Ms. Clayton has the gene but no symptoms.
2. Dr. Hamm, occupational medicine doctor, testified that Ms. Clayton has no symptoms of HD. He agreed that she may develop symptoms but he had no estimate of the likelihood of that and he was not provided with any reports that stated the likelihood. He did review a report that her expanded allele is less than her father's; the medical information says that the number of repeats increases the probability for an earlier onset and a more intense disease. HD could affect her work depending on the type of work and the nature and intensity of the symptoms.
3. Dr. MacKean, physical medicine doctor, testified that she was not an expert on HD, and it is outside of her expertise. This type of condition would have to be assessed by a neurologist.
4. Dr. Bowler, family doctor, testified that she is not an expert in HD. However, she testified that Ms. Clayton does not have the disease but only the gene. This would not affect her future treatment.

**110**  The following reports were referenced during the evidence. Ms. Clayton confirmed she had been advised of the information contained in the excerpts set out below; however, they were not tendered as opinion evidence:

1. June 17, 2011 - Report of Myra Micek, Genetic Counsellor, to Dr. Dhanoa:

As you know, HD is a progressive disorder which leads to motor, cognitive and psychiatric manifestations. The mean age of onset is 35-44 years, and about two-thirds of affected individuals first present with neurological manifestations. Others present with psychiatric changes. In roughly 25% of individuals with HD, onset is delayed until after 50.

A person who has 40 or more CAG repeats on one of their HD genes will become affected with HD.

1. August 18, 2011 - Report of Myra Micek and Dr. P.M. MacLeod, Clinical Geneticist, to Dr. Dhanoa:

Chelsea's test results show that she has one normal-sized HD allele with 22 CAG repeats, and an expanded allele with 41 CAG repeats. CAG repeats of 40 or greater are thought to be fully penetrant, meaning that a person with a CAG repeat of 40 or greater would be expected to develop the symptoms associated with HD at some time during their life... At the same time, we cannot use a repeat size to accurately determine when the onset of symptoms may occur...

1. December 2, 2011 - Letter from Dr. MacLeod to Ms. Clayton:

I would be cautious in your reading because most of the information about the children of HD fathers, suggests an earlier onset severe form, because of the tendency of the repeat to expand. In your case, the opposite has happened, and I suspect that that will modify, to some extent, the age of onset and the degree to which you suffer these signs and symptoms. Remember, however, that this is going to change with time as we have specific interventions.

1. August 6, 2013 - Report of Dr. Blair R. Leavitt, Clinical Neurologist with the Centre for Huntington Disease, to Dr. Sapozhnikov:

We have explained to Chelsea that the genetic test being positive does not indicate that she has a current diagnosis of Huntington disease. We have educated her that she does not have any motor symptoms and that her changes in mood and irritability cannot be attributed to Huntington disease but are likely related to the process that has brought on depression roughly ten years ago.

1. September 30, 2014 - Report of Dr. Blair R. Leavitt to Dr. Sapozhnikov:

She is a 27-year-old right-handed female who tested positive in pre-symptomatic testing for the [Huntington] gene.

**111**  This is a case in which the defendant tendered no opinion evidence to support the future course of the HD as it relates to Ms. Clayton. That type of expert evidence should have been tendered to support a significant reduction in non-pecuniary damages. In submissions the defendant's counsel noted, to support a 25% reduction in non-pecuniary damages, that: "Such a severe reduction is warranted given the severe nature of impairment that will arise once HD becomes active", and, "The impact of the HD symptoms will at some point overshadow and ultimately completely eclipse the impact of the symptoms arising from the Accident." There was no expert evidence to support these statements.

**112**  The defendant relies on the decisions in *Barnes* (S.C.), and *Khudabux v. McClary*, [*2016 BCSC 1886*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M13-K1S1-JKHB-644X-00000-00&context=) [*Khudabux*], and submits that the plaintiff's damages should be reduced by 25%.

**113**  In *Khudabux*, Saunders J. reduced the plaintiff's non-pecuniary damages from $75,000 to $30,000 based on the finding that the plaintiff's condition was only marginally worse than it would have been but for the accident at issue (at para. 206). The facts in *Khudabux* involved a series of motor vehicle accidents that contributed to the plaintiff's end state. In my view, *Khudabux* is distinguishable from the case at hand, which, quite differently, seeks the likelihood and timing of the plaintiff succumbing to a genetic disease that is currently asymptomatic.

**114**  Likewise, I find the case in *Barnes* distinguishable from the case at hand. In *Barnes*, Martinson J. reduced the plaintiff's non-pecuniary damages on the basis of a finding that the plaintiff's pre-existing condition, congenital isthmic spondylolisthesis, had a 15% likelihood of becoming active in any event (at paras. 97-98). This finding was based on opinion evidence from an expert, Dr. Hunt, who testified directly on the issue of this genetic condition. Justice Martinson gave Dr. Hunt's evidence significant weight (at paras. 39-43). In contrast, there was no opinion evidence tendered at this trial to support the statements contained in the reports put to the plaintiff.

**115**  As a result, there is no cogent evidence to support the relative likelihood of when Ms. Clayton will begin suffering symptoms from HD or the degree to which those symptoms will impact her life. It may be that in the future Ms. Clayton will have to cope with symptoms of HD in addition to the chronic back pain that she has. However, there is no evidentiary basis for a percentage reduction in the amount of non-pecuniary damages that she is awarded.

**116**  I should note that the impact of the potential HD symptoms on future wage loss will be considered under that heading.

**117**  Ms. Clayton should be commended on her positive approach to life after her father died, her decision to find out if she was carrying the gene for HD, and her decision not to have children because of carrying the gene. These are courageous decisions made by a young person and speak to the strength of her personality. As her family doctor testified, Ms. Clayton is doing remarkably well with the information and she has not allowed it to affect her functioning or career.

**Past Loss of Wages or Income Earning Capacity**

**Applicable Law**

**118**  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, Abrioux J. discussed the purpose and framework for determining the appropriate award for past loss of earning capacity and the task to award compensation for any pecuniary loss which has resulted from an inability to work.

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

**Application of the Law to the Facts**

**120**  Ms. Clayton seeks an award for past wage loss net after tax and EI deductions of $1,700 for the days she missed working on-call as a labourer at Saanich in June and July 2013. There was no wage loss claimed for any time lost working for Integra.

**121**  The defendant agrees that this is the appropriate figure for the past wage loss.

**122**  At the time of the accident Ms. Clayton was working two jobs: one as a support worker for Integra, providing support to two mentally-challenged men, and one as an on-call labourer for Saanich.

**123**  As of June 2013, she had worked for Saanich since July 26, 2011. As an auxiliary labourer, she would be called on when needed. She did not return to this job after the accident. According to the amended Certificate of Earnings from Saanich, Ms. Clayton's wage loss, including lost benefits for June and July 2013, was $1,942.06 (gross), after accounting for the three days she was paid for sick leave.

**124**  The amount awarded for the past wage loss is $1,700.

**Loss of Future Earning Capacity**

**Applicable Law**

**125**  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?

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

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

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

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

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

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

**128**  The use of female statistics has been commented on in a number of recent authorities. In *Jamal v. Kemery-Higgins*, [*2017 BCSC 213*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MXP-54B1-JJD0-G4BD-00000-00&context=), the discriminatory nature of such was commented on:

[96] The proper labour market contingencies and multiplier to be applied was also the subject of legal argument. Counsel for Ms. Jamal took issue with the Ms. Grogan's analysis relating to future loss of earnings capacity to the extent that it relied on female statistics which they submit are unreliable and discriminatory. Counsel refer to the following reasons of Madam Justice Saunders in *Terracciano (Guardian ad litem of) v. Etheridge*, [*[1997] B.C.J. No. 1051*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B16X-00000-00&context=) in this regard:

78 In 1991, in Tucker v. Asleson, [*[1991] B.C.J. No. 954*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JGPY-X1B7-00000-00&context=), (25 April 1991), Vancouver B871616 (B.C.S.C.) Mr. Justice Finch accepted "as a starting point, that the measure of the plaintiff's earning capacity should not be limited by statistics based upon her sex." In the recent decision [B.I.Z.] v. Sams, [*[1997] B.C.J. No. 3124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1XF-00000-00&context=), (24 March 1997), Kamloops 18872 (B.C.S.C.), Mr. Justice Hunter accepted the observation that average earnings differentials now between males and females with college or university education are not explained by gender but by different behaviour in the labour market.

79 In this case the statistics of average female earnings were pressed on the Court by the defendants as the best predictor of Ms. Terracciano's future at the time of the injury.

80 Apart from the fact that these statistics perpetuate historical inequality between men and women in average earning ability, and that they have hidden in them serious discounts for lower and sporadic participation in the labour market which are duplicated by many of the negative contingencies used by economists to massage the numbers downward, such statistics may provide little assistance in predicting the future of a particular female plaintiff: Tucker, supra, and [B.I.Z.], supra.

81 Indeed, it may be as inappropriately discriminatory to discount an award solely on statistics framed on gender as it would be to discount an award on considerations of race or ethnic origin. I am doubtful of the propriety, today, of this Court basing an award of damages on a class characteristic such as gender, instead of individual characteristics or considerations related to behaviour: Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [*[1994] 1 S.C.R. 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3BV-00000-00&context=).

[Emphasis added.]

[97] Counsel for Ms. Jamal also relied on the decision of in *J.D. v. Chandra*, [*2014 BCSC 466*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61V4-00000-00&context=), aff'd [*2015 BCCA 131*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60RB-00000-00&context=), wherein Griffin J. reasons as follows in assessing the plaintiff's loss of earning capacity:

190 In considering an appropriate assessment, I have considered that the statistics used by the plaintiff are a very conservative starting point, taking into account potential negative contingencies, for two reasons.

191 The plaintiff has put forward a table of historical average earnings of females which is lower than males, presumably based on a number of factors including time off work to have children but also presumably based on historical discrimination, the latter of which may hopefully decrease in the future. The tables thus might undervalue future female lawyers' incomes.

[98] Along a similar vein, in *Crimeni v. Chandra*, [*2015 BCCA 131*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60RB-00000-00&context=), Willcock J.A. reasons as follows in regard to the use of gender-specific historical income figures:

[23] Experts are frequently asked to estimate the income losses by using gender-specific historical income figures. Such figures may be useful where they can fairly be said to be the most accurate predictor of the lost stream of earnings. However, there is authority for the proposition that the use of female earning statistics may incorporate gender bias into the assessment of damages. There is also authority for taking judicial notice of convergence in gender incomes: *Steinebach v. O'Brien*, [*2011 BCCA 302*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22CF-00000-00&context=).

**Application of the Law to the Facts**

**129**  It is this head of damages that represents the most significant and complex aspect of Ms. Clayton's claim and generates the greatest disagreement, or in the words of plaintiff's counsel, the "battleground", between the parties.

**Plaintiff's Position**

**130**  Ms. Clayton is advancing a claim for loss of future earning capacity and loss of pension benefits on the basis that but for the accident, she would have been one of the following:

1. a full-time Saanich worker;
2. a full-time iron worker; or
3. a group home operator.

**131**  She further claims that she is at risk of losing her current job if she loses her current clients, both of whom are non-aggressive clients that place few physical demands on her.

**132**  Since Ms. Clayton has decided not to have children, she will not be involved in a family, and as such, she will have a greater attachment to the workforce in comparison with the statistics for female workers. She has already demonstrated an attachment to the workforce.

**133**  Plaintiff's counsel submits that the loss of earning capacity approach is the appropriate approach in this case. Ms. Clayton relies on a report by Robert Carson, economist, to quantify that loss. In his report dated October 6, 2017, Mr. Carson was instructed to assume the following with respect to Ms. Clayton's employment potential prior to the accident:

1. Table 1 - working as a labourer from 2014 to 2019 at Saanich, and from 2020 onward working as a waterworks and gas maintenance worker, using full-time earnings of a BC male. ("Saanich Worker")
2. Table 2 - working as a structural metal and plate work fabricator and fitter or iron worker with a high school education from 2014 to 2017 and from 2018 onward using earnings for males in Canada with registered apprenticeship certificates. ("Iron Worker")
3. Table 3 - working in jobs described as visiting homemakers, housekeepers and related occupations using male statistics, but using the 75th percentile on the basis that Ms. Clayton was already earning more than the average male. ("Caregiver")

**134**  All of the assumptions have Ms. Clayton retiring at age 70. The estimate of earnings are all on a gross basis, and as such, tax consequences must be factored in.

**135**  Mr. Carson testified that the reason male statistics were used was because there were not enough woman working in occupations like steel erectors for there to be an adequate sample size for analysis. Also, it is his view that if a woman is physically capable of doing the job and puts in the same number of hours, she will make the same amount as a man. Mr. Carson also maintained that he based his premise on a person who works in the labour force and does not compromise work for family formation. As a result, male statistics were the appropriate measurement for Ms. Clayton.

**136**  The approach taken by the plaintiff's counsel was to use Mr. Carson's report to set out the net present value of what she would have earned under the first two scenarios plus benefits, either as a Saanich Worker ($1,769,500) or an Iron Worker ($1,932,600), and then deduct the net earnings of a Caregiver ($1,274,400). The average future loss through this approach amounts to $576,650.

**137**  Plaintiff's counsel also suggests that had Ms. Clayton set up a tax-free home environment for looking after aggressive clients, she would have earned up to $10,000-$15,000 tax-free per month. Under this scenario, her future loss is between $3 and $4.7 million.

**Defendant's Position**

**138**  The defendant's position is that Ms. Clayton has lost some future capacity but has not proven the magnitude of the loss as set out in Mr. Carson's report. The defendant disputes that Ms. Clayton would have returned to working for What A Steel Erector or in a similar capacity for some other employer.

**139**  The defendant submits that the evidence does not support that Ms. Clayton would have worked solely for Saanich as a labourer. The defendant concedes that it is not unrealistic that Ms. Clayton would have continued working for Integra and supplemented her income by doing manual labour for Saanich.

**140**  The defendant's position is that Ms. Clayton will continue to work at her present job, and there is no risk that she will face a dismissal.

**141**  The defendant submits that a negative contingency should be applied for the likelihood that Ms. Clayton will develop HD during her working lifetime, which will prevent her from working at any occupation.

**142**  The defendant submits that the appropriate approach is the loss of capital asset approach, and accordingly, one year's earning should be awarded. This would be an award of $50,000.

**Analysis**

**143**  There are six main issues to be addressed:

1. What future job opportunities has Ms. Clayton lost as a result of her injuries in the accident?
2. Are the future income loss figures provided by Mr. Carson a reasonable estimation of her loss?
3. What is the risk that Ms. Clayton will lose her present job?
4. What is the appropriate approach to take on the assessment of this loss?
5. Should there be a negative contingency for the impact of HD on Ms. Clayton's future income earnings?
6. Has Ms. Clayton failed to mitigate her losses with respect to wage loss or earning capacity?

***a) What Future Job Opportunities has Ms. Clayton Lost as a Result of the Accident?***

**144**  The medical evidence supports that Ms. Clayton cannot work in heavy labouring jobs. This precludes her from working as a labourer, construction worker, and metal erector, all jobs she had performed in the past. Ms. Clayton has been rendered less capable of earning income from these types of employment. As a result of her physical restrictions, she is also less marketable as a potential employee in the homecare field in which she currently works. She is restricted to caring for individuals who are non-aggressive and who place little physical demands on her.

**145**  Ms. Clayton testified that her ambition was to become a permanent worker for Saanich, with the hopes of moving into the waterworks department. This job opportunity has been lost.

**146**  Ms. Clayton testified that if the job at Saanich did not work out, she would have returned to her previous job as a steel erector with the plan to become a journeyman. The evidence supports that she would have been rehired by her past employer, although there is an issue of whether Ms. Clayton would have returned to that occupation with the degree of out of town work it required. She had previously left that full-time occupation in 2011 because her then partner did not want her being away all the time working all over the country. She returned in 2013 to do a very short job erecting a building.

**147**  Ms. Clayton gave no evidence that she had considered having disabled individuals live at her home with her. The defendant was not given any opportunity to cross-examine Ms. Clayton on this potential job since she did not testify to this as a potential career path.

**148**  The only evidence of this possibility came from Mr. Pennock Sr., who testified that when he first began working with Ms. Clayton, he projected that she would be able to work in this kind of arrangement in the future. Mr. Pennock Sr. has personal experience with this kind of business model. Ms. Clayton did not pursue such an arrangement prior to the accident. She instead opted to work at a group home operated by an agency. In addition, there is no evidence to support that Ms. Clayton could not operate a group home for less aggressive individuals. Mr. Pennock Sr. testified that Ms. Clayton would be able to work with a different client base.

**149**  Based on all the evidence, this option was not one that Ms. Clayton would have pursued.

***b) Are the Future Income Loss Figures Provided by***

***Mr. Carson Reasonable Estimations of her Losses?***

**150**  Mr. Carson relied on certain assumptions to support the future loss of earnings projection in his three tables. In respect to Table 1, there are two assumptions: first, that Ms. Clayton would have been employed full-time as a labourer for Saanich as of January 1, 2014; and second, that Ms. Clayton would have, from 2020 onwards, worked as a waterworks and gas maintenance worker.

**151**  In respect to the first assumption, Kristine Kelly, current manager of support services for Saanich, testified that Ms. Clayton had not worked enough hours from 2011 to the date of her accident to qualify her to apply for a seasonal job. She had worked less than 500 hours at Saanich as of June 2013. In 2011 and 2012, Ms. Clayton was in the bottom third for hours accumulated by employees hired in the same time period. The evidence supports that Ms. Clayton worked the following number of hours at Saanich:

1. 2011 - 120 hours
2. 2012 - 288 hours
3. 2013 - 54 hours (for 5.5 months)

**152**  Ms. Clayton would have needed to work a total of 1,040 hours before she could be considered for a promotion to a seasonal employee. In the two-year period leading up to June 2013, she worked a total of 462 hours, which means she would have needed to have worked 578 hours for the remainder of 2013 to have achieved full-time status by January 1, 2014, as assumed by Mr. Carson.

**153**  The evidence does not support that this would have been likely. As a result, it is not possible to predict when Ms. Clayton might have qualified to apply for seasonal work or when she might have been hired to work in a specific department. Therefore, Mr. Carson's assumption is unsupported.

**154**  In respect to the second assumption, the evidence of Kristine Kelly was that in order to qualify for jobs in the waterworks department, further education was needed. Her evidence was that jobs in the waterworks department are technical, and the candidate must take a number of technical-based programs and achieve certain certifications before applying for the jobs. Mr. Carson acknowledged in his report that jobs in the waterworks department are likely to require some post-secondary training at the college level.

**155**  For example the job description for a "Waterworks Operations Technician" set out the following requirements:

1. Completion of Grade 12 or equivalent;
2. Level III EOCP Certification in Water Distribution;
3. Minimum of 5 years direct Waterworks technical experience in class 3 distribution system;
4. Training in Programmable Logic Controllers, instrumentation, variable speed drives;
5. Training in CAD/GIS;
6. Training in SCADA/RTU systems;
7. BCWWA Cross Connection Control Certification;
8. Valid B.C. Class 5 Driver's Licence; and
9. Annual renewal of Driver's Abstract.

**156**  The job description for an "Instrumentation Technician" had equally challenging, if not more challenging, requirements.

**157**  It is not clear from the evidence whether Ms. Clayton would have been able to secure these requirements. For example, Mr. Trainor tested Ms. Clayton on the Differential Aptitude Test ("DAT"), and Ms. Clayton tested in the 5th to 3rd percentile in Numerical Reasoning. Mr. Trainor states in his report:

**Numerical Reasoning**

Numerical reasoning is important in training programs and occupations of a scientific, technological or commercial nature where the individual is likely to encounter reasoning tasks that call for a fundamental understanding of numbers and operators as well as the capacity to determine what mathematical operations are required to arrive at an appropriate solution to a problem. The testee is presented with typical problems that require being able to identify unknown values from known values in order to arrive at a solution; e.g., find the next number in a number sequence; identify the value of a missing variable in an equality. Ms. Clayton's score is in the below average range when compared to norms for all the reference groups.

**158**  Mr. Trainor testified that with such a score she would not do well in courses requiring math unless she took further courses. He further testified that Ms. Clayton's skill set would be better suited for courses that were relatively straightforward and of a more practical nature.

**159**  The evidence does not support the assumption that Ms. Clayton would have achieved the status of a waterworks or gas maintenance worker by 2020.

**160**  Table 2 assumes that Ms. Clayton would have commenced working as an Iron Worker from January 1, 2014, and would have achieved a journeyman's certificate by the end of December 2017. There was little evidence provided on the requirements to obtain such a certificate except that it did require attendance at a university. She would at the same time be working in a job that required her to travel across the country. It is pure speculation that Ms. Clayton would have been able to achieve a journeyman's certificate, and there is no evidence to support that she would have returned to working as an Iron Worker as of January 1, 2014. Ms. Clayton's evidence was that her focus was on trying to work more at Saanich while also working at Integra.

**161**  Table 3 assumes that Ms. Clayton will remain working as a Caregiver and uses male statistics increased to the 75th percentile since Ms. Clayton was already earning more than the average male. Ms. Clayton was likely earning more because she had become a team leader at Integra. This table underestimates what Ms. Clayton will earn in her current occupation. For example, in 2017 Ms. Clayton earned $51,774, whereas Table 3 assumes that in 2018 she would earn only $43,281. As such, $1,512,277 (gross) is not an accurate prediction of the value of her future income potential.

**162**  Overall, I do not find Mr. Carson's estimations of loss particularly helpful as his calculations are largely based on either unrealistic or inaccurate assumptions.

***c) What is the Risk that Ms. Clayton Will Lose her Present Job?***

**163**  Integra has 18 worksites, seven of which are in the Cowichan Valley, but all of the sites, except for the site where Ms. Clayton works, have aggressive clients. The evidence of Ms. Sudyko, her current supervisor, was that Ms. Clayton has been working with the same two residents since before Integra took over the contract. Ms. Sudyko testified that Ms. Clayton is a great worker and is known as the "R & R whisperer" (referencing the first initials of the two clients she cares for) at Integra.

**164**  Ms. Clayton testified that she is very good at her job at Integra and that her performance evaluations have been good. Since the accident, she has been promoted to team leader. Her employer is very happy with her services and has accommodated her to support her continued employment. There is no evidence that her performance is a problem or that she would be dismissed because she cannot do her job.

**165**  Mr. Trainor testified that Ms. Clayton has a long-standing interest in working with disabled persons and that the path she is following makes sense for her.

**166**  Based on the evidence, I find that there is little likelihood that Ms. Clayton will lose her employment with Integra.

**167**  I also note that at Integra she has the same pension plan as at Saanich: the Municipal Pension Plan.

***d) What is the Appropriate Approach for the Assessment of this Loss?***

**168**  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*, [*[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=), 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.

**169**  The capital asset approach, on the other hand, 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.

**170**  The capital asset approach is more useful when the loss is not 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 paras. 11, 32. Although the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Morgan v. Galbraith*, [*2013 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M12P-00000-00&context=) at para. 56.

**171**  Ms. Clayton's loss of future earning capacity is not easily measurable. At the time of the accident, Ms. Clayton had not permanently settled into a long-term vocation. She did testify that she aimed to secure long-term employment with Saanich, but as other evidence indicates, this was not guaranteed. As a result, I am unable to pin down with any certainty exactly what Ms. Clayton would have been doing but for the accident.

**172**  What is evident, however, is that before the accident, Ms. Clayton was a good worker who did not have significant physical constraints and whom employers valued. I consider these characteristics to be a "capital asset" of Ms. Clayton that has been impaired as a result of her injuries. Overall, she is less capable of earning income in all types of environments. She is less marketable in both the labour and homecare fields, she has definitely lost the opportunity to take advantage of many opportunities in both, and she currently has little hope that her condition will fully recover. I do not doubt that she is less competitive in the labour market; a former employer in the homecare industry, Mr. Pennock Sr., described Ms. Clayton's pain as a "liability" in that type of work.

**173**  As a result, I assess an award for loss of future earning capacity at $225,000. I have come to this amount through the facts of the case and on the reasonable assumptions I can make on the evidence. Although not arrived at through a mathematical formula, this amount equates to around four or five years' income. I find this amount completely justified on the facts of this case, and such an award is not without precedent: see e.g. *Ilett v. Buckley*, [*2016 BCSC 1407*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KDN-X121-F2F4-G081-00000-00&context=) at paras. 243-244, var'd on a different issue, [*2017 BCCA 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5P1T-XTV1-JX8W-M3PG-00000-00&context=); *Cumpf v. Barbuta*, [*2014 BCSC 1898*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M49R-00000-00&context=) at paras. 168-175.

***e) Should there be a Negative Contingency for the Impact of HD on Ms. Clayton's Future Income Earnings?***

**174**  I do not find that there should be any negative contingency assessed due to the pre-existing conditions Ms. Clayton had. The defendant suggests that a 25% reduction is reasonable on the basis that Ms. Clayton will develop symptoms of HD at some time in her life, and these symptoms will have a substantially negative impact upon her ability to work. The defendant submits that there is a likelihood that HD symptoms will manifest at or before the time that Ms. Clayton turns 50 years of age.

**175**  The question then is whether there was enough evidence at trial for me to reduce the award because of this contingency. As discussed earlier in these reasons, no admissible opinion evidence addressing the likelihood of Ms. Clayton experiencing the symptoms of HD was tendered. The evidence pertaining to the future effect of HD on Ms. Clayton is purely speculative, and as a result, I am unable to reach a conclusion that there is a real and substantial possibility of this occurring. In my view, the assessment I have arrived at above through the capital asset approach to loss of future earnings is just and appropriate in the circumstances, and therefore I will not alter the amount.

***f) Has Ms. Clayton Failed to Mitigate her Losses***

***with respect to Wage Loss or Earning Capacity?***

**176**  The defendant further submits that the failures of Ms. Clayton to pursue further educational courses and try more respite work for the Ministry of Child and Family Development are examples of a failure to mitigate. In my view, the evidence was lacking in this regard.

**177**  Ms. Clayton explored the issue of taking further education, but that would require her to travel and sit in classes. She testified that she would not be able to withstand the drive and sitting in classes. She further testified that the pain medication that she would need to take makes her groggy. She is currently working full-time as a team leader for Integra, and as such, there is no basis to support any failure to mitigate for not taking further educational courses.

**178**  In respect to the work for the Ministry of Child and Family Development, Ms. Clayton did try this work in 2017 but found it too painful. She testified that she tried two assignments, but one required lifting a child in and out of the bathtub, and most of the clients had a lot of energy. She found the work very draining. Most of the families that needed assistance had children who were autistic or had Down syndrome. The experts who assessed Ms. Clayton agreed that she is not capable of returning to work as a daycare worker or early childhood education worker. It makes sense that it would be equally challenging for her to care for disabled children. Therefore, there is no basis to support a failure to mitigate for Ms. Clayton not pursuing further respite care jobs.

**Conclusion**

**179**  Bearing in mind the applicable principles in light of the evidence and weighing the pertinent contingencies, I conclude that the sum of $225,000 is the present value of a fair and reasonable measure of Ms. Clayton's future loss of earning capacity and loss of benefits.

**Cost of Future Care**

**180**  Ms. Clayton advances a claim for future care for $170,000. This is based on a report of Ms. Jewett, who provided an opinion that Ms. Clayton required various ongoing therapies, a gym pass, housecleaning assistance, medical equipment, and medications.

**181**  The defendant submits that Ms. Clayton only requires funding for the PRP therapy and limited funds for a gym pass, a body pillow, a heating pad, and medications. The defendant submits that an award in the range of approximately $11,000 should be made.

**Applicable Law**

**182**  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.

**183**  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.

**184**  Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services 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 [*O'Connell*].

**185**  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**

***Medical/Professional & Support Services***

**186**  The claim for physiotherapy treatment on a yearly basis until age 67 was abandoned by plaintiff's counsel on the basis that Ms. Clayton found physiotherapy painful and not helpful, and therefore would not be doing it.

**187**  The claim is made for massage therapy treatments on an annual basis to age 67. The rationale provided by Ms. Jewett for these treatments is that Ms. Clayton continues to have chronic pain from her post-traumatic left sacroiliac strain and left sacrotuberous strain. Dr. Sapozhnikov recommended that Ms. Clayton have intermittent physiotherapy and massage.

**188**  Dr. MacKean, her treating physiatrist, did not make any recommendations for massage therapy but recommended active rehabilitation in the form of pool therapy or aqua therapy. Dr. MacKean testified that therapies like physio, massage, and chiropractic treatments help with the management of pain symptoms while a person is recovering but after a period of time they become less effective.

**189**  Ms. Clayton had 12 sessions of massage therapy treatments in August and September 2013. She testified that the massage therapy treatments provided temporary relief but no permanent or substantial relief. She found the treatments painful.

**190**  I find there is no basis to make an award of massage therapy sessions on an ongoing basis until age 67.

**191**  Ms. Clayton has sought and obtained some relief from prolotherapy. The medical experts support that this treatment is one she should continue to have.

**192**  Dr. Bowler testified that Ms. Clayton should continue to have the PRP therapy. Ms. Clayton would not also need the prolotherapy at the same time. Dr. Bowler testified that PRP is equivalent to three prolotherapy treatments and as such, fewer treatments are needed. Dr. Bowler agreed with the provision of two to three PRP treatments per year for approximately five to seven years.

**193**  The current cost of the PRP is $500 per session. This represents a cost of $1,000 to $1,500 per year. The mid-point range is $1,250 per year, and using Mr. Carson's present value multiplier of 5.640, this represents an award of $7,050. Since there is some risk that Ms. Clayton will not continue to have these treatments for the full period of time, an award of $6,000 would be appropriate.

**194**  Ms. Clayton seeks the costs of a gym membership for the rest of her life. The present value of that amounts to $24,218.

**195**  Ms. Clayton has not joined a gym since the accident. She was active in boot camps prior to the accident. It was recommended by Dr. MacKean that aqua therapy would help maintain Ms. Clayton's fitness in a weight-free environment. Although recommended to Ms. Clayton by Dr. MacKean in May of 2015, Ms. Clayton has not tried this form of treatment.

**196**  Ms. Clayton did attend 24 personal training sessions from June 2016 to August 2017, but she found that the exercises were painful and aggravated her back.

**197**  It is appropriate to provide funding for a membership in a community centre that includes a pool for some period of time. I award the sum of $5,000 for this item.

**198**  The claim for vocational funding was abandoned by plaintiff's counsel in submissions on the basis that Ms. Clayton could not attend classes.

**Housing and Maintenance**

**199**  The claim is advanced for housekeeping for two hours every two weeks to do the heavier cleaning tasks and for seasonal cleaning for eight hours every spring and fall for life. Ms. Jewett estimates these services to cost $2,232 a year.

**200**  Ms. Clayton testified that she struggles with housekeeping duties. She has had the assistance of her mother and partner since the accident. She has also been accommodated at work, where she is not required to carry out the heavier housekeeping duties.

**201**  The defendant's position is that no award for housekeeping or seasonal help should be made on the following basis:

1. the recommendation for housekeeping is only made by Ms. Jewett as an occupational therapist, and there is no medical justification for this award;
2. Ms. Clayton has not paid for any housekeeping services since the accident;
3. Ms. Clayton can do housekeeping if she paces herself and if she can rely on her partner and her mother to help her with these chores; and
4. Ms. Clayton will likely need housekeeping assistance in any event as she ages, particularly given that she will suffer from the symptoms of HD at some point in the future.

**202**  In the alternative, the defendant submits that any housekeeping award ought to be incorporated into the non-pecuniary award and that the non-pecuniary damages should be increased by the sum of $5,000 for this loss.

**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=) at paras. 38-39, the Court of Appeal wrote:

[38] Courts do accept testimony from a variety of health care professionals as to necessary and reasonable costs of future care: *Jacobson v. Nike Canada Ltd*. [*(1996), 19 B.C.L.R. (3d) 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G26C-00000-00&context=), [*133 D.L.R. (4th) 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G26C-00000-00&context=) (S.C.) at para. 182; in which Levine J. (as she then was) said:

[182] The test she enunciated does not, in my view, require that the evidence of the specific care that is required by the plaintiff be provided by a medical doctor. In *Milina v. Bartsch*, McLachlin J. accepted the evidence of a rehabilitation expert as to the type of care that should be provided.

See also: *Aberdeen v. Zanatta*, [*2008 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RY-00000-00&context=) at paras. 43-53, 63; *Rizzolo v. Brett*, [*2010 BCCA 398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2M8-00000-00&context=) at paras. 72-83.

[39] I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Aberdeen* at paras. 43, 63.

**204**  In respect to the need for medical justification, Ms. Jewett testified that as an occupational therapist with the past history of working at Alberta Home Care, she has expertise in assessing the needs of individuals when they return home. Part of her job at Alberta Home Care was to determine what type of services, such as home support, an individual would need when they return to their home. In light of Ms. Jewett's past education, qualifications, and experience, she is qualified to give an opinion on whether Ms. Clayton required some assistance with housekeeping and home maintenance services.

**205**  Ms. Jewett, who assessed Ms. Clayton in her home, wrote the following in her report dated September 15, 2017:

Ms. Clayton does not have the physical tolerances to be able to do cleaning tasks in her current job. She is living in a small suite right now and is able to do some cleaning tasks a bit at a time. She reports that if she vacuums her small suite, she is then unable to do any other tasks that day. She would benefit from assistance with her regular housecleaning every other week to help reduce risk of exacerbations of pain and to help maintain her ability to remain within the workforce. She would also benefit from assistance with heavier seasonal cleaning tasks such as washing windows, walls and cleaning cupboards.

**206**  I find that Ms. Jewett's recommendations for treatment and care have a sufficient evidentiary link with the assessments of pain and disability in the evidence of Ms. Clayton's physicians. As a result, I reject the defendant's first basis against such an award.

**207**  The fact that Ms. Clayton has not paid for housekeeping in the past also does not preclude her from advancing this claim. The proper approach for assessing homemaking costs was discussed in *O'Connell* at paras. 59-68, cited in *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=) at para. 196. The Court of Appeal has since reiterated 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=), that:

[74] ... homemaking costs, properly considered, are awarded for loss of capacity and are distinct from possible future cost of care claims. An award ordered for homemaking is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: his or her ability to perform household tasks that would have been of value to him or herself as well as others in the family unit but for the accident. This is different from future care costs where what is being compensated is the value of services that are reasonably expected to be rendered to the plaintiff rather than by the plaintiff.

...

[76] As noted in *O'Connell* damages for loss of capacity to complete homemaking tasks are not dependent upon whether replacement costs are actually incurred because what is being compensated is the loss of capacity itself.

[Emphasis in original.]

**208**  As a result, the fact that Ms. Clayton has not incurred replacement costs is not of consequence. What is relevant is that Ms. Clayton has suffered a clear loss of capacity for homemaking tasks.

**209**  For the same reason, the submission that Ms. Clayton's partner and mother can continue to carry out those housekeeping chores that she cannot perform does not support that an award for housekeeping should not be made. I note that in *Wolford v. Shlakoff*, [*2017 BCSC 2043*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R1J-31X1-F956-S16N-00000-00&context=) at para. 181, Milman J. summarized that:

[181] A plaintiff who has suffered a reduction in her ability to perform household duties is in principle entitled to be compensated for that loss: *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; *Hart v. Hansma*, [*2014 BCSC 518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61XP-00000-00&context=) at para. 160. Where work is performed by others, even if gratuitously, that provides evidence that the loss has value: *McTavish* at para. 63. The loss for services that are gratuitously performed remain with the plaintiff: *McTavish* at para. 63. The courts may recognize a loss under this head where the plaintiff is able to carry on with her domestic duties, but does so less efficiently: *McIntrye v. Docherty*, [*2009 ONCA 448*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-FBN1-22RF-00000-00&context=) at paras. 73 and 74.

[Emphasis added.]

**210**  It may well be expected that Ms. Clayton's partner take on some responsibility for housekeeping in a home in which he lives. However, it is not a reasonable expectation that Ms. Clayton's mother should have to attend at her adult daughter's home every two weeks to carry out housekeeping duties that her daughter cannot perform or can only perform in pain. That goes beyond the role that should be placed on a parent of an adult child.

**211**  Mr. Jackson, who assessed Ms. Clayton for a functional capacity evaluation, testified that Ms. Clayton was able to do her housekeeping as long as she paced herself. Mr. Jackson's report dated August 18, 2015, included a subjective assessment from Ms. Clayton in respect to her housekeeping capacity:

Able but has to regulate how much she does. She will experience increased symptoms and will have to pace housework. Sometimes pushes through pain then ends up on couch for symptom control to pain response. Her mother helps her clean her house when symptoms are elevated. She estimated her mother does her housework 10% of the time.

**212**  The defendant relies of *Dosangh v. Xie*, [*2017 BCSC 1937*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PWM-06C1-JX8W-M4YD-00000-00&context=) [*Dosangh*] at paras. 140 and 147, for the assertion that no amount for homemaking services should be awarded if the plaintiff can still perform all of her chores, albeit with less efficiency. In my view, the evidence before me distinguishes the case at hand from *Dosangh*. Both Ms. Buss and Ms. Clayton's current partner, Kyle Pennock, testified to the difficulty that Ms. Clayton has with housekeeping. This evidence supports that Ms. Clayton cannot do all aspects of housekeeping without causing her more pain. This is consistent with Ms. Jewett's report. In contrast, in *Dosangh*, Weatherill (G.P.) J. noted that the evidence under this head of damages was weak and that the plaintiff did not put forward an adequate submission on the issue.

**213**  There is some merit to the argument that Ms. Clayton will need some assistance for housekeeping at some point as she grows older. It may well be that if she shows the symptoms of HD, she may need some assistance with some tasks of housekeeping. As a result, I have considered this in my assessment.

**214**  Overall, because of Ms. Clayton's chronic low back pain, she will continue to need assistance with the heavier housekeeping tasks and heavier seasonal cleaning. In my view, the appropriate approach is to award a sum for Ms. Clayton's diminished housekeeping capacity.

**215**  Based on all of the evidence, I find the appropriate award for diminished housekeeping capacity to be $40,000: see generally *X. v. Y.*, [*2011 BCSC 944*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22MK-00000-00&context=) at paras. 250-261 [*X. v. Y*.].

**Medical Equipment**

**216**  Ms. Clayton claims for bathroom safety aids, positional aids including a mattress differential, pillows, and pain management aids.

**217**  Ms. Jewett recommended that safety aids, being wall bars and tub rail, be installed in the bathroom because Ms. Clayton showed decreased balance, and such items would be beneficial to prevent any falls. The defendant disagrees with all of the safety aids on the basis that Ms. Clayton has no mobility issues.

**218**  Mr. Jackson found that Ms. Clayton's static balance was overall good but that her dynamic and transitioning balance was poor. Dr. Hamm found that Ms. Clayton was able to stand on either leg. Ms. Clayton did not report any balance issues or problems getting into or out of her bathtub.

**219**  Overall the evidence does not support that these safety aids are necessary. No award is made for these items.

**220**  Ms. Jewett recommends that Ms. Clayton have a more supportive mattress and that a mattress differential be provided, along with a cervical pillow and body pillow.

**221**  The defendant agrees with the need for the body pillow but not for the more supportive mattress and cervical pillow.

**222**  There is no evidence that Ms. Clayton is having any ongoing neck issues, and there is no basis to award funding for a cervical pillow.

**223**  Ms. Clayton suffers from chronic back pain, and as such, a supportive mattress is important to assist in supporting quality sleep. Ms. Clayton advised Dr. MacKean that she had recently purchased a more comfortable mattress for her home but that the mattress at the group home was uncomfortable for her. Dr. MacKean recommended that a new mattress be purchased for her use at the group home.

**224**  It is reasonable that Ms. Clayton have an appropriate supportive mattress to help reduce her pain and help improve her sleep. Mr. Carson has started the funding for this in 2018, although Ms. Clayton testified that she had purchased a more comfortable mattress sometime prior to July 2017. As such, an award of $4,800 for this item would be appropriate.

**225**  Ms. Clayton has purchased and is constantly using her body pillow. She purchased the body pillow for $156.79, and it is appropriate that she receives funding for this item in the amount of $1,770 for lifetime purchases.

**226**  Ms. Jewett recommends the purchase of a TENS machine to assist with Ms. Clayton's chronic low back pain. Ms. Clayton has never used a TENS machine and was not treated with one when she did attend physiotherapy. There is a lack of medical justification for funding this item. No award is made.

**227**  Ms. Jewett recommends funding for hot/cold packs, a magic bag, and a heating pad. Most of these items are ones that are found in every household. Ms. Clayton did testify that she uses a heating pad on a regular basis. While in court she used a heating pad. The evidence of Ms. Buss confirms her daughter's use of a heating pad. The defendant conceded that Ms. Clayton receives relief from a heating pad and accepts that some award would be appropriate. I find that an award of $600 for this item is appropriate.

**Medications**

**228**  Funding is sought for the prescription medication that Ms. Clayton is taking and for the Robaxacet for her lower back pain. Ms. Clayton testified that she is now taking Robaxacet every other day to manage her pain symptoms.

**229**  The defendant submits that costs for the prescription drugs appear to be covered by her benefits plan as there was no claim advanced for this in the special damages claim. The defendant, however, has not indicated a case authority that explains how this impacts my analysis. The defendant concedes that there is medical justification for the prescription medication that Ms. Clayton is taking. The defendant agrees that some funding should be provided for ongoing pain medication and suggests an amount no more than $5,000.

**230**  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=) at 401, Cory J. writing for the majority explained the principle underlying the private insurance exception to damage entitlement:

Recovery in tort is dependent 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.

**231**  The private insurance exception is often challenged in the context of special damages. For example, in *Napoleone v. Sharma*, [*2008 BCSC 1746*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B37C-00000-00&context=), Bruce J. was unable to apply the private insurance exception to an award of special expenses because there was no evidence of any consideration passing between the plaintiff and employer in respect of the plaintiff's extended health benefit. At paras. 9-12, Her Ladyship wrote:

[9] Whether the plaintiff has paid for private insurance or has obtained these benefits through an employment contract, the exception will apply. It is also irrelevant that it is the plaintiff's husband who secured these benefits. See, *Brennan*, [*[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=), at para. 182-3. However, the onus rests with the plaintiff to prove he or she has paid for the provision of insurance benefits in some fashion.

As Cory J. says in *Cunningham* at para. 94:

In my view, *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=), supra, simply placed an evidentiary burden upon plaintiffs to establish that they had paid for the provision of disability benefits. I think the manner of payment may be found, for example, in evidence pertaining to the provisions of a collective bargaining agreement just as clearly as in a direct payroll deduction.

[10] There is no evidence before the court as to what, if any, consideration passed between Mr. Napoleone and his employer in respect of the extended health benefits. There is no evidence of whether Mr. Napoleone pays all or a portion of the insurance cost or whether it was negotiated as a part of a collective bargaining scheme. The only evidence before the court is that the plan was secured through Mr. Napoleone's employer and it covers 80% of Mrs. Napoleone's health related expenses.

[11] Without an evidentiary foundation to support the claim, I am unable to apply the private insurance exception to the case at hand. As Cory J. says at para. 93 of *Cunningham*, it is only when this evidentiary requirement is met that the court may be satisfied the plaintiff has shown the prudence and corresponding deprivation that underlies the exception and permits double recovery.

[12] For these reasons, I must dismiss Ms. Napoleone's claim for the gross cost of the special expenses.

**232**  I am not convinced that such reasoning should apply with respect to costs of future care. Although it appears that Ms. Clayon's current employee benefits plan covers 80% of the cost of prescription medication, there is no evidence that Ms. Clayton will continue to have this same coverage or will continue to be employed by her current employer. I note that in *Tabet v. Hatzis*, [*2013 BCSC 1167*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M13J-00000-00&context=) at para. 107, Dickson J. (as she then was) said that "[t]he cost of future extended health benefits should not be deducted from the cost of future case award based on the principles enunciated in *Cunningham v. Wheeler*".

**233**  In my view, the appropriate approach is the one taken by Fisher J. (as she then was) 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 para. 276, in which Her Ladyship took the plaintiff's extended medical benefits into consideration when determining a reasonable award for future costs of medication:

Medications

[276] Mr. Chappell claims $50,000 for medications. In my view, this does not sufficiently take into account the fact that his extended medical benefits cover 80% of this cost to age 60 while he remains employed by the Corporation of Delta. Given this, as well the need for medications related to non-accident injuries, this amount must be reduced further and I consider an award of $25,000 to be reasonable.

**234**  Applying this approach to the evidence before me, I am of the view that an award of $20,000 for the future costs of prescription drugs and Robaxacet is appropriate.

**235**  Overall, the amount of the award for future care items, including the loss of housekeeping capacity, is $78,170.

**Special Damages**

**236**  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.

**237**  Ms. Clayton incurred costs to attend at various therapies. All the therapies were recommended by her medical professionals. Although some of the therapies did not assist her in her recovery, it was reasonable for her to attend them.

**238**  The amount claimed is $3,928.75. The defendant did not contest this figure, and I agree that is a reasonable amount.

**239**  I award the sum of $3,928.75 for special damages.

**Conclusion**

**240**  In summary, Ms. Clayton is entitled to the following damages:

1. Non-pecuniary damages: $130,000
2. Past income/earning capacity loss: $1,700
3. Future income/earning capacity loss: $225,000
4. Cost of future care (including loss of housekeeping capacity): $78,170
5. Special damages: $3,928.75

**TOTAL: $438,798.75**

**241**  With respect to the past wage loss and special damages, it appears that Ms. Clayton has received advances to cover these items. As such, pre-judgment interest is not awarded.

**242**  The parties have agreed to adjust the awards to account for the advances that have already been paid to the plaintiff. If necessary, a post-judgment application can be made pursuant to s. 83 of the *Insurance (Vehicle) Act*, *R.S.B.C. 1996, c. 231*, to determine this amount. The plaintiff is entitled to judgment in the above amount less the advances made.

**243**  If the parties are unable to agree on costs, the plaintiff is at liberty to file a written submission with 60 days from the date of these reasons. Counsel for the defendant is to file written submissions in response within 15 days of receipt of the plaintiff's submissions. Any reply submissions must be filed within ten days.

C.L. FORTH J.

**End of Document**

[***Henry v. Bennett, [2011] B.C.J. No. 1752***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-626K-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.K. Ballance J.

Heard: March 14-18 and 21-23, 2011.

Judgment: September 20, 2011.

Docket: M091794

Registry: Vancouver

**[2011] B.C.J. No. 1752** | [*2011 BCSC 1254*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1N8-00000-00&context=) | [*25 B.C.L.R. (5th) 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1N8-00000-00&context=) | [*2011 CarswellBC 2447*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1N8-00000-00&context=)

Between Stephen Henry, Plaintiff, and Danielle Bennett, Defendant

(75 paras.)

**Case Summary**

**Tort law — *Negligence* — Motor vehicles — Rules of the road — Action for damages resulting from a motor vehicle accident dismissed — The plaintiff collided with the defendant's vehicle as she made a left hand turn at an intersection — Accident was solely plaintiff's fault — Plaintiff entered the intersection on a red light and could have stopped his vehicle in time to avoid the collision.**

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| --- |
| Action for damages resulting from a motor vehicle accident. The plaintiff was driving southbound through an intersection. The defendant was driving northbound and intended to turn left at the intersection. The defendant entered into the intersection on a green light and was stopped when the light turned amber. A vehicle then stopped across from the defendant and partially obstructed her view of the southbound traffic. When the light turned red, the defendant made her turn. Her vehicle was then struck by the plaintiff's vehicle. The defendant had not seen the plaintiff's vehicle prior to the impact. The plaintiff admitted that he was about 100 feet away from the intersection when the e light changed and when he noticed the defendant's vehicle stopped to make a left hand turn. The plaintiff also admitted that, when the light turned amber, he just kept going and took no steps to slow down. The defendant's trial evidence differed significantly from his discovery evidence with respect to material events.  HELD: Action dismissed.  The accident was solely the plaintiff's fault. The court accepted the defendant's evidence that she proceeded lawfully into the intersection on a green light and came to a complete stop with her left turn signal on. The court accepted that the light had turned red as the plaintiff went through the intersection. The plaintiff had ample opportunity to safely bring his vehicle to a stop at or before the intersection and thereby avoid the accident altogether. The defendant was entitled to make her left tune when she did on the assumption that oncoming traffic, including the plaintiff, would act in accordance with the law and come to a stop on the late amber, absent any reasonable indication to the contrary. The defendant could be validly characterized as the dominant driver in the circumstances. She posed an immediate hazard to the plaintiff, which he should have appreciated, and it was he who ought to have yielded the right-of-way. |

**Statutes, Regulations and Rules Cited:**

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)(a), s. 129(1), s. 174

**Counsel**

Counsel for Plaintiff: R.P. Campbell.

Counsel for Defendant: A. Urquhart.

**Reasons for Judgment**

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| **S.K. BALLANCE J.** |

**INTRODUCTION**

**1**  Stephen Henry claims damages for injuries arising from a motor vehicle accident that occurred around 5:00 p.m. on September 17, 2008 at the intersection of King George Boulevard ("King George") and 68th Avenue, in Surrey, B.C.

**2**  Liability and quantum of damages are both in issue.

**BACKGROUND**

**3**  At the time of the accident, Mr. Henry was 20 years old. He was driving southbound on King George in a light-silver BMW that had been recently acquired by his father. He intended to proceed straight through the controlled intersection to White Rock, where he lived with his grandmother. It was rush hour and the flow of traffic along King George was steady. It was not raining and the roads were not wet.

**4**  The subject intersection is relatively long and wide. King George has two travel lanes in each direction, with dedicated left and right turn lanes. 68th Avenue has one through travel lane each way that branches off to form a separate right turn lane just before it reaches the intersection. There is also a left turn lane in each direction, with an advance turn signal activated by the presence of left turning vehicles. At the time of the accident, there was no left turn signal for traffic on King George. Mr. Henry was relatively familiar with the intersection, having previously driven through it approximately twenty times.

**5**  The defendant, Danielle Bennett, was one day short of her 23rd birthday and five months pregnant when the accident occurred. She was driving her dark-grey Honda Civic northbound along King George intending to turn left at the intersection and then continue west on 68th Avenue. She too was familiar with the area and the intersection.

**6**  The evidence establishes that as Ms. Bennett approached the intersection, she pulled into the left turn lane on King George and entered into the intersection on a green light. There were no vehicles ahead of or behind her. Ms. Bennett testified, and I accept, that she sat stopped in her vehicle, with her left turn signal on, watching the oncoming traffic heading south along King George and waiting for a safe opportunity to negotiate her left turn. I find that Ms. Bennett waited in that position for approximately thirty seconds, at which point the signal for traffic on King George turned amber.

**7**  Ms. Bennett explained that her automobile sits low to the ground. She described the grade of King George as largely flat with a slight incline that did not compromise her view of oncoming traffic. She testified that while she remained stationary, a southbound SUV stopped across from her on King George and partially obstructed her view of the flow of southbound traffic in the through lanes. She placed the position of the stopped SUV in the most easterly through lane, running alongside the southbound left turn lane on King George. Ms. Bennett testified that Mr. Henry's vehicle would have to have been situated far down King George in order for her to have a view beyond the SUV and to have seen his vehicle in its approach to the intersection.

**8**  According to Ms. Bennett, she continued to wait after the traffic signal turned amber. She stated that a "couple of seconds" or so thereafter she saw, directly overhead, the traffic light controlling northbound traffic on King George, change to red. At that time, she could see out of the corner of her eye that the left turn arrow for traffic facing west along 68th Avenue was blinking green. Believing that the intersection was then clear, Ms. Bennett initiated her turn. When she had moved "a couple of feet", the front driver's side of her car collided with the driver's door area of Mr. Henry's vehicle, tearing off her front bumper. Mr. Henry's vehicle then skidded towards the southwest corner of the intersection, where it struck a light standard and came to rest. His vehicle was severely damaged.

**9**  The impact caused Ms. Bennett's vehicle to move only slightly. In order to avoid impeding traffic, she completed her left turn and pulled over on 68th Avenue. She then returned to the scene and exchanged information with Mr. Henry.

**10**  Ms. Bennett candidly testified that she had not noticed Mr. Henry's vehicle approaching the intersection or at any time before the impact.

**11**  As I will elaborate below, Mr. Henry's evidence pertaining to the material events leading up to the accident is problematic. For example, referring in direct evidence to one of the photographs of the intersection, he identified his position as being in relatively close proximity to the intersection when the controlling traffic light changed to amber. He testified along similar lines to the effect that the light turned amber when he was "right before" the intersection. In cross-examination, however, it was put to Mr. Henry that he was actually in the range of 100 feet back from the intersection when the traffic light changed from green to amber. At first, he allowed that he could have been between 10 and 100 feet away. When confronted with his discovery evidence where he had stated more than once that he had been about 100 feet away from the intersection when the colour of the light changed, Mr. Henry significantly modified his evidence on this crucial point. Ultimately, he adopted his discovery evidence and agreed that he had been further back from the intersection than he had initially indicated in his direct evidence. Mr. Henry went on to agree that when he was approximately 100 feet away from the intersection, he noticed Ms. Bennett's vehicle stopped in the middle of the intersection with her left turn signal activated. He knew at that time that she intended to turn left across his path.

**12**  Mr. Henry was cross-examined about the state of the surrounding traffic immediately before the accident. At first, he would not agree with the suggestion that there had been no traffic in front of him. Instead, he claimed that there had been vehicles ahead of him, although not directly in front. That testimony was at odds with Mr. Henry's discovery evidence, where he had agreed that there was no car in front of him when he was 100 feet away from the intersection. At trial, he adopted that discovery evidence without explaining his inconsistency.

**13**  At trial, Mr. Henry testified that there were no cars in the lane beside him as he approached the intersection and was "sure" that there were no southbound vehicles stopped at the intersection when he entered it. Yet, when questioned about that matter at his examination for discovery, Mr. Henry had not been quite so unequivocal. After initially denying at his discovery the existence of any stopped southbound vehicles, Mr. Henry qualified his answer saying that he could simply not recall and did not remember whether there were any stopped vehicles. He adopted his discovery evidence as true.

**14**  Additionally, Mr. Henry was cross-examined about the opportunity to stop his vehicle after the light changed to amber. In response to cross-examination about whether the brakes on the vehicle were in brand-new condition, he replied that he was "not sure". At his discovery, Mr. Henry had testified that, as far as he knew, the brakes were brand new. He went on to clarify that he had accompanied his father to the car dealership to purchase the vehicle and from that had understood that the brakes were brand new. He adopted that evidence at trial.

**15**  Mr. Henry confirmed that the brakes on his vehicle were in working condition at the time of the accident. He was asked whether before the accident he had ever tested the brakes by performing a "hard brake" or was otherwise knowledgeable about their capability. He answered "no". He also denied having driven the vehicle "quite a bit" prior to the accident. Once again, however, Mr. Henry's testimony at trial did not fit with his evidence on discovery. There, he had stated that he had driven the vehicle "quite a bit" and was "sure" that he had performed a hard brake at some point before the accident. When confronted with these inconsistencies in his evidence, Mr. Henry agreed that his discovery evidence on these matters was accurate.

**16**  The evidence indicates that the governing speed limit along King George is either 50 or 60 kilometres per hour. Mr. Henry testified that he was driving the posted speed limit as he approached the intersection. One of the independent witnesses, Kevin McCartney, testified that Mr. Henry was probably doing the speed limit, "if not more". Mr. Henry's short and tarnished driving history was brought out in cross-examination. He admitted that before the accident he had a propensity to speed and had been issued approximately ten speeding tickets and had had his driver's licence suspended several times. That pattern continued more or less unabated after the accident.

**17**  In closing argument, defence counsel did not suggest that evidence of Mr. Henry's driving record supported an inference that he had sped as he neared the intersection or proceeded through it. Indeed, the preponderance of the evidence favours the opposite conclusion. I find that Mr. Henry was likely not speeding and was travelling at the applicable speed limit at the material time.

**18**  Mr. Henry also adopted his discovery evidence to the effect that when the light turned amber, he "just kept going" and took no steps to slow down, explaining that he had the right-of-way. In response to questioning about his obligations in approaching an intersection on an amber light, Mr. Henry agreed that he ought to be readying himself for a red light and should be preparing to stop.

**19**  Three independent witnesses to the accident testified.

**20**  Keri Johnson was stopped at the red light on 68th Avenue facing east. Her 14-year-old son, Marco, was in the front passenger seat and her little girl was seated in the rear. The Johnson family was en route to dinner. They had lived in the neighbourhood for years and Ms. Johnson had driven through the intersection countless times. As they sat at the red light they amused themselves by chatting, singing songs and "looking around". Ms. Johnson described herself as multi-tasking, which included keeping an eye on the traffic lights for 68th Avenue.

**21**  Ms. Johnson testified that Mr. Henry's vehicle was at the end, but not straggling behind, the flow of southbound traffic on King George. She recalled that those southbound cars were not forming a single file pattern; rather, they moved as a group variously occupying both through lanes, and that Mr. Henry's vehicle was less than two car lengths behind the flow. She was "100% positive" that the light facing Mr. Henry was green and not amber when he entered the intersection and when the accident happened. Although Mr. Henry was approaching the intersection at her left, Ms. Johnson had been looking at the King George traffic light to her right at the time of the collision.

**22**  Ms. Johnson recalled that the light facing her was still red when the accident occurred. In response to questioning about the sequence of the signal changes at the intersection, she agreed that if the advance left turn signal for traffic on 68th Avenue had been green, then her light would remain red for that interval. She further agreed that in that situation, the light for southbound traffic on King George would also be red.

**23**  Ms. Johnson had a distinct recollection that there were no southbound vehicles stopped on King George at the intersection when Mr. Henry came through it. Although her view of the intersection was somewhat impeded by the flow of southbound traffic, she was "pretty sure" that the northbound left turning vehicle (that is, Ms. Bennett's vehicle) had been a van.

**24**  The accident happened so quickly that Ms. Johnson was not able to recall whether she had actually seen the collision, or had merely heard it. However, she did remember seeing Mr. Henry's automobile skid into the light standard near to her car after the impact and was grateful that his vehicle had not hit hers.

**25**  Joanne Ciapelletti, the adjuster for the Insurance Corporation of British Columbia ("ICBC"), testified that she interviewed Ms. Johnson over the telephone one week after the accident. Ms. Ciapelletti had made file notes of her interview, which were not in evidence, and says that she recalls the matter independently of those notes because throughout September and October Mr. Henry's mother had regularly telephoned her inquiring as to the status of the claim. I accept Ms. Ciapelletti's testimony that she eventually handed off the file to an independent adjuster due to Mrs. Henry's criticisms of her treatment of the liability matter. I am satisfied that this was not a typical claim file from Ms. Ciapelletti's standpoint and that she has an independent recollection of it, including the contents of her interview of Ms. Johnson.

**26**  Ms. Ciapelletti claims that during that interview, Ms. Johnson told her that she did not know the colour of the light for southbound traffic on King George when the accident occurred. At trial, Ms. Johnson agreed that she could have had a telephone discussion with Ms. Ciapelletti or another insurance adjuster, but was not able to recall the specifics of any such discussion. She did recollect that after the accident Mr. Henry contacted her at least once and likely twice, and believes that he probably asked whether ICBC had been in touch with her. She thought that it was possible that she may have even telephoned Mr. Henry to thank him for not striking her car. I find that Mr. Henry's mother also telephoned Ms. Johnson to discuss the accident; however, Ms. Johnson was not able to recollect that call.

**27**  Marco Johnson testified that as Mr. Henry entered the intersection there were vehicles ahead of him at a distance equivalent to approximately three or more car lengths. In his evidence in chief, Marco testified that the traffic light was in the midst of changing from green to amber as Mr. Henry entered the intersection. When pressed on that point in cross-examination, he agreed that he "did not fully remember" where Mr. Henry was positioned in relation to the intersection when the traffic signal turned amber. Marco explained that he had been looking at the lights governing northbound traffic on King George situated to his left in the direction of Mr. Henry, but had also glanced to his right at times.

**28**  Marco was not able to say whether Ms. Bennett's vehicle was a car, truck or van. Yet, he testified that her vehicle had proceeded into a left turn without slowing down or stopping in the intersection. Later in his evidence, he testified that he was unsure whether he had even seen Ms. Bennett's vehicle prior to the crash.

**29**  Kevin McCartney had driven through the intersection to and from work on nearly a daily basis. He was stopped at the red light facing east on 68th Avenue directly behind the Johnson vehicle. He was alone in his car. Mr. McCartney testified that there were two stopped vehicles next to him in the left turn lane. He stated that his view of the intersection was impeded "a bit" by the presence of those two vehicles but maintained that he was able to see the traffic. I accept that.

**30**  Mr. McCartney has held a commercial driver's licence for many years and for a time had been an independent truck driver. From his days in that line of work, he developed a habit of observing the traffic lights, as well as the progression of the traffic itself, while stopped at a light. As was his custom, he kept himself aware of the traffic lights controlling the flow along King George as he sat at the red light.

**31**  Mr. McCartney saw Ms. Bennett's vehicle move into the intersection on a green light and come to a complete stop, with the left turn signal activated. He supported Ms. Bennett's testimony that she had remained stationary in the intersection for roughly thirty seconds before the light changed to amber. He noticed that her car continued motionless for a time after the light turned amber.

**32**  Mr. McCartney confirmed that all southbound traffic along King George had cleared through the intersection before the accident occurred. He explained that the last of that traffic flow had passed through about two to three seconds before Mr. Henry's vehicle arrived at the intersection. Mr. McCartney further recalled that before Mr. Henry entered the intersection, two southbound vehicles had stopped in the lanes flanking Mr. Henry's lane, namely in the left turn lane and in the most westerly southbound through lane. He stated that the vehicle which was stopped in the through lane to the west of Mr. Henry's path of travel had been stopped for "a couple of seconds" before the accident.

**33**  Mr. McCartney testified that he observed the signal governing Mr. Henry change from amber to red and when that occurred, he cast his eye back to the intersection. According to him, it was only after the light had turned red that Ms. Bennett started into her left turn. He noticed that the green arrow in the left turn lane adjacent to him started to blink immediately before Mr. Henry entered the intersection. Mr. McCartney says that given Ms. Bennett's position, which he described as being effectively in the middle of the intersection, she was in the path of the left-turning vehicles.

**34**  Mr. McCartney witnessed the crash which he says occurred slightly to the west of the centre of the intersection. He testified that the vehicles collided when the traffic light facing Mr. Henry was red and just as the left turn arrow for 68th Avenue was activated.

**35**  Mr. McCartney recalls that Ms. Bennett's vehicle was mostly orientated north- south at the time of impact. That is consistent with Ms. Bennett's testimony as well as the physical evidence of the damage to her vehicle which is concentrated around the front bumper region on the driver's side, indicating that she had hardly executed her left turn manoeuvre when the crash occurred.

**36**  After the accident, Mr. McCartney saw the two vehicles that had been next to him in the left turn lane negotiate their turns through the intersection.

**37**  On October 2, 2008, Mr. McCartney provided ICBC with a written statement regarding the accident. His statement does not mention the existence of any stopped vehicles southbound on King George. Nor does the cryptic sketch accompanying his statement identify any such vehicles.

**38**  When questioned about those omissions from his statement and the sketch, Mr. McCartney explained that his statement had been composed by the insurance adjuster based on his answers to the specific questions that she posed. He had not been asked about the position of any southbound vehicles along King George and had not thought to mention them. He clarified that he had not prepared the sketch either.

**39**  I find Mr. McCartney's explanation to be credible. I am satisfied that the lack of reference to the stopped southbound vehicles in his statement and the sketch was nothing more than the by-product of the less-than-thorough interview conducted by the adjuster. I would add that the sketch is so lacking in useful detail in any event that it is of no concrete assistance to the Court.

**40**  I am satisfied that Ms. Johnson and her son each gave an honest account of the events leading up to the accident as best they were able to recall them. At the same time, however, I conclude that they were somewhat distracted while waiting at the red light by their interactions with each other and the young family member in the back seat. Those distractions interfered with their ability to obtain an accurate picture of the sequence of events.

**41**  Most concerning with regard to Ms. Johnson's evidence is that she says the accident occurred on a green light. That key piece of evidence is contradicted by all of the other witnesses, including Mr. Henry himself. Moreover, I accept Ms. Ciapelletti's credible testimony that during her interview of Ms. Johnson, Ms. Johnson said she did not know the colour of the light at the time of the accident. I have no confidence that Ms. Johnson's testimony about the colour of the traffic light facing Mr. Henry as he entered the intersection is reliable.

**42**  Difficulties of significance were also present in Marco Johnson's testimony, including inconsistent evidence about whether he had noticed Ms. Bennett's vehicle in the intersection prior to the accident. To the extent that he had seen her enter the intersection, his testimony to the effect that she had not stopped before she launched into her left turn was incompatible with the evidence of Ms. Bennett and Mr. McCartney, as well as Mr. Henry.

**43**  In the end, I am not satisfied that either Ms. Johnson or her son have a sound recollection of the crucial events surrounding the accident. I contrast their undependable testimony with the detailed and persuasive account of the accident given by Mr. McCartney. I find that he carefully watched the scene, including the traffic lights, without distraction and accept that his recollection of the pertinent events leading up to the accident is accurate

**44**  I also found Ms. Bennett to be a credible witness. Her testimony of the vital events was reliable, with one exception. I find that she was mistaken that the SUV was stopped in the most eastern through lane southbound on King George. The evidence is clear that Mr. Henry occupied that lane. I am satisfied that the stopped SUV recalled by Ms. Bennett was situated in the southbound left turn lane across from her as remembered by Mr. McCartney. In my view, Ms. Bennett's inaccurate recollection on this matter did not reveal a concerning level of inattentiveness to the events surrounding the accident on her part as urged by plaintiff's counsel, nor does it detract in any meaningful way from her otherwise reliable account of the manner in which the accident unfolded.

**45**  The inconsistencies between Mr. Henry's evidence at trial and his testimony at discovery relative to material events were significant and not adequately explained or otherwise ameliorated by his proffered explanations. Their cumulative effect reflected negatively on his credibility. I would add that his evidence explaining his purported basis for applying for private disability insurance after the accident, and his claim of alleged attempts to re-establish employment with Richmond Elevators were fraught with difficulty and served to compound his compromised credibility. Ultimately, I consider it unsafe to accept Mr. Henry's evidence of the events leading up to the accident where it differs from the testimony of Mr. McCartney. I make the same observation with respect to rejecting Mr. Henry's evidence to the extent that it is at odds with the testimony of Ms. Bennett.

**46**  Based on the totality of the evidence that I accept, I conclude that Ms. Bennett proceeded lawfully into the intersection on a green light and came to a complete stop with her left turn signal on. She sat motionless for approximately thirty seconds observing the oncoming traffic and periodically casting her eye to the light governing King George traffic. As the light she faced turned amber, Ms. Bennett remained stationary for a few seconds longer until the signal changed to red. I also conclude that at least three seconds before Mr. Henry entered the intersection, the flow of southbound traffic on King George ahead of him had ended. I conclude further that before Mr. Henry arrived at the intersection, a southbound vehicle had stopped in the left turn lane, and another in the most westerly through lane to Mr. Henry's right. There is no evidence that the SUV stopped across from Ms. Bennett constituted merely a minor impediment to her view, as suggested by plaintiff's counsel in his closing submissions. I find that her view of Mr. Henry's path of travel from her low to the ground vehicle was critically impeded by the SUV.

**47**  Travelling at the posted speed limit, Mr. Henry saw his green light turn to amber when he was a distance of not less than 100 feet from the start of the intersection. More or less contemporaneously, he turned his attention to the goings-on in the intersection and saw Ms. Bennett's stopped vehicle intending to turn left. With the mindset that he had the right-of-way, Mr. Henry decided to keep going and to proceed straight through the intersection, making no attempt to brake or slow down.

**48**  I find that by the time Mr. Henry reached the near side of the intersection the light was an extremely stale amber, about to turn red, and that it changed to red as his vehicle passed into the intersection. After the light governing traffic on King George had turned red and the left turn arrow for eastbound traffic on 68th Avenue began to blink green, Ms. Bennett started into her left turn and the collision ensued.

**LEGAL FRAMEWORK AND ANALYSIS**

**49**  In support of his argument that Ms. Bennett is completely at fault for the accident, Mr. Henry relies on s. 174 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* (the "*Act"*), which reads, in relevant part, as follows:

1. 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.

**50**  Mr. Henry contends that, as the left turning driver, Ms. Bennett had a duty to yield the right-of-way to him because he posed an immediate hazard which she failed to appreciate due to her careless inattentiveness and inadequate look-out. He argues that Ms. Bennett's complaint that the parked SUV compromised her full view of the oncoming traffic is less an answer as to why she did not see Mr. Henry's approach, than it is reinforcement of his assertion that she failed to determine whether she could safely execute her turn and launched into that manoeuvre without knowing the oncoming traffic situation one way or the other. Mr. Henry contends that had Ms. Bennett maintained a proper lookout she would have been aware of his vehicle approaching the intersection. He asserts that she should have taken more care, even if it is determined that he should not have proceeded through at the time, and had she done so, the accident would have been averted.

**51**  Mr. Henry's companion line of argument is to the effect that he was the dominant driver and enjoyed the right-of-way, and that Ms. Bennett was servient. Formulating the analysis within the dominant-servient driver framework laid out by Cartwright J. 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.) [*Walker*], Mr. Henry says that in order to fix him with any liability, Ms. Bennett must establish that after Mr. Henry became aware or reasonably ought to have become aware of her disregard of the law, he had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself. It is Mr. Henry's contention that Ms. Bennett has not met her burden.

**52**  Ms. Bennett's position is that Mr. Henry is completely at fault for the collision and should be held fully liable for it. Her argument starts with reference to ss. 128 and 129 of the *Act,* which set out the obligations of a driver approaching an intersection facing an amber light and a red light, respectively. The relevant statutory extracts are reproduced below.

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, ...

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.

**53**  As I have concluded that Mr. Henry began to cross the near side of the intersection on the final phase of the amber light and that the signal changed to red as his car passed into the intersection, I will address the submissions on that factual premise.

**54**  Ms. Bennett submits that given that Mr. Henry was driving at the posted speed limit and was a distance of not less than 100 feet from the intersection when the signal turned amber, he had plenty of time to stop safely before the intersection and should have done so. She says that the fact that drivers to his left and his right had come to an uneventful stop before he reached the intersection bolsters her submission. Building on this, Ms. Bennett contends that Mr. Henry therefore entered the intersection in breach of his duty to stop imposed by s. 128 of the *Act.* Relying mainly on the decision of the Court of Appeal in *Kokkinis v. Hall* [*(1996), 19 B.C.L.R. (3d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3BS-00000-00&context=), [*71 B.C.A.C. 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3BS-00000-00&context=) [*Kokkinis*], discussed below, Ms. Bennett asserts that Mr. Henry was negligent and must shoulder the entire blame for the accident.

**55**  Resolving the issue of liability in respect of the inherently hazardous left turn scenario is a predominantly fact-driven exercise. Even so, several decisions have distilled the animating legal principles and are of precedential value.

**56**  In assessing liability, considerable judicial attention has been paid to the meaning of "immediate hazard" under the provisions of the *Act*, including in s. 174. The leading cases on the question of when through traffic amounts to an immediate hazard are the decisions of our Court of Appeal in *Raie v. Thorpe* (1963), 43 W.W.R. 405 [*Raie*] and *Keen v. Stene* [*(1964), 44 D.L.R. (2d) 350*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3RS-00000-00&context=) [*Keen*].

**57**  Tysoe J.A., speaking for the majority in *Raie*, made these instructive remarks at 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 sec. 164.

**58**  Tysoe J.A. went on to clarify at 413-14 that the point in time to assess whether the through driver poses an immediate hazard is the moment before the left turning driver commences to make the turn.

**59**  In *Keen*, the court considered the meaning of "immediate hazard" in the context of a driver who had stopped at a stop sign before attempting to cross a four-lane through highway. The court emphasized that it is the hazard or the threat of the collision, as distinct from the collision itself, which must be immediate such that the hazard will be considered to be immediate if reasonable danger of the future collision may be apprehended at the time of the proposed entry into the intersection (at 365).

**60**  The duty placed on a left turning driver pursuant to s. 174 is not absolute. It is well-established that drivers are entitled to rely on the assumption that other drivers will obey the rules of the road, unless there is reason to know otherwise: *Kokkinis*; *Brucks v. Caslavsky* [*(1994), 4 M.V.R. (3d) 278*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F5T5-M260-00000-00&context=), [*45 B.C.A.C. 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F5T5-M260-00000-00&context=); *Rollins v. Lovely*, [*2007 BCSC 1752*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21X8-00000-00&context=), [*60 M.V.R. (5th) 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21X8-00000-00&context=). The Court of Appeal in particular has acknowledged the realistic exigencies involved in making what are usually split-second decisions by drivers in circumstances where traffic factors have to be assessed quickly. The standard of perfection on the part of a left turning driver is not expected, and such drivers will not necessarily be faulted if they fail to precisely gauge the distance and speed of oncoming traffic: *Uyeyama (Guardian ad litem of) v. Wittenberg*, [*[1985] B.C.J. No. 1883*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61N3-00000-00&context=) (C.A.). It is also settled law that the mere presence of a left turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care: *Pacheco (Guardian ad litem) v. Robinson* [*(1993), 75 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=) (C.A.) at para. 15, [*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.).

**61**  In *Morgan v. Hauck* [*(1988), 27 B.C.L.R. (2d) 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-605J-00000-00&context=) (C.A.) [*Morgan*], the trial judge found that the defendant had accelerated into the intersection on a red light, and that the plaintiff had entered the left turn lane without coming to a stop and then proceeded slowly into his turn. The trial judge concluded that while the defendant was primarily at fault for the accident, the plaintiff was guilty of some ***negligence*** for failing to keep a proper lookout before moving into his left turn. Liability was apportioned 10% to the plaintiff and 90% to the defendant. The Court of Appeal declined to alter apportionment and dismissed the defendant's appeal. In doing so, Esson J.A. expressed a degree of reluctance, although not in the defendant's favour. He reasoned that the serious and flagrant fault belonged to the defendant who, upon seeing the amber warning lights, sped up and entered the intersection against a red light. While acknowledging the heavy duty to be shouldered by a driver manoeuvring left across a major highway, his Lordship also remarked at pages 122-123 on the concomitant burden that falls to drivers proceeding through the intersection:

... I think it is time, therefore, to emphasize the heavy onus which rests upon drivers approaching signals of this kind to make due allowance for the possibility that there will be a vehicle seeking to make a turn such as the plaintiff was making on this day. Their clear duty is to comply with the warning lights and to not run the red. I would note one additional fact, and that is that it was found that the plaintiff's left-turn signal was flashing. On these facts, I see no reason to disturb the apportionment of liability. It might even be open to doubt, in view of the decision of this court in *Uyeyama v. Wittenberg*, referred to by Mr. Justice Macfarlane, that any portion of the liability should have been placed upon the plaintiff. But the circumstances were different in some respects and, in any event, that issue is not before us. I agree that the appeal should be dismissed.

**62**  Mr. Justice Macfarlane concurred with Esson J.A.'s observations.

**63**  The sentiment expressed by Esson J.A. in *Morgan* was referred to by the Court of Appeal in *Kokkinis*. There, the defendant travelling along Granville Street failed to stop on an amber light in circumstances where he could have safely done so. Instead, he continued driving through the amber light and into the intersection, where he collided with the plaintiff's vehicle as it attempted to turn left. The left turning plaintiff was unaware of the defendant's vehicle "until it was on top of her". The defendant conceded that he had been negligent. Left for the Court's determination was whether the plaintiff was contributorily negligent.

**64**  The trial judge in *Kokkinis*, [*[1994] B.C.J. No. 1715*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F57G-S1CY-00000-00&context=), reasoned that the plaintiff had taken her eyes off the oncoming traffic in order to check whether any stopped eastbound cross traffic had jumped the light and hence failed to maintain a proper lookout. In the alternative, the trial judge found that the plaintiff's failure to focus on the oncoming traffic had deprived her of an opportunity to see that the defendant constituted an immediate hazard and to yield to him. He concluded that the plaintiff was negligent on both bases and allocated fault equally by application of s. 1 of the ***Negligence*** *Act*, R.S.B.C. 1979, c. 298, then in effect.

**65**  On appeal, Newbury J.A. framed the pertinent question of law as whether the plaintiff was entitled to reasonably assume that the defendant would stop before entering the intersection or, on the other hand, whether she ought to be faulted for failing to see the defendant's van which constituted an immediate hazard.

**66**  The chief argument advanced by the defendant on appeal was that the plaintiff's entitlement to assume that other traffic (i.e. the defendant) would obey the law did not relieve her of the obligation to act reasonably and not proceed into the collision where it is apparent, or should be, that the other driver is not going to yield the right-of-way. Newbury J.A. confronted that difficult issue at para. 10 in the following terms:

I must say this argument has given me pause; but ultimately I resolve it by asking whether in law [the plaintiff] should be faulted for diverting her attention momentarily from oncoming traffic to check cross traffic at the point in time in question, i.e., as she prepared to start her turn - to see if any of those cars had jumped the light or were going to pose a threat to her turn. Was this an unreasonable or careless thing to do? I think not, given both the realities of the situation (which of course occurred over only a few seconds) and past decisions of this Court that have imposed on left-turning drivers the duty to be aware not only of oncoming traffic, but also of cross traffic, pedestrians, and whatever else may be present in the intersection. To say that the plaintiff can be found at fault because she relied on the assumption that [the defendant] would stop, and because she checked cross-traffic, would in my view subvert the duty on [the defendant] to bring his vehicle to a safe stop at the amber light as the other traffic did. An amber light is not, as the current witticism suggests, a signal to accelerate or to pass traffic that is slowing to a stop. Indeed, as Mr. Justice Esson noted in *Uyeyama*, in a busy city like Vancouver and at a busy intersection like 25th and Granville, an amber is likely the only time one can complete a left turn. Drivers approaching intersections must expect that this will be occurring. Putting a burden on a left-turning driver to wait until he or she sees that all approaching drivers have stopped would, in my view, bring traffic to a standstill. We should not endorse such a result.

**67**  Concluding that the trial judge had imposed too high a standard on the plaintiff and that he had not considered assumptions about the conduct of the oncoming traffic that the plaintiff was entitled to make, Newbury J.A. reapportioned fault 100% to the defendant.

**68**  Turning to the case at hand, I have found that Mr. Henry entered the intersection at the very end of the amber light phase, just as it was turning red. He knew that the brakes on his vehicle were in good working condition. There was no expert evidence relative to the dynamics of the accident, including whether Mr. Henry had sufficient time to safely come to a stop when he first saw that the controlling signal had turned amber. He did not testify that he had determined that he could not stop safely at that juncture. Moreover, there was no evidence of any condition or factor that would have made it unsafe or impossible for him to bring his car to a stop at or before the intersection. At best, Mr. Henry could do little more than guess about whether he might have been able to stop at the intersection had he applied his brakes at the time he saw the light change to amber. In my view, the probabilities of the situation weigh in favour of finding that Mr. Henry, proceeding at the speed limit and in the prevailing conditions, had an ample opportunity to safely bring his vehicle to a stop at or before the intersection and thereby avoid the accident altogether. However, he chose not to proceed in that fashion.

**69**  As Mr. Henry approached his entry into the intersection, he passed by vehicles on either side that had come to a stop. There had been an ebb in the flow of southbound through traffic along King George and Mr. Henry was well behind the last car that had gone through the intersection. He was aware that Ms. Bennett was sitting in the intersection waiting for an opportunity to turn left and that the amber light was about to turn red. Influenced by the misguided notion that he nonetheless had the right-of-way, Mr. Henry made no attempt to slow down or to come to a stop, even though he could have done so safely. I conclude that Mr. Henry entered the intersection in violation of his duty under s. 128 of the *Act*.

**70**  In the meantime, Ms. Bennett sat in the intersection observing the oncoming traffic with care and a reasonable level of attentiveness, waiting for an opportune window to execute her turn. When Mr. Henry's light changed to amber, she was entitled to act on the assumption that approaching vehicles which could stop safely would do so unless the contrary was apparent. The contrary was not apparent, but still she waited because her view of the critical area was impeded by the stopped SUV and she was exercising extra caution. I accept that Ms. Bennett glanced to check cross traffic, as she ought to, and could see that the arrow for the left turning traffic eastward on 68th Avenue was green, leaving her in the path of that traffic. Had she remained there, she likely would have herself been at risk. Ms. Bennett waited until the traffic light was red before moving into her turn, and even then she did not overly accelerate through her turn; she nosed left cautiously to accommodate the fact that her view was somewhat compromised. Very early into her turn, the collision occurred. Ms. Bennett did not strike Mr. Henry's car; rather, he ploughed into hers.

**71**  The decisions of *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=), [*4 B.C.L.R. (5th) 117*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62YV-00000-00&context=) *Najdychor v. Swartz*, [*2009 BCSC 801*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S05V-00000-00&context=), and *Bain v. Shafron*, [*2009 BCSC 543*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M24J-00000-00&context=), relied on by Mr. Henry are readily distinguishable on their facts and ultimately are of no assistance to him.

**72**  Ms. Bennett was in a position remarkably similar to that of the plaintiff in *Kokkinis*. Although she did not see Mr. Henry prior to the collision, *Kokkinis* indicates that it does not necessarily follow that she was in any way negligent. Having said that, I wish to clarify that I do not read *Kokkinis* as standing for the proposition that left-turning drivers are entitled to proceed blindly on the assumption that oncoming drivers will obey the rules of the road, without regard to their concurrent obligation to act reasonably as the circumstances dictate. In my view, Ms. Bennett was entitled to proceed on the assumption that oncoming traffic, including Mr. Henry, would act in accordance with the law and come to a stop on the late amber, absent any reasonable indication to the contrary and provided she comported herself with reasonable care. Here, there was no contrary indication from Ms. Bennett's standpoint. Indeed, she could see that the SUV across from her had complied with the rules and she was aware as well that the flow of straight through traffic had ceased some seconds earlier. She had no reasonable indication that oncoming traffic in the form of Mr. Henry would proceed through the intersection in clear violation of the rules of the road. Moreover, I find that in all the circumstances she conducted herself prudently and with reasonable care in negotiating her left turn. In contrast, Mr. Henry knew or reasonably ought to have known that in all likelihood Ms. Bennett would have carried through with her left turn at the final stage of the amber light, and most assuredly when the signal turned red. He created an extremely unsafe situation in failing to come to a stop.

**73**  I endorse the case authorities that cast doubt over the legitimacy of portraying a driver in Mr. Henry's shoes as having the presumptive right-of-way or otherwise qualifying as the dominant driver for the purposes of assessing liability using the *Walker* paradigm: see, for example, *Snow v. Toth*, [*[1994] B.C.J. No. 563*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M0X0-00000-00&context=) (S.C.); *Shahidi v. Oppersma*, [*[1998] B.C.J. No. 2017*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JCBX-S0H9-00000-00&context=) (S.C.); *Ziani v. Thede*, [*2011 BCSC 895*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22H0-00000-00&context=). The dominant/servient driver analysis in *Walker* is predicated on the footing that the dominant driver has proceeded lawfully and, it seems to me, is of utility in that circumstance only. I, therefore, question whether that framework is of any assistance to a driver like Mr. Henry, who has acted in breach of his statutory duty. In any case, it cannot be said that Ms. Bennett attempted to execute her turn in complete disregard of her statutory duty to yield, which is an integral component of the *Walker* analysis. Indeed, it is my view that Ms. Bennett can be validly characterized as the dominant driver in the circumstances. There is no cogent evidence to remotely suggest that she could have avoided Mr. Henry by the exercise of reasonable care. To formulate it in the terms of s. 174, Ms. Bennett posed an immediate hazard to Mr. Henry, which he should have appreciated, and it is he who ought to have yielded the right-of-way.

**74**  Based on the foregoing, I am satisfied that the accident was caused solely by the negligent driving of Mr. Henry. As he is entirely at fault for the accident, his claim is dismissed.

**75**  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 30, 2011.

S.K. BALLANCE J.

**End of Document**

[***Mainardi v. Shannon, [2005] B.C.J. No. 1033***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0VK-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Preston J.

Heard: April 18 and 19, 2005.

Judgment: May 2, 2005.

Vancouver Registry No. S042578

**[2005] B.C.J. No. 1033** | 2005 BCSC 644 | 138 A.C.W.S. (3d) 1204

Between Emilia Mainardi, plaintiff, and Andrew Shannon, defendant

(28 paras.)

**Case Summary**

**Tort law — Occupiers' liability — Duty of occupier — To invitees.**

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| Action by the plaintiff, Mainardi, against the defendant, Shannon, for damages sustained as a result of a slip and fall accident on the property of Shannon. Damages were agreed to at $50,000, but Shannon disputed his liability. Mainardi was a 76-year-old self-employed business woman who was delivering presents to the children at the Shannon household when she slipped on the front stairs. Though she had negotiated her way to the door, on her way back she had noticed the wet and icy conditions on the stairs and fell down a number of stairs to a brick landing, sustaining multiple injuries. She was wearing flat heeled shoes. Mainardi's granddaughter and friend who later attended the scene observed the stairs were not really icy, but definitely frosty or glazed. All three reported that the handrail was too wide to grip with the hands. Shannon's contractor testified to having painted the wooden stairs four years previously with a non-skid surface. The weather had been rainy, then below freezing.  HELD: Action allowed.  Mainardi was entitled to $50,000 in damages and costs. There was nothing dangerous or unsuitable about Mainardi's footwear. The witnesses' evidence of the condition of the stairs was consistent with the weather reports. The photos shown in court did not show stair treads or visible indications of a non-skid finish, but rather a worn painted surface and a railing that was very wide. The court was satisfied that the stairs were treacherously slippery and it was the slippery condition of the stairway that caused the fall. Shannon knew or ought to have known of the worn condition and absence of effective non-skid finish. Mainardi was aware of the slippery condition of the stairway, as she had testified that she considered asking to go through the house to use the back door. However, that did not constitute contributory ***negligence***. |

**Statutes, Regulations and Rules Cited:**

Occupiers Liability Act, [*R.S.B.C. 1996, c. 337 s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JKPJ-G0P7-00000-00&context=)(1), s. 3(2)

Occupiers Liability Act, R.S.O. 1980, c. 315

**Counsel**

Counsel for the Plaintiff: M.D. Murphy

Counsel for the Defendant: K. Fast

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| **PRESTON J.** |

NATURE OF THE PROCEEDINGS

**1**  The plaintiff, Amelia Mainardi brings this action seeking damages for injuries sustained from a slip and fall accident which she alleges was caused by the ***negligence*** of the defendant, Dr. Shannon. She relies on the provisions of the Occupiers Liability Act, *R.S.B.C. 1996, c. 337* (the "Act"). On December 23, 2002, Mrs. Mainardi, slipped and fell when descending the stairs at Dr. Shannon's residence. She was 76 years of age at the time of her fall. She suffered multiple injuries. Mrs. Mainardi is a self employed businesswoman who has for many years operated a travel agency on Commercial Drive in Vancouver. The parties agree that the appropriate award of damages to compensate her for her injuries is $50,000. The only issue at trial was the extent of Dr. Shannon's liability, if any.

BACKGROUND

**2**  Mrs. Mainardi's daughter, Nicolette, was a close personal friend of Dr. Shannon's late wife. Nicolette Mainardi had given her mother some Christmas presents for the Shannon children and asked her to deliver them to Dr. Shannon's residence. Mrs. Mainardi had driven past the home on more than one occasion to accomplish the delivery but no one was home. On December 23, 2002 at approximately 9:30 a.m., Mrs. Mainardi was on her way to work at her travel agency. She drove past Dr. Shannon's residence which is approximately one block away from her business. She noticed that the van which the children's nanny used to transport the Shannon children was parked at the residence and decided to deliver the presents. She parked in an alleyway alongside the Shannon residence and, although there is a back door near the area where she parked, she elected, because of the time of day, to walk around to the front of the residence and climb the steps to the front door.

**3**  At the front of the residence there are 4 brick steps leading up to a brick landing and from there a further 10 wooden steps leading up to the porch where the front door to the residence is situated. The handrail on either side of the wooden steps consists of a 2" x 6" wooden board supported on wooden uprights approximately 10 inches apart. The precise dimensions of the wooden board capping the uprights are 1-1/2 inches by 5-1/2 inches. Mrs. Mainardi testified that she was unable to grasp the handrail because of its width. Accordingly, she used the wooden uprights for support, clutching them in turn with her right hand as she proceeded slowly up the stairs with the Christmas presents in her left hand. She successfully negotiated the stairs and did not recall seeing anything about the condition of the stairs on the way up that concerned her.

**4**  She rang the doorbell and a woman, whom she thinks was the children's nanny, came to the door. Mrs. Mainardi explained the nature of her errand and gave the Christmas presents to the nanny who took them and closed the door. Mrs. Mainardi then turned to leave and noticed that the stairs looked damp. She noticed that the surface of the stairs "a couple of steps down" looked icy. She briefly considered asking the nanny to let her come through the house to use the interior stairs but, because she did not know the nanny, elected to proceed carefully down the stairs. She began to advance down the stairs holding onto the uprights with her right hand. At some point she slipped and fell all the way down the stairs to the brick landing.

**5**  Mrs. Mainardi was wearing leather shoes with rubber "Topy" soles. They had metal "Blakey" shoe protectors on one side of the heel. They had flat heels. I am satisfied that there was nothing dangerous or unsuitable about her footwear.

**6**  After falling, Mrs. Mainardi reported that she was dazed. After a short time she called for help. However, nobody responded to her calls. She then managed to stand and proceeded to walk to her business premises 1-1/2 blocks away. When she arrived she was bleeding from her mouth and nose and holding her injured arm. There her bookkeeper, Ms. Dykes, attended to her and called her daughter, Angela, from another business location a few blocks away. Mrs. Mainardi's granddaughter, Tamara, and her grandson, Christopher, were at the travel agency when she arrived. Tamara was sent by Ms. Dykes to look for Mrs. Mainardi's purse. She did not have the purse when she arrived at the office and could not remember where it was. Tamara went to the Shannon residence to look for the purse but did not find it (Mrs. Mainardi had left it in her locked vehicle under the seat).

**7**  Tamara observed the condition of the stairs at the Shannon home during the course of her search for the purse. She walked up the middle of the stairs. She said "they had a bit of white on them" and that "they were looking frosty". She was wearing new running shoes and was able to walk up the stairs "casually" without slipping. When descended the stairs, however, she slipped after about four stairs but was able to steady herself and avoid falling. She reported that each step was frosty over its entire surface but added that if the steps had been "really, really icy" she would not have walked up them. She said that she noticed that the grass was damp and there was some frost on the ground when she walked down the street on which the residence is located. Tamara then returned to the travel agency and informed Ms. Dykes that she had been unable to find Mrs. Mainardi's purse.

**8**  Ms. Dykes then left the travel agency and walked to the Shannon residence to see if she could locate the purse. When she arrived, she observed blood on the brick landing where Mrs. Mainardi had landed after her fall. She said she observed that the railings on the steps were too wide to get a grip on and that she could see icy patches on the tread portion of the lower stairs. Ms. Dykes also reported that "all of the surface [of the stairs] was covered by glaze or something". She elected not to climb the 10 wooden stairs because of their condition and did not observe the tread portion of the upper few stairs.

**9**  Ms. Gisela Bradley, the nanny who answered the door at the Shannon home, did not learn of Mrs. Mainardi's fall until some time later on the morning of December 23rd. After learning of the fall, she went outside with Dr. Shannon's 10-year-old daughter, Tessa, to inspect the stairs. They found blood at the bottom of the stairs and Miss Shannon found a tooth. They cleaned up the blood. Neither one of them had any difficulty negotiating the stairs and they reported seeing no moisture or ice on the stairs.

THE EVIDENCE

**10**  Dr. Shannon testified that he is a careful homeowner and attends to any dangerous conditions on his premises when they come to his attention. He had the front stairs of the residence rebuilt in 1993. In 1998, Mr. Shannon engaged Mr. Stewart McKenna to repaint the stairs.

**11**  Mr. McKenna, a renovations contractor, testified that he painted the front stairway of the Shannon home on two occasions. The second occasion was, to the best to his recollection, the summer of 1998. The first occasion was a year or so before that. The second application of paint was required because the black paint which had been used on the stairs blistered due to its exposure to the sun and had to be replaced. Mr. McKenna reported that he stripped the stairs to bare wood, applied a base primer and three coats of latex. The top two coats consisted of specially formulated paint containing sand which provided a non-skid surface.

**12**  The witnesses all agreed that it was a cold morning on December 23rd. Temperature and rainfall records for the weather station at the Vancouver International Airport indicate that there was 1.6 mm of rain on December 22, 2002 but that there was no precipitation on December 23rd. The maximum temperature on December 23rd was 7.3[degrees]C and the minimum -.5[degrees]C. The hourly records indicate that the precipitation on December 22nd took place between 2:00 a.m. and 8:00 a.m. and consisted of rain showers. Temperatures were below freezing on December 23rd between 5:00 a.m. and 8:00 a.m. but by 9:00 a.m. the temperature was 1.4[degrees]C.

**13**  The most reliable evidence regarding the conditions of the front stairs of the Shannon home is that of Mrs. Mainardi, Ms. Dykes and Tamara Mainardi. They were the only ones who observed the stairway at the time of, or closely proximate to, Mrs. Mainardi's fall. Their evidence that the steps were wet and icy or frosty is consistent with the records from the Vancouver International Airport which confirmed that the minimum temperatures were at or near the freezing level at the relevant time. Ms. Dykes testified that she observed ice on her wooden stairs in Pitt Meadows that morning before she left for work. Because of the distance between Pitt Meadows and East Vancouver and the absence of any evidence that would indicate that the conditions in the two places were similar on December 23, 2002, very little can be drawn from this evidence. The Vancouver International Airport is closer to the Shannon residence but, because of the probability of local variation, provides only a general picture of the weather in the Vancouver area.

**14**  Evidence from the weather station at the Vancouver International Airport and the recollections of the witnesses indicate that the morning of December 23, 2002 was chilly but that as the day wore on it was sunny with some clouds.

**15**  There were in evidence a number of photographs taken on January 3, 2000 showing various views of the stairway. It is clear from those photographs that the surface of the stairs was painted. There are no stair treads or visible indications of a non-skid finish and the painted surface is worn. The wide railings do not provide an easy grip to assist someone ascending or descending the staircase. It is also evident from the photographs that the staircase is open to the elements.

RELEVANT LEGAL PRINCIPLES

**16**  The duty of care imposed upon an occupier of premises is statutory in nature. Sections 3(1) and (2) of the Act read in part as follows:

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 the premises, will be reasonably safe in using the premises.
2. The duty of care referred to in subsection (1) applies in relation to the
3. condition of the premises ...

**17**  There is no dispute that Dr. Shannon was the occupier of the premises where Mrs. Mainardi fell.

**18**  In Waldick v. Malcolm, *[1991] 2 S.C.R. 456*, the Supreme Court of Canada considered the nature of the duty imposed by the Occupiers Liability Act, R.S.O 1980 c. 315, the provisions of which are, for the purposes of the facts before me, the same as those of the British Columbia Act.

**19**  Mr. Justice Iacobucci delivered the judgment of the Court. Respecting the nature of the duty imposed by the statute he said (at p. 472):

After all, the statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation -- thus the proviso "such care as in all the circumstances of the case is reasonable". [emphasis in the original]

**20**  He went on to say (at p. 477):

The goals of the Act are to promote, and indeed, require where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe.

**21**  In applying the duty imposed by the Act to the facts of an individual case there are a number of propositions of law that are well established by the jurisprudence.

1. The plaintiff bears the onus of proving on a balance of probabilities that the occupier breached his or her duty of care.
2. A presumption of ***negligence*** is not created by the fact that the plaintiff was injured. The plaintiff must establish that some act or failure to act on the part of the occupier resulted in his or her injury: (Bauman v. Stein [*(1991), 78 D.L.R. (4th) 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-F8KH-X150-00000-00&context=) (B.C.C.A.)).
3. The duty of care imposed by the Act does not require the occupier to remove every possibility of danger -- the test is one of reasonableness, not perfection: (Gerak v. British Columbia [*(1984), 59 B.C.L.R. 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2KM-00000-00&context=) (C.A.) (leave to appeal to S.C.C. refused; Carlson v. Canada Safeway Ltd. [*(1983), 47 B.C.L.R. 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F2TK-22G9-00000-00&context=) (C.A.)).
4. The Court is not entitled to resort to speculation when determining the cause of the plaintiff's fall and subsequent injury. The plaintiff must prove the nexus between his or her fall and the occupier's failure to discharge his or her duty of care: (Cropley v. Daishinpan (Canada) Ltd., [*[2002] B.C.J. No. 2398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-60H4-00000-00&context=), [*2002 BCSC 1477*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-60H4-00000-00&context=) [paragraph] 22).
5. The care that an occupier must take differs according to the nature and use of the premises: (Kayser v. Park Royal Shopping Centre Ltd. [*(1995), 16 B.C.L.R. (3d) 330*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2B9-00000-00&context=) (C.A.)).
6. The occupier need not, in all cases, show that he or she had a specific policy in place to deal with the maintenance of the portion of the premises where the fall occurred. The nature of the premises will determine whether or not a maintenance scheme will be required: (Leduc v. Goodwill Investments Ltd., [*[1997] B.C.J. No. 1709*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0X7-00000-00&context=) (S.C.) [paragraph] 20).

APPLICATION TO THE FACTS

**22**  I am satisfied by the evidence of Ms. Dykes, Mrs. Mainardi and Tamara Mainardi that the stairway was treacherously slippery at the time that Mrs. Mainardi fell. I am also satisfied that it was the slippery condition of the stairway that caused Mrs. Mainardi's fall.

**23**  The condition of the premises that led to Mrs. Mainardi's fall was the slippery nature of the exposed, painted stairway. It is not necessary for the plaintiff to establish that Dr. Shannon knew of the conditions in existence at the time she fell -- only that the condition of the front staircase was such that a reasonable occupier would have been alerted to the likelihood that the stairs would be slippery and dangerous if ice or frost formed on them. While the primary means of access to the home was the back door, I accept Dr. Shannon's evidence that the front door was often used when he and his children left the home for family activities in the neighbourhood. The non-skid finish that had been applied to the stairs some four and one-half years earlier by Mr. McKenna was either no longer there or had been rendered ineffective through wear and exposure to the elements. That is apparent from the slippery conditions observed and experienced by Tamara Mainardi and Mrs. Mainardi as well as the appearance of the stair treads in the photographs. Dr. Shannon either knew or ought to have known of the worn condition and the absence of an effective non-skid finish at the time of Mrs. Mainardi's fall.

**24**  Mrs. Mainardi was aware of the potentially slippery condition of the stairway. She considered returning to the door and asking Ms. Bradley, whom she did not know, to allow her into the house so that she could use the interior stairs. She concluded that it would be inappropriate to do so, although in retrospect it would have been the wiser course. She approached the stairs cautiously, she was not wearing inappropriate footwear and she held onto the wooden uprights which provided the only support available to her. In all the circumstances, given the social realities of the situation, I am not prepared to say that Mrs. Mainardi's course of action constituted contributory ***negligence***.

**25**  I am satisfied that the plaintiff has established that the defendant breached his duty of care to her and that the breach of duty was the cause of her fall and injury.

DISPOSITION

**26**  Mrs. Mainardi is entitled to judgment for $50,000, the agreed amount of damages.

**27**  Unless there are matters concerning costs that have to be spoken to, Mrs. Mainardi is entitled to her costs on scale 3.

**28**  I would like to thank both counsel for their competent, professional and helpful presentation of this case.

PRESTON J.

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